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## Title 13 – Business Credit and Assistance

### Chapter I – Small Business Administration

#### Part 124 8(a) Business Development/Small Disadvantaged Business Status Determinations

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

**Authority:** 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644, 42 U.S.C. 9815; and Pub. L. 99-661, 100 Stat. 3816; Sec. 1207, Pub. L. 100-656, 102 Stat. 3853; Pub. L. 101-37, 103 Stat. 70; Pub. L. 101-574, 104 Stat. 2814; Sec. 8021, Pub. L. 108-87, 117 Stat. 1054; and Sec. 330, Pub. L. 116-260.

**Source:** 63 FR 35739, June 30, 1998, unless otherwise noted.

**Editorial Note:** Nomenclature changes to part 124 appear at 72 FR 50040, Aug. 30, 2007, and 76 FR 8253, Feb. 11, 2011.

## Subpart A—8(a) Business Development

### PROVISIONS OF GENERAL APPLICABILITY

#### § 124.1 What is the purpose of the 8(a) Business Development program?

Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or “8(a) BD” program for purposes of the regulations in this part). The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.

#### § 124.2 What length of time may a business participate in the 8(a) BD program?

- (a) Except as set forth in paragraph (b) of this section, a Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine-year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal as provided for in this subpart.
- (b) Pursuant to section 330 of the Consolidated Appropriations Act, 2021, and section 869 of the National Defense Authorization Act for Fiscal Year 2021, a small business concern participating the 8(a) BD program on March 13, 2020, may elect to extend such participation by a period of one year from the end of its program term, regardless of whether it previously elected to suspend participation in the program under the procedures set forth in § 124.305(h)(1)(iii).
  - (1) Unless expressly declined in writing, SBA will extend a Participant's program term by one year if the concern was a Participant in the 8(a) BD program on March 13, 2020, and continued its participation through January 13, 2021. Declines of such extension must be submitted to: Deputy Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to [8aQuestions@sba.gov](mailto:8aQuestions@sba.gov).
  - (2) Except as set forth in paragraph (b)(2)(iii) of this section any concern that was a Participant in the 8(a) BD program on March 13, 2020, but graduated or otherwise left the program before January 13, 2021 may elect to be readmitted to the 8(a) BD program for the period of time equal to one year from the date of the original expiration of the concern's program term. A concern seeking to be readmitted to the 8(a) BD program must notify SBA of its intent to be readmitted no later than March 15, 2021.

*Example 1 to paragraph (b)(2) introductory text.* Business Concern A was a Participant in the 8(a) BD program on September 9, 2020, and its program term expired on November 25, 2020. On January 28, 2021, Business Concern A notified SBA of its election to be readmitted to the 8(a) BD program under the process outlined in this paragraph (b)(2). Business Concern A would be eligible to participate in the 8(a) BD program until November 25, 2021.

(i) All requests for readmittance must be submitted to: Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to [8aQuestions@sba.gov](mailto:8aQuestions@sba.gov).

- (ii) As part of a concern's notification to SBA of its intent to be readmitted to the 8(a) BD program, the concern must certify that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111. SBA may, in its discretion, request information or documentation to assess whether the concern meets the eligibility criteria for readmittance.
- (iii) Business concerns that were Participants in the 8(a) BD program on March 13, 2020, but were terminated or early graduated by SBA or elected to voluntarily withdraw or early graduate in lieu of termination are not eligible to extend their program terms.
- (iv) The readmittance of a business concern owned and controlled by a tribe, ANC, NHO, or CDC to the 8(a) BD program under this paragraph (b)(2) will be disregarded for purposes of the ownership restrictions applicable to Participants owned by a tribe, ANC, NHO, or CDC as set forth in §§ 124.109(c)(3)(ii), 124.110(e), and 124.111(d). The date to commence the two-year waiting period for the tribe, ANC, NHO, or CDC to own another business concern in the 8(a) BD program with the same primary NAICS code as the readmitted concern will not be readjusted with the firm's readmittance.

[86 FR 2532, Jan. 13, 2021]

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

**Alaska Native**, as defined by the Alaska Native Claims Settlement Act (43 U.S.C. 1602), 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 or 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.*)

**Bona fide place of business**, for purposes of 8(a) construction procurements, means a location where a Participant regularly maintains an office within the appropriate geographical boundary which employs at least one individual who works at least 20 hours per week at that location. The term does not include construction trailers or other temporary construction sites.

**Community Development Corporation or CDC** means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.*

**Concern** is defined in part 121 of this title.

**Days** means calendar days unless otherwise specified.

**Day-to-day operations** of a firm means the marketing, production, sales, and administrative functions of the firm.

**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.

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-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."

**NAICS code** means North American Industry Classification System code.

**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.

**Negative control** is defined in [part 121 of this title](#).

**Non-disadvantaged individual** means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose disadvantaged status an applicant or Participant does not rely in qualifying for 8(a) BD program participation.

**Participant** means a small business concern admitted to participate in the 8(a) BD program.

**Primary industry classification** means the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The NAICS code designations are described in the North American Industry Classification System book published by the U.S. Office of Management and Budget. SBA utilizes [§ 121.107 of this chapter](#) in determining a firm's primary industry classification. A Participant may change its primary industry classification where it can demonstrate to SBA by clear evidence that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

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

**Program year** means a 12-month period of an 8(a) BD Participant's program participation. The first program year begins on the date that the concern is certified to participate in the 8(a) BD program and ends one year later. Each subsequent program year begins on the Participant's anniversary of program certification and runs for one 12-month period.

**Regularly maintains an office** means conducting business activities as an on-going business concern from a fixed location on a daily basis. The best evidence of the regular maintenance of an office is documentation that shows that third parties routinely transact business with a Participant at a location within a particular geographical area. Such evidence includes lease agreements, payroll records, advertisements, bills, correspondence, and evidence that the Participant has complied with all local requirements concerning registering, licensing, or filing with the State or County where the place of

business is located. Although a firm would generally be required to have a license to do business in a particular location in order to "regularly maintain an office" there, the firm would not be required to have an additional construction license or other specific type of license in order to regularly maintain an office.

**Same or similar line of business** means business activities within the same four-digit "Industry Group" of the NAICS Manual as the primary industry classification of the applicant or Participant. The phrase "same business area" is synonymous with this definition.

**Self-marketing** of a requirement occurs when a Participant identifies a requirement that has not been committed to the 8(a) BD program and, through its marketing efforts, causes the procuring activity to offer that specific requirement to the 8(a) BD program on the Participant's behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) BD program as an open requirement or on behalf of another Participant has not "self-marketed" the requirement within the meaning of this part.

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

**Unconditional ownership** means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8253, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 85 FR 66183, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

## § 124.4 What restrictions apply to fees for applicant and Participant representatives?

- (a) The compensation received by any packager, agent or representative of an 8(a) applicant or Participant for assisting the applicant in obtaining 8(a) certification or for assisting the Participant in obtaining 8(a) contracts, or any other assistance to support program participation, must be reasonable in light of the service(s) performed by the packager, agent or representative.
- (b) In assisting a Participant obtain one or more 8(a) contracts, a packager, agent or representative cannot receive a fee that is a percentage of the gross contract value.
- (c) For good cause, the AA/BD may initiate proceedings to suspend or revoke a packager's, agent's or representative's privilege to assist applicants obtain 8(a) certification, assist Participants obtain 8(a) contracts, or any other assistance to support program participation. Good cause is defined in § 103.4 of these regulations.
  - (1) The AA/BD may send a show cause letter requesting the agent or representative to demonstrate why the agent or representative should not be suspended or proposed for revocation, or may immediately send a written notice suspending or proposing revocation, depending upon the evidence in the administrative record. The notice will include a discussion of the relevant facts and the reason(s) why the AA/BD believes that good cause exists.
  - (2) Unless the AA/BD specifies a different time in the notice, the agent or representative must respond to the notice within 30 days of the date of the notice with any facts or arguments showing why good cause does not exist. The agent or representative may request additional time to respond, which the AA/BD may grant in his or her discretion.

- (3) After considering the agent's or representative's response, the AA/BD will issue a final determination, setting forth the reasons for this decision and, if a suspension continues to be effective or a revocation is implemented, the term of the suspension or revocation.
- (d) The AA/BD may refer a packager, agent, or other representative to SBA's Suspension and Debarment Official for possible Government-wide suspension or debarment where appropriate, including where it appears that the packager, agent or representative assisted an applicant to or Participant in the 8(a) BD program submit information to SBA that the packager, agent or representative knew was false or materially misleading.

[76 FR 8253, Feb. 11, 2011]

#### ELIGIBILITY REQUIREMENTS FOR PARTICIPATION IN THE 8(A) BUSINESS DEVELOPMENT PROGRAM

### § 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?

Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.

[76 FR 8254, Feb. 11, 2011]

### § 124.102 What size business is eligible to participate in the 8(a) BD program?

- (a)
  - (1) An applicant concern must qualify as a small business concern as defined in part 121 of this title. The applicable size standard is the one for its primary industry classification. The rules for calculating the size of a tribally-owned concern, a concern owned by an Alaska Native Corporation, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.
  - (2) In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years, unless the firm demonstrates that through its growth and development its primary industry is changing, pursuant to the criteria described in 13 CFR 121.107, to a related secondary NAICS code that is contained in its most recently approved business plan. The firm's business plan must contain specific targets, objectives, and goals for its continued growth and development under its new primary industry.
- (b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may request a formal size determination under part 121 of this title.



- (c) A concern whose application is denied due to size by SBA may request a formal size determination with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the business is located under part 121 of this chapter. Where the SBA Government Contracting Area Office determines that an applicant qualifies as a small business concern for the size standard corresponding to its primary NAICS code:
- (1) The AA/BD will certify the concern as eligible to participate in the 8(a) BD program if size was the only reason for decline; or
  - (2) The concern may reapply for participation in the 8(a) BD program at any point after 90 days from the AA/BD's decline if size was not the only reason for decline. In such a case, the AA/BD will accept the size determination as conclusive of the concern's small business status, provided the applicant concern has not completed an additional fiscal year in the intervening period and SBA believes that the additional fiscal year changes the applicant's size.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011; 88 FR 26204, Apr. 27, 2023]

### § 124.103 Who is socially disadvantaged?

- (a) **General.** 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. The social disadvantage must stem from circumstances beyond their control.
- (b) **Members of designated groups.**
- (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.
  - (2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.
  - (3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.
- (c) **Individuals not members of designated groups.**
- (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence. Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

- (2) Evidence of individual social disadvantage must include the following elements:
- (i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, identifiable 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;
  - (ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;
  - (iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and
  - (iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.
    - (A) **Education.** SBA considers such factors as denial of equal access to institutions of higher education, 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.
    - (B) **Employment.** SBA considers 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; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.
    - (C) **Business history.** SBA considers 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.
- (3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.
- (i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.
  - (ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

*Example 1 to paragraph (c)(3)(ii).* A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of

gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

*Example 2 to paragraph (c)(3)(ii).* A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

- (iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

*Example to paragraph (c)(3)(iii).* A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

- (4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.
- (5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.
- (6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

- (i) Each specific claim establishes an incident of bias or discriminatory conduct;
- (ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and
- (iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

(d) ***Socially disadvantaged group inclusion*** –

- (1) ***General.*** Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the FEDERAL REGISTER that it has received and is considering such a request, and that it will consider public comments.
- (2) ***Standards to be applied.*** In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:
  - (i) The group has suffered prejudice, bias, or discriminatory practices;
  - (ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and
  - (iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.
- (3) ***Procedure.*** The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.
- (4) ***Decision.*** In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the FEDERAL REGISTER. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8254, Feb. 11, 2011; 81 FR 48579, July 25, 2016; 88 FR 26204, Apr. 27, 2023]

## § 124.104 Who is economically disadvantaged?

- (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 submit personal financial information.
- (2) When married, an individual claiming economic disadvantage must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (e.g., an officer, employee or director) or has lent money to, provided credit support to, or guaranteed a loan of the business. SBA does not take into consideration community property laws when determining economic disadvantage.

(c) **Factors to be considered.** In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including income for the past three years (including bonuses and the value of company stock received in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. An individual who exceeds any one of the thresholds set forth in this paragraph for personal income, net worth or total assets will generally be deemed to have access to credit and capital and not economically disadvantaged.

(1) **Transfers within two years.**

- (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA 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 8(a) BD program or within two years of a Participant's annual program review, 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.
- (ii) SBA 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.
- (iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) **Net worth.** The net worth of an individual claiming disadvantage must be less than \$850,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

- (i) A contingent liability does not reduce an individual's net worth.

- (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. In order to properly assess whether funds invested in a retirement account may be excluded from an individual's net worth, SBA may require the individual to provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.
  - (iii) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.
- (3) **Personal income for the past three years.**
- (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 \$400,000. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.
  - (ii) Income received from an applicant or Participant that is an S corporation, LLC or partnership will be excluded from an individual's income where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. Losses from the S corporation, LLC or partnership, however, are losses to the company only, not losses to the individual, and cannot be used to reduce an individual's personal income.
- (4) **Fair market value of all assets.** 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 \$6.5 million. The only assets excluded from this determination are funds excluded under paragraph (c)(2)(ii) of this section as being invested in a qualified IRA account.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 27660, May 11, 2020; 87 FR 69154, Nov. 17, 2022; 88 FR 26204, Apr. 27, 2023]

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

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). See § 124.3 for definition of unconditional ownership; and §§ 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

- (a) **Ownership must be direct.** Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a disadvantaged individual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.
- (b) **Ownership of a partnership.** In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.
- (c) **Ownership of a limited liability company.** In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.
- (d) **Ownership of a corporation.** In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.
- (e) **Stock options' effect on ownership.** In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-disadvantaged individuals will be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.
- (f) **Dividends and distributions.** One or more disadvantaged individuals must be entitled to receive:
  - (1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;
  - (2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and
  - (3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.
- (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.

**(h) *Ownership restrictions for non-disadvantaged individuals and concerns.***

- (1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.
- (2) A non-Participant concern in the same or similar line of business or a principal of such concern may generally not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program, except that:
  - (i) A former Participant in the same or similar line of business or a principal of such a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§ 124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant; and



(ii) A business concern approved by SBA to be a mentor pursuant to § 125.9 of this chapter may own up to 40 percent of its 8(a) Participant protégé as set forth in § 125.9(d)(2) of this chapter, whether or not that concern is in the same or similar line of business as the Participant.

(i) **Change of ownership.** A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the AA/BD. The decision of the AA/BD is the final decision of the Agency. The AA/BD will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.

(1) Any Participant or former Participant that is performing one or more 8(a) contracts may substitute one disadvantaged individual or entity for another disadvantaged individual or entity without requiring the termination of those contracts or a request for waiver under § 124.515, as long as it receives SBA's approval prior to the change.

(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. In determining whether a non-disadvantaged individual involved in a change of ownership has more than a 20 percent interest in the concern, SBA will aggregate the interests of all immediate family members as set forth in § 124.3, as well as any individuals who are affiliated based on an identity of interest under § 121.103(f). 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.

- (3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.
  - (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.
  - (5) A change in ownership does not provide the new owner(s) with a new 8(a) BD program term. For example, if a concern has been in the 8(a) BD program for five years when a change in ownership occurs, the new owner will have four years remaining until program graduation.
- (j) **Public offering.** A Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) BD program.
- (k) **Community property laws given effect.** In determining ownership interests when an owner resides in any of the community property states or territories of the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 66183, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

## § 124.106 When do disadvantaged individuals control an applicant or Participant?

Control is not the same as ownership, although both may reside in the same person. SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (See §§ 124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by

Native Hawaiian Organizations, and for CDC-owned concerns.) Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant. Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

(a)

- (1) An applicant or Participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.
  - (2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant and be physically located in the United States.
  - (3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the 8(a) firm, and not to firms in which the disadvantaged individual has an ownership interest.
  - (4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.
  - (5) Except as provided in paragraph (d)(1) of this section, a disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.
- (b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.
- (c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.
- (d) One or more disadvantaged individuals must control the Board of Directors of a corporate applicant or Participant.
- (1) SBA will deem disadvantaged individuals to control the Board of Directors where:
    - (i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern;
    - (ii) A single disadvantaged individual owns at least 51% of all voting stock of an applicant or Participant concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority

voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or

(iii) More than one disadvantaged shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the disadvantaged shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.

(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (d)(1) of this section, the disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors, directly or indirectly;

(ii) Any Executive Committee of Directors must be controlled by disadvantaged directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(3) An applicant must inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being admitted to the program, a Participant must inform SBA of changes regarding super majority voting requirements.

(4) Non-voting, advisory, or honorary Directors may be appointed without affecting disadvantaged individuals' control of the Board of Directors.

(5) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or Participant;

(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-

disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

- (f) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm.
- (g) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:
  - (1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.
  - (2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.
  - (3) A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.
  - (4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.
- (h) Notwithstanding the provisions of this section requiring a disadvantaged owner to control the daily business operations and long-term strategic planning of an 8(a) BD Participant, where a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the Participant may elect to designate one or more individuals to control the Participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) Participant and no additional time will be added to its program term. Alternatively, the Participant may elect to suspend its 8(a) BD participation during the active duty call-up period pursuant to §§ 124.305(h)(1)(ii) and 124.305(h)(4).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016]

## § 124.107 What is potential for success?

SBA must determine that with contract, financial, technical, and management support from the 8(a) BD program, the applicant concern is able to perform 8(a) contracts and possess reasonable prospects for success in competing in the private sector. To do so, the applicant concern must show that it has operated and received contracts (either in

the private sector, at the state or local government level, or with the Federal Government) in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

- (a) Income tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification.
- (b)
  - (1) SBA may waive the two years in business requirement if each of the following five conditions are met:
    - (i) The individual or individuals upon whom eligibility is based have substantial business management experience;
    - (ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success if admitted to the 8(a) BD program;
    - (iii) The applicant has adequate capital to sustain its operations and carry out its business plan as a Participant;
    - (iv) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category; and
    - (v) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts as a Participant.
  - (2) The concern seeking a waiver under paragraph (b) must provide information on governmental and nongovernmental contracts in progress and completed (including letters of reference) in order to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver. SBA considers an applicant's performance on both government and private sector contracts in determining whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, SBA will review its performance on those contracts alone to determine whether the applicant possesses a record of successful performance.
- (c) In assessing potential for success, SBA considers the concern's access to credit and capital, including, but not limited to, access to long-term financing, access to working capital financing, equipment trade credit, access to raw materials and supplier trade credit, and bonding capability.
- (d) In assessing potential for success, SBA will also consider the technical and managerial experience of the applicant concern's managers, the operating history of the concern, the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) BD certification, and its financial capacity. The applicant concern as a whole must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.
- (e) The Participant or individuals employed by the Participant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accountancy, law, professional engineering).
- (f) An applicant will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the concern unless:

- (1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or
- (2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Participants providing the same or similar items or services.

[63 FR 35739, June 30, 1998, as amended at 88 FR 26204, Apr. 27, 2023]

## § 124.108 What other eligibility requirements apply for individuals or businesses?

- (a) **Good character.** The applicant or Participant and all its principals must have good character.
  - (1) If during the processing of an application, SBA receives adverse information from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, SBA may suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. If the SBA suspends the application, but does not hear back from OIG within 45 days, SBA may proceed with application processing. The AA/BD will consider any findings of the OIG when evaluating the application.
  - (2) Violations of any of SBA's regulations may result in denial of participation in the 8(a) BD program. The AA/BD will consider the nature and severity of the violation in making an eligibility determination.
  - (3) Debarred or suspended concerns or concerns owned by debarred or suspended persons are ineligible for admission to the 8(a) BD program.
  - (4) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, partner, limited liability member, director, officer, or holder of at least 20 percent of its stock, or another person (including key employees) with significant authority over the concern:
    - (i) Lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; or
    - (ii) Is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity.
  - (5) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after admission to the program, SBA discovers that false information has been knowingly submitted by a firm, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred to SBA's Office of Inspector General for review.
- (b) **One-time eligibility.** Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.
  - (1) An individual who claims disadvantage and completes the appropriate SBA forms to qualify an applicant has participated in the 8(a) BD program if SBA approves the application.
  - (2) Use of eligibility will take effect on the date of the concern's approval for admission into the program.

- (3) An individual who uses his or her one-time eligibility to qualify a concern for the 8(a) BD program will be considered a non-disadvantaged individual for ownership or control purposes of another applicant or Participant. The criteria restricting participation by non-disadvantaged individuals will apply to such an individual. See §§ 124.105 and 124.106.
  - (4) When at least 50% of the assets of a concern are the same as those of a former Participant, the concern will not be eligible for entry into the program.
  - (5) Participants which change their form of business organization and transfer their assets and liabilities to the new organization may do so without affecting the eligibility of the new organization provided the previous business is dissolved and all other eligibility criteria are met. In such a case, the new organization may complete the remaining program term of the previous organization. A request for a change in business form will be treated as a change of ownership under § 124.105(i).
- (c) **Wholesalers.** An applicant concern seeking admission to the 8(a) BD program as a wholesaler need not demonstrate that it is capable of meeting the requirements of the nonmanufacturer rule for its primary industry classification.
- (d) **Brokers.** Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities.
- (e) **Federal financial obligations.** Neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program. However, a firm will not be ineligible to participate in the 8(a) BD program if the firm or the affected principals can demonstrate that the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 88 FR 26204, Apr. 27, 2023]

### § 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) **Special rules for ANCs.** Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in § 124.112 to the extent the criteria are not inconsistent with this section. ANC-owned concerns are subject to the same conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:
- (1) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).
  - (2) An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.



- (3) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.
  - (4) The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage.
  - (5) Paragraphs (b)(3)(i), (ii) and (iv) of this section are not applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation.
  - (6) Paragraph (c)(1) of this section is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a "sue and be sued" clause.
  - (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.
- (b) **Tribal eligibility.** In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian Tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Once an Indian Tribe establishes that it is economically disadvantaged in connection with the application for one Tribally-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. An Indian Tribe may request to meet with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires for it to establish economic disadvantage. Each Tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.
- (1) **Social disadvantage.** An Indian tribe as defined in § 124.3 is considered to be socially disadvantaged.
  - (2) **Economic disadvantage.** In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:
    - (i) The number of tribal members.
    - (ii) The present tribal unemployment rate.
    - (iii) The per capita income of tribal members, excluding judgment awards.
    - (iv) The percentage of the local Indian population below the poverty level.
    - (v) The tribe's access to capital.
    - (vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

(3) **Forms and documents required to be submitted.** Except as otherwise provided in this section, the Indian tribe generally must submit the forms and documents required of 8(a) BD applicants as well as the following material:

(i) A copy of all governing documents such as the tribe's constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) **Business eligibility.** In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) **Legal business entity organized for profit and susceptible to suit.** The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. Where an applicant or participating concern is owned by a federally recognized tribe, the concern's articles of incorporation, partnership agreement, limited liability company articles of organization, or other similar incorporating documents for tribally incorporated applicants must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) **Size.**

(i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern.

(ii) A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

- (iv) In determining whether a tribally-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally as compared to the overall small business share of that industry.
  - (A) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.
  - (B) SBA does not contemplate a finding of affiliation where a tribally-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(3) **Ownership.**

- (i) For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest.
- (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.

- (iii) The restrictions of § 124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.
  - (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) **Control and management.**
- (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:
    - (A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or
    - (B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.
  - (ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.
  - (iii) The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.
    - (A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.
    - (B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.
    - (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.
- (5) **Individual eligibility limitation.** SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

- (6) **Potential for success.** A Tribally-owned applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. A Tribally-owned applicant may establish potential for success by demonstrating that:
- (i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) or financial statements (either audited, reviewed or in-house as set-forth in § 124.602) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant seeks 8(a) BD certification; or
  - (ii) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or
  - (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) **Other eligibility criteria.**
- (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:
    - (A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or
    - (B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.
  - (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)).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

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

- (a) Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in § 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

- (b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category. In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.
- (1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.
  - (2) SBA does not contemplate a finding of affiliation where an NHO-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.
- (c) An NHO must establish that it is economically disadvantaged and that its business activities will principally benefit Native Hawaiians. Once an NHO establishes that it is economically disadvantaged in connection with the application of one NHO-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. If a different NHO identifies that it will serve and benefit the same Native Hawaiian community as an NHO that has already established its economic disadvantage status, that NHO need not establish its economic disadvantage status in connection with an 8(a) BD application of a business concern that it owns, unless specifically requested to do so by the AA/BD.
- (1) In order to establish that an NHO is economically disadvantaged, it must demonstrate that it will principally benefit economically disadvantaged Native Hawaiians. To do this, the NHO must provide data showing the economic condition of the Native Hawaiian community that it intends to serve, including:
    - (i) The number of Native Hawaiians in the community that the NHO intends to serve;
    - (ii) The present Native Hawaiian unemployment rate of those individuals;
    - (iii) The per capita income of those Native Hawaiians, excluding judgment awards;
    - (iv) The percentage of those Native Hawaiians below the poverty level; and
    - (v) The access to capital of those Native Hawaiians.
  - (2) An NHO should describe any activities that it has done to benefit Native Hawaiians at the time its NHO-owned firm applies to the 8(a) BD program. In addition, the NHO must include statements in its bylaws or operating agreements identifying the benefits Native Hawaiians will receive from the NHO. The NHO must have a detailed plan that shows how revenue earned by the NHO will principally benefit Native Hawaiians. As part of an annual review conducted for an NHO-owned Participant, SBA will review how the NHO is fulfilling its obligation to principally benefit Native Hawaiians.
- (d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors, managing members, managers or managing partners.

- (1) The NHO need not possess the technical expertise necessary to run the NHO-owned applicant or Participant firm. The NHO must have managerial experience of the extent and complexity needed to run the concern. Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.
- (2) An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.
- (3) The individuals responsible for the management and daily operations of an NHO-owned concern cannot manage more than two Program Participants at the same time.
  - (i) An individual's officer position or membership on the board of directors does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.
  - (ii) NHO officers and/or board members may control a holding company overseeing several NHO-owned business concerns, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.
  - (iii) Because an individual may be responsible for the management and daily business operations of two NHO-owned concerns, the full-time devotion requirement does not apply to NHO-owned applicants and Participants.
- (e) For corporate entities, an NHO must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, an NHO must unconditionally own at least a 51 percent interest.
- (f) 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.
- (g) SBA does not deem an individual involved in the management or daily business operations of a Participant owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of [§ 124.108\(b\)](#).

- (h) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers. The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.
- (i) An applicant concern owned by a NHO must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a NHO may establish potential for success by demonstrating that:
  - (1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or
  - (2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or
  - (3) The NHO has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8256, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48580, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

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

- (a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in § 124.101 through § 124.108 and § 124.112 to the extent that they are not inconsistent with this section.
- (b) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) is considered to be controlled by such CDC and eligible for participation in the 8(a) BD program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial experience of an extent and complexity needed to run the concern.
- (c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the CDC or any other business enterprise owned by the CDC, unless the Administrator determines that one or more such concerns owned by the CDC have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category. In determining whether a CDC-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.



## 8(a) Business Development/Small Disadvantaged Business Status...

- (1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.
  - (2) SBA does not contemplate a finding of affiliation where a CDC-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.
  - (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 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 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.
- (e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).
- (f) An applicant concern owned by a CDC must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a CDC may establish potential for success by demonstrating that:
- (1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or
  - (2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or
  - (3) The CDC has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.
- (g) A CDC-owned applicant and all of its principals must have good character as set forth in § 124.108(a).

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48581, July 25, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

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

- (a) **Standards.** In order for a concern (except those owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs) to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in § 124.101 through § 124.108. For concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs to remain eligible, they must meet the criteria set forth in this § 124.112 to the extent that they are not inconsistent with § 124.109, § 124.110 and § 124.111, respectively. The concern must inform SBA in writing of any changes in circumstances which would adversely affect its program eligibility, especially economic disadvantage and ownership and control. Any concern that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§ 124.302 through 124.304, as appropriate.
- (b) **Submissions supporting continued eligibility.** As part of an annual review, each Participant must annually submit to the servicing district office the following:
- (1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in § 124.101 through § 124.108 and paragraph (a) of this section;
  - (2) A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility. If the Participant is unable to provide such certification, the Participant must inform SBA of any changes and provide relevant supporting documentation.
  - (3) Personal financial information for each disadvantaged owner;
  - (4) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.
  - (5) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the Participant to each of its owners, officers or directors, or to any person or entity affiliated with such individuals;
  - (6) If it is an approved protégé, a narrative report detailing the contracts it has had with its mentor and benefits it has received from the mentor/protégé relationship. See § 124.520(b)(4) for additional annual requirements;
  - (7) A listing of any fees paid to agents or representatives to assist the Participant in obtaining or seeking to obtain a Federal contract;
  - (8) A report for each 8(a) contract performed during the year explaining how the performance of work requirements are being met for the contract, including any 8(a) contracts performed as a joint venture; and
  - (9) Such other information as SBA may deem necessary. For other required annual submissions, see §§ 124.601 through 124.603.
- (c) **Eligibility reviews.**

- (1) Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility, SBA will review the concern's eligibility for continued participation in the program.
- (2) Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include, but are not limited to, excessive withdrawals of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. SBA may also consider access by the Participant firm to a significant new source of capital or loans since the financial condition of the Participant is considered in evaluating the disadvantaged individual's economic status.

(d) ***Excessive withdrawals.***

- (1) The term withdrawal includes, but is not limited to, the following: Cash dividends; distributions in excess of amounts needed to pay S Corporation, LLC or partnership taxes; cash and property withdrawals; payments to immediate family members not employed by the Participant; bonuses to officers; and investments on behalf of an owner. Although officers' salaries are generally not considered withdrawals for purposes of this paragraph, SBA will count those salaries as withdrawals where SBA believes that a firm is attempting to circumvent the excessive withdrawal limitations through the payment of officers' salaries. SBA will look at the totality of the circumstances in determining whether to include any specific amount as a withdrawal under this paragraph.
- (2) If SBA determines that funds or assets have been excessively withdrawn from the Participant for the personal benefit of one or more owners or managers, or any person or entity affiliated with such owners or managers, and such withdrawal was detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, SBA may:
  - (i) Initiate termination proceedings under §§ 124.303 and 124.304 where the withdrawals detrimentally affect the achievement of the Participant's targets, objectives and goals set forth in its business plan, or its overall business development;
  - (ii) Initiate early graduation proceedings under §§ 124.302 and 124.303 where the withdrawals do not adversely affect the Participant's business development; or
  - (iii) Require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility.
- (3) Withdrawals are excessive if in the aggregate during any fiscal year of the Participant they exceed
  - (i) \$250,000 for firms with sales up to \$1,000,000;
  - (ii) \$300,000 for firms with sales between \$1,000,000 and \$2,000,000; and
  - (iii) \$400,000 for firms with sales exceeding \$2,000,000.
- (4) The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.
- (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) Change in primary industry classification.**

- (1) A Participant may request that the primary industry classification contained in its business plan be changed by filing such a request with its servicing SBA district office. SBA will grant such a request where the Participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.
- (2) SBA may change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during the Participant's last three completed fiscal years has evolved from one NAICS code to another. As part of its annual review, SBA will consider whether the primary NAICS code contained in a Participant's business plan continues to be appropriate.
  - (i) Where SBA believes that the primary industry classification contained in a Participant's business plan does not match the Participant's actual revenues over the Participant's most recently completed three fiscal years, SBA may notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to respond.
  - (ii) A Participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate, despite an increase in revenues in a secondary NAICS code beyond those received in its designated primary industry classification. The Participant should identify: All non-federal work that it has performed in its primary NAICS code; any efforts it has made and any plans it has to make to receive contracts to obtain contracts in its primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

- (iii) As long as the Participant provides a reasonable explanation as to why the identified primary NAICS code continues to be its primary NAICS code, SBA will not change the Participant's primary NAICS code.
- (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.
- (v) Where an SBA change in the primary NAICS code of an entity-owned firm results in the entity having two Participants with the same primary NAICS code, the second, newer Participant will not be able to receive any 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the first, older Participant for a period of time equal to two years after the first Participant leaves the 8(a) BD program.
- (f) **Graduation determination.** As part of the final annual review performed by SBA prior to the expiration of a Participant's nine-year program term, SBA will determine if the Participant has met the targets, objectives and goals set forth in its business plan and, thus, whether the Participant will be considered to have graduated from the 8(a) BD program at the expiration of its program term. A firm that has not met the targets, objectives and goals set forth in its business plan at the end of its nine-year term in the 8(a) BD program will not be considered to have graduated from the 8(a) BD program, but rather to have merely completed its program term.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48581, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66185, Oct. 16, 2020]

#### APPLYING TO THE 8(A) BD PROGRAM

### § 124.201 May any business submit an application?

Any concern or any individual on behalf of a business has the right to apply for 8(a) BD program participation whether or not there is an appearance of eligibility.

### § 124.202 How must an application be filed?

An application for 8(a) BD program admission must be filed in an electronic format. An electronic application can be found by going to the 8(a) BD page of SBA's Web site (<http://www.sba.gov>). The SBA district office will provide an applicant with information regarding the 8(a) BD program.

[81 FR 48581, July 25, 2016]

### § 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. In all cases, the applicant must provide a signature from each individual claiming social and economic disadvantage status. The electronic signing protocol will ensure the Agency is able to specifically identify the individual making the representation. The individual(s) upon whom eligibility is based take responsibility for the accuracy of all information submitted on behalf of the applicant.

[81 FR 48581, July 25, 2016, as amended at 85 FR 66185, Oct. 16, 2020]

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

- (a) The AA/BD is authorized to approve or decline applications for admission to the 8(a) BD program.
  - (1) Except as set forth in paragraph (a)(2) of this section, the DPCE will receive, review and evaluate all 8(a) BD applications.
  - (2) Where an applicant answers on its electronic application that it is not a for-profit business (see §§ 121.105 and 124.104), that one or more of the individuals upon whom eligibility is based is not a United States citizen (see § 124.104), that the applicant or one or more of the individuals upon whom eligibility is based has previously participated in the 8(a) BD program (see § 124.108(b)), or that the applicant is not an entity-owned business and has generated no revenues (see §§ 124.107(a) and 124.107(b)(1)(iv)), its application will be closed automatically and it will be prevented from completing a full electronic application.
  - (3) SBA will advise each program applicant within 15 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.
  - (4) SBA will process an application for 8(a) BD program participation within 90 days of receipt of an application package deemed complete by the DPCE. Incomplete packages will not be processed. 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.
- (b) SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.
- (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 firm or would demonstrate lack of eligibility in the area to which the information relates.
- (d) An applicant must be eligible as of the date the AA/BD issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification made pursuant to paragraph (b) of this section, and any changed circumstances since the date of application.
- (e) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program

(particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.

- (f) The decision of the AA/BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.
- (g) If the AA/BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011; 85 FR 66185, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

### **§ 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.

[85 FR 66185, Oct. 16, 2020]

### **§ 124.206 What appeal rights are available to an applicant that has been denied admission?**

- (a) An applicant may appeal a denial of program admission to SBA's Office of Hearings and Appeals (OHA), if it is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. A denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final decision of SBA.
- (b) [Reserved]
- (b) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the applicant receives the Agency decision.
- (c) If an appeal is filed with OHA, the written decision of the Administrative Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/BD is the final Agency decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 85 FR 66185, Oct. 16, 2020]

### **§ 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.

[85 FR 66185, Oct. 16, 2020]

## EXITING THE 8(A) BD PROGRAM

## § 124.300 What are the ways a business may leave the 8(a) BD program?

A concern participating in the 8(a) BD program may leave the program by any of the following means:

- (a) Expiration of the program term established pursuant to § 124.2;
- (b) Voluntary withdrawal or voluntary early graduation;
- (c) Graduation pursuant to § 124.302;
- (d) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or
- (e) Termination pursuant to the provisions of §§ 124.303 and 124.304.

[76 FR 8258, Feb. 11, 2011. Redesignated at 85 FR 66186, Oct. 16, 2020]

## § 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.

[85 FR 66186, Oct. 16, 2020]

## § 124.302 What is graduation and what is early graduation?

- (a) **General.** SBA may graduate a firm from the 8(a) BD program at the expiration of its program term (graduation) or prior to the expiration of its program term (early graduation) where SBA determines that:
  - (1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or
  - (2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.
- (b) **Exceeding the size standard corresponding to the primary NAICS code.** SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted during the program, for three successive program years unless the firm is able to demonstrate that it has taken steps to change its industry focus to another NAICS code that is contained in the goals, targets and objectives of its business plan.
- (c) **Excessive withdrawals.** SBA may graduate a Participant prior to the expiration of its program term where excessive funds or other assets have been withdrawn from the Participant (see § 124.112(d)(3)), causing SBA to determine that the Participant has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]



## § 124.303 What is termination?

- (a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:
- (1) Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.
  - (2) Failure by the concern to maintain its eligibility for program participation, including failure by an individual owner or manager to continue to meet the requirements for economic disadvantage set forth in § 124.104 where such status is needed for eligibility.
  - (3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.
  - (4) Failure by the concern to obtain prior written approval from SBA for any changes in ownership or business structure, management or control pursuant to §§ 124.105 and 124.106.
  - (5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.
  - (6) Failure by the concern or one or more of the concern's principals to maintain good character.
  - (7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.
  - (8) Cessation of business operations by the concern.
  - (9) Failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.
  - (10) A pattern of inadequate performance by the concern of awarded section 8(a) contracts.
  - (11) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.
  - (12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.
  - (13) Excessive withdrawals that are detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, including transfers of funds or other business assets from the concern for the personal benefit of any of its owners or managers, or any person or entity affiliated with the owners or managers (see § 124.112(d)).
  - (14) Unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement.

- (15) Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.509 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under § 124.204 and § 124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false.
  - (16) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 2 CFR parts 180 and 2700 or FAR subpart 9.4 (48 CFR part 9, subpart 9.4). \* \* \*
  - (17) Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case.
  - (18) Willful failure by the Participant business concern to comply with applicable labor standards and obligations.
  - (19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.
  - (20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.
- (b) The examples of good cause listed in paragraph (a) of this section are intended to be illustrative only. Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]

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

- (a) **General.** The same procedures apply to both early graduation and termination of Participants from the 8(a) BD program.
- (b) **Letter of Intent to Terminate or Graduate Early.**
- (1) Except as set forth in paragraph (b)(2) of this section, when SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings and will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation.
  - (2) Where SBA obtains evidence that a Participant has ceased its operations, the AA/BD may immediately terminate a concern's participation in the 8(a) BD program by notifying the concern of its termination and right to appeal that decision to OHA.
- (c) **Recommendation and decision.** Following the 30-day response period, the Assistant Administrator for DPCE (AA/DPCE) or designee will consider the proposed early graduation or termination and any information submitted in response by the concern. Upon determining that early graduation or termination is not warranted, the AA/DPCE or designee will notify the Participant in writing. If early graduation or termination appears warranted, the AA/DPCE will make such a recommendation to the AA/BD, who will then make a decision whether to early graduate or terminate the concern. SBA will act in a timely manner in processing early graduation and termination actions.

- (d) **Notice requirements and effect of decision.** Upon deciding that early graduation or termination is warranted, the AA/BD will issue a Notice of Early Graduation or Termination. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may appeal the decision in accordance with the provisions of part 134 of this title. 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.
- (e) **Appeal to OHA.** Procedures governing appeals of early graduation or termination to SBA's OHA are set forth in part 134. If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days after the Participant receives the Notification, the decision of the AA/BD is the final agency decision effective on the date the appeal right expired.
- (f) **Effect or early graduation or termination.**
- (1) After the effective date of early graduation or termination, a Participant is no longer eligible to receive any 8(a) BD program assistance. However, such concern is obligated to complete previously awarded 8(a) contracts, including any priced options which may be exercised.
  - (2) When SBA early graduates or terminates a firm from the 8(a) BD program, the firm will generally not qualify as an SDB for future procurement actions. If the firm believes that it does qualify as an SDB and seeks to certify itself as an SDB, as part of its SDB certification the firm must identify:
    - (i) That it has been early graduated or terminated;
    - (ii) The statutory or regulatory authority that qualifies the firm for SDB status; and
    - (iii) Where applicable, the circumstances that have changed since the early graduation or termination or that do not prevent it from qualifying as an SDB.
  - (3) Where a concern certifies that it qualifies as an SDB pursuant to paragraph (f)(2) of the section, the procuring activity contracting officer may protest the SDB status of the firm to SBA pursuant to § 124.1002 where questions regarding the firm's SDB status remain.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011; 85 FR 66186, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

### § 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.
- (b) SBA will issue a Notice of Suspension to the Participant's last known address by certified mail, return receipt requested. Suspension is effective as of the date of the issuance of the Notice. The Notice will provide the following information:
- (1) The basis for the suspension;

- (2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;
  - (3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been "self-marketed" by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;
  - (4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;
  - (5) A statement that the suspension is effective nationally throughout SBA;
  - (6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.
  - (7) A statement that the firm's participation in the program is suspended effective on the date the Notice is served, and that the program term will resume only if the suspension is lifted or the firm is not terminated.
- (c) The Participant may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the concern receives the Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.
- (d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.
- (1) The term "adequate evidence" means information contained in the record before the AA/BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.
  - (2) SBA need not demonstrate that an act or omission actually occurred in order for OHA to uphold a suspension. SBA's burden in a suspension proceeding is limited to demonstrating that it had a reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.
  - (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.
- (e) If there is a timely appeal, the decision of the Administrative Law Judge is the final SBA decision. If there is not a timely appeal, the decision of the AA/BD is the final Agency decision.
- (f) Upon the request of SBA, OHA may consolidate suspension and termination proceedings when the issues presented are identical.
- (g) Any program suspension which occurs under this section is effective until such time as SBA lifts the suspension or the Participant's participation in the program is fully terminated. If the concern is ultimately not terminated from the 8(a) BD program, the suspension will be lifted and the length of the suspension will be added to the concern's program term.

(h)

- (1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:
  - (i) A Participant requests a change of ownership and/or control and SBA discovers that a change of ownership or control has in fact occurred prior to SBA's approval; or
  - (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;
  - (iii) A Participant has a principal place of business located in a federally declared disaster area and elects to suspend its participation in the 8(a) BD program for a period of up to one year from the date of the disaster declaration to allow the firm to recover from the disaster and take full advantage of the program. A Participant that elects to be suspended may request that the suspension be lifted prior to the end date of the original request; or
  - (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.
- (2) A suspension initiated under paragraph (h) of this section will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a suspension issued under paragraph (h) is not appealable.
- (3) Where a Participant is suspended pursuant to paragraph (h)(1)(i) of this section and SBA approves the change of ownership and/or control, the length of the suspension will be added to the firm's program term only where the change in ownership or control results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited at least 60 days for SBA approval before making the change.
- (4) Where a Participant is suspended pursuant to paragraph (h)(1)(ii) of this section, the Participant must notify SBA when the disadvantaged individual returns to control the firm so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.
- (5) Where a Participant is suspended pursuant to (h)(1)(iv) of this section, the Participant must notify SBA when the lapse in appropriation ends so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.
- (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.

- (7) **Effect of suspension.** Once a suspension is issued pursuant to this section, a Participant cannot receive any additional 8(a) BD program assistance, including new 8(a) contract awards, for as long as the Participant is suspended. This includes any procurement requirements that the firm has self-marketed and those that have been accepted into the 8(a) BD program on behalf of the suspended concern. However, the suspended Participant must complete any previously awarded 8(a) contracts.
- (i) SBA does not recognize the concept of de facto suspension. Adding time to the end of a Participant's program term equal to the length of a suspension will occur only where a concern's program participation has been formally suspended in accordance with the procedures set forth in this section.
- (j) A suspension from 8(a) BD participation under this section has no effect on a concern's eligibility for non-8(a) Federal Government contracts. However, a debarment or suspension under the Federal Acquisition Regulation (48 CFR, chapter 1) will disqualify a concern from receiving all Federal Government contracts, including 8(a) contracts.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011; 81 FR 48582, July 25, 2016; 85 FR 66186, Oct. 16, 2020]

## BUSINESS DEVELOPMENT

### § 124.401 Which SBA field office services a Participant?

The SBA district office which serves the geographical territory where a Participant's principal place of business is located normally will service the concern during its participation in the 8(a) BD program.

### § 124.402 How does a Participant develop a business plan?

- (a) **General.** In order to assist the SBA servicing office in determining the business development needs of its portfolio Participants, each Participant must develop a comprehensive business plan setting forth its business targets, objectives, and goals.
- (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. Where a sole source 8(a) requirement is offered to SBA on behalf of a Participant or a Participant is the apparent successful offeror for a competitive 8(a) requirement and SBA has not yet approved the Participant's business plan, SBA will approve the Participant's business plan as part of its eligibility determination prior to contract award.
- (c) **Contents of business plan.** The business plan must contain at least the following:
- (1) A detailed description of any products currently being produced and any services currently being performed by the concern, as well as any future plans to enter into one or more new markets;
  - (2) The applicant's designation of its primary industry classification, as defined in § 124.3;
  - (3) An analysis of market potential, competitive environment, and the concern's prospects for profitable operations during and after its participation in the 8(a) BD program;
  - (4) An analysis of the concern's strengths and weaknesses, with particular attention on ways to correct any financial, managerial, technical, or work force conditions which could impede the concern from receiving and performing non-8(a) contracts;

- (5) Specific targets, objectives, and goals for the business development of the concern during the next two years;
- (6) Estimates of both 8(a) and non-8(a) contract awards that will be needed to meet its targets, objectives and goals; and
- (7) Such other information as SBA may require.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66186, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

### § 124.403 How is a business plan updated and modified?

- (a) **Annual review.** Each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS), and modify the plan as appropriate. If there are no changes in a Participant's business plan, the Participant need not resubmit its business plan. A Participant must submit a new or modified business plan only if its business plan has changed from the previous year. The Participant must submit a modified plan and updated information to its BOS within thirty (30) days after the close of each program year. It also must submit a capability statement describing its current contract performance capabilities as part of its updated business plan.
- (b) **Contract forecast.** As part of the annual review of its business plan, each Participant must annually forecast in writing its needs for contract awards for the next program year. The forecast must include:
  - (1) The aggregate dollar value of 8(a) contracts to be sought, broken down by sole source and competitive opportunities where possible;
  - (2) The aggregate dollar value of non-8(a) contracts to be sought;
  - (3) The types of contract opportunities to be sought, identified by product or service; and
  - (4) Such other information as SBA may request to aid in providing effective business development assistance to the Participant.
- (c) **Transition management strategy.** Beginning in the first year of the transitional stage of program participation, each Participant must annually submit a transition management strategy to be incorporated into its business plan. The transition management strategy must describe:
  - (1) How the Participant intends to meet the applicable non-8(a) business activity target imposed by § 124.509 during the transitional stage of participation; and
  - (2) The specific steps the Participant intends to take to continue its business growth and promote profitable business operations after the expiration of its program term.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]

### § 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

- (a) **General.** Participation in the 8(a) BD program is divided into two stages, a developmental stage and a transitional stage. The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term or has elected to extend its participation pursuant to § 124.2(b).

- (b) **Developmental stage of program participation.** A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:
- (1) Sole source and competitive 8(a) contract support;
  - (2) Financial assistance pursuant to § 120.375 of this title;
  - (3) The transfer of technology or surplus property owned by the United States pursuant to § 124.405; and
  - (4) Training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.
- (c) **Transitional stage of program participation.** A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:
- (1) The same assistance as that provided to Participants in the developmental stage;
  - (2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and
  - (3) Training and technical assistance in transitional business planning.

[63 FR 35739, June 30, 1998, as amended at 86 FR 2533, Jan. 13, 2021]

## § 124.405 How does a Participant obtain Federal Government surplus property?

- (a) **General.**
- (1) Pursuant to 15 U.S.C. 636(j)(13)(F), eligible Participants may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102-37 and this section will be used to transfer surplus personal property to eligible Participants.
  - (2) The surplus personal property which may be transferred to SASPs for further transfer to eligible Participants includes all personal property which has become available for donation pursuant to 41 CFR 102-37.30.
- (b) **Eligibility to receive Federal surplus property.** To be eligible to receive Federal surplus property, on the date of transfer a concern must:
- (1) Be in the 8(a) BD program;
  - (2) Be in compliance with all program requirements, including any reporting requirements;
  - (3) Not be debarred, suspended, or declared ineligible under Title 2 or Title 48 of the Code of Federal Regulations;
  - (4) Not be under a pending 8(a) BD program suspension, termination or early graduation proceeding; and
  - (5) Be engaged or expect to be engaged in business activities making the item useful to it.



- (6) Not have received property under part 129, Subpart B of this chapter, during the applicable period described in that section.

**(c) Use of acquired surplus personal property.**

- (1) Eligible Participants may acquire Federal surplus personal property from the SASP in the State(s) where the Participant is located and operates, provided the Participant represents in writing:
  - (i) As to what the intended use of the surplus property is to be and that this use is consistent with the objectives of the concern's 8(a) business plan;
  - (ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;
  - (iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government during its term of participation in the 8(a) program and for one year after it leaves the program;
  - (iv) That, at its own expense, it will return the property to a SASP or transfer it to another Participant if directed to do so by SBA because it has not used the property as intended within one year of receipt;
  - (v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and
  - (vi) That it will give SBA access to inspect the property and all records pertaining to it.
- (2) A firm receiving surplus property pursuant to this section assumes all liability associated with or stemming from the use of the property.
- (3) If the property is not placed in use for the purposes for which it was intended within one year of its receipt, SBA may direct the concern to deliver the property to another Participant or to the SASP from which it was acquired.
- (4) Failure to comply with any of the commitments made under paragraph (c)(1) of this section constitutes a basis for termination from the 8(a) program.

**(d) Procedures for acquiring Federal Government surplus personal property.**

- (1) Participants may participate in the GSA Federal Surplus Personal Property Donation Program administered by the SASPs. See generally 41 CFR part 102-37 and/or § 102-37.125 of that title.
- (2) Each Participant seeking to acquire Federal Government surplus property from a SASP must:
  - (i) Certify in writing to the SASP that it is eligible to receive the property pursuant to paragraph (b) of this section;
  - (ii) Make the written representations and agreement required by paragraph (c)(1) of this section; and
  - (iii) Identify to the SASP its servicing SBA field office.

- (3) Upon receipt of the required certification, representations, agreement, and information set forth in paragraph (d)(2) of this section, the SASP must contact the appropriate SBA field office and obtain SBA's verification that the concern seeking to acquire the surplus property is eligible, and that the identified use of the property is consistent with the concern's business activities. SASPs may not release property to a Participant without this verification.
- (4) The SASP and the Participant must agree on and record the fair market value of the surplus property at the time of the transfer to the Participant. The SASP must provide to SBA a written record, including the agreed upon fair market value, of each transaction to a Participant when any property has been transferred.
- (e) **Costs.** Participants acquiring surplus property from a SASP must pay a service fee to the SASP which is equal to the SASP's direct costs of locating, inspecting, and transporting the surplus property. If a Participant elects to incur the responsibility and the expense for transporting the acquired property, the concern may do so and no transportation costs will be charged by the SASP. In addition, the SASP may charge a reasonable fee to cover its costs of administering the program. In no instance will any SASP charge a Participant more for any service than their established fees charged to other transferees.
- (f) **Title.** Upon execution of the SASP distribution document, the Participant has conditional title only to the surplus personal property during the applicable period of restriction. Full title to the surplus personal property will vest in the donee only after the donee has met all of the requirements of this part.
- (g) **Compliance.**
  - (1) SBA will periodically review whether Participants that have received surplus property have used and maintained the property as agreed. This review may include site visits to visually inspect the property to ensure that it is being used in a manner consistent with the terms of its transfer.
  - (2) Participants must provide SBA with access to all relevant records upon request.
  - (3) Where SBA receives credible information that transferred surplus property may have been disposed of or otherwise used in a manner that is not consistent with the terms of the transfer, SBA may investigate such claim to determine its validity.
  - (4) SBA may take any action to correct any noncompliance involving the use of transferred property still in possession of the Participant or to enforce any terms, conditions, reservations, or restrictions imposed on the property by the distribution document. Actions to enforce compliance, or which may be taken as a result of noncompliance, include the following:
    - (i) Requiring that the property be placed in proper use within a specified time;
    - (ii) Requiring that the property be transferred to another Participant having a need and use for the property, returned to the SASP serving the area where the property is located for distribution to another eligible transferee or to another SASP, or transferred through GSA to another Federal agency;
    - (iii) Recovery of the fair rental value of the property from the date of its receipt by the Participant; and
    - (iv) Initiation of proceedings to terminate the Participant from the 8(a) BD program.
  - (5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater.

However, a Participant need not repay any amount where it can demonstrate to SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives SBA's prior consent.

- (6) Any funds received by SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

[63 FR 35739, June 30, 1998, as amended at 85 FR 69124, Nov. 2, 2020]

## CONTRACTUAL ASSISTANCE

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

- (a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies regardless of the place of performance, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. This includes set-asides, partial set-asides and reserves of Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. Where practicable, simplified acquisition procedures should be used for 8(a) contracts at or below the simplified acquisition threshold. Where appropriate, SBA will delegate the contract execution function to procuring activities. In order to receive and retain a delegation of SBA's contract execution and review functions, a procuring activity must report all 8(a) contract awards, modifications, and options to SBA.
- (b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants. In addition, for multiple award contracts not set aside for the 8(a) BD program, a procuring agency may award an 8(a) sole source order or set aside one or more specific orders to be competed only among eligible 8(a) Participants. Such an order may be awarded as an 8(a) award where the order was offered to and accepted by SBA as an 8(a) award and the order specifies that the performance of work and/or non-manufacturer rule requirements apply as appropriate. A procuring activity cannot restrict an 8(a) competition (for either a contract or order) to require SBA socioeconomic certifications other than 8(a) certification (*i.e.*, a competition cannot be limited only to business concerns that are both 8(a) and HUBZone, 8(a) and WOSB, or 8(a) and SDVO) or give evaluation preferences to firms having one or more other certifications.
- (c) Admission into the 8(a) BD program does not guarantee that a Participant will receive 8(a) contracts.
- (d) A requirement for possible award may be identified by SBA, a particular Participant or the procuring activity itself. SBA will submit the capability statements provided to SBA annually under § 124.403 to appropriate procuring activities for the purpose of matching requirements with Participants.
- (e) Participants should market their capabilities to appropriate procuring activities to increase their prospects of receiving sole source 8(a) contracts.
- (f) An 8(a) participant that identifies a requirement that appears suitable for award through the 8(a) BD program may request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) BD program.

- (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. Where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement or is offered a sole source order under a previously competitively awarded 8(a) multiple award contract, SBA will determine whether the 8(a) partner to the joint venture is eligible for award, but will not review the joint venture agreement to determine compliance with § 124.513 (see § 124.513(e)(1)). In any case in which an 8(a) Participant is determined to be ineligible, SBA will notify the 8(a) Participant of that determination. Eligibility is based on 8(a) BD program criteria, including whether the 8(a) 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 and must qualify as small for the size standard corresponding to the NAICS code assigned to the contract or order on the date the contract or order is offered to the 8(a) BD program. 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).
- (i) A Participant must certify that it qualifies as a small business under the size standard corresponding to the NAICS code assigned to each 8(a) contract. 8(a) BD program personnel will verify size prior to award of an 8(a) contract. If the Participant is not verified as small, it may request a formal size determination from the appropriate General Contracting Area Office under part 121 of this title.
- (j) Any person or entity that misrepresents its status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" in order to obtain any 8(a) contracting opportunity will be subject to possible criminal, civil and administrative penalties, including those imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(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),

a contiguous county (whether in the same or different state), or the geographical area serviced by a contiguous SBA district office to where the work will be performed. A Participant with a bona fide place of business within a state will be deemed eligible for a construction contract anywhere in that state (even if that state is serviced by more than one SBA district office). SBA may also determine that a Participant with a bona fide place of business in the geographic area served by one of several SBA district offices 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) If a Participant is currently performing a contract in a specific state, it qualifies as having a bona fide place of business in that state for one or more additional contracts. The Participant may not use contract performance in one state to allow it to be eligible for an 8(a) contract in a contiguous state unless it officially establishes a bona fide place of business in the location in which it is currently performing a contract, in the contiguous state or in a location in another state in which the geographical area serviced by the SBA district office is contiguous to the district office in the state where the work will be performed.
- (5) A Participant may establish a bona fide place of business through a full-time employee in a home office.
- (6) An individual designated as the full-time employee of the Participant seeking to establish a bona fide place of business in a specific geographic location need not be a resident of the state where he/she is conducting business.
- (7) 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.
- (8) 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.
- (9) For an 8(a) construction contract requiring work in multiple locations, a Participant is eligible if:
  - (i) For a single award contract, the Participant has a bona fide place of business where a majority of the work (as identified by the dollar value of the work) is anticipated to be performed; and
  - (ii) For a multiple award contract, the Participant has a bona fide place of business in any location where work is to be performed.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011; 78 FR 61132, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 85 FR 66186, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26206, Apr. 27, 2023]

## **§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?**

- (a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA.
  - (1) Except as set forth in § 124.503(a)(4)(ii) and § 124.503(i)(1)(ii), a procuring activity contracting officer must submit an offering letter for each intended 8(a) procurement, including follow-on 8(a) contracts, competitive 8(a) orders issued under non-8(a) multiple award contracts, and sole source 8(a) orders issued under 8(a) multiple award contracts.
  - (2) The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.
- (b) Contracting officers must submit offering letters to the following locations:

- (1) For competitive 8(a) requirements and those sole source requirements for which no specific Participant is nominated (i.e., open requirements) other than construction requirements, to the SBA district office serving the geographical area in which the procuring activity is located;
  - (2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed or, in the case of such contracts to be performed overseas, to the Office of 8(a) BD located in SBA Headquarters;
  - (3) For sole source requirements offered on behalf of a specific Participant, to the SBA district office servicing that concern.
- (c) An offering letter must contain the following information:
- (1) A description of the work to be performed;
  - (2) The estimated period of performance;
  - (3) The NAICS code that applies to the principal nature of the acquisition;
  - (4) The anticipated dollar value of the requirement, including options, if any;
  - (5) Any special restrictions or geographical limitations on the requirement;
  - (6) The location of the work to be performed for construction procurements;
  - (7) Any special capabilities or disciplines needed for contract performance;
  - (8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;
  - (9) The acquisition history, if any, of the requirement, including specifically whether the requirement is a follow-on requirement, and whether any portion of the contract was previously performed by a small business outside of the 8(a) BD program;
  - (10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;
  - (11) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business set-aside, or as a small disadvantaged business set-aside if applicable, and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the procuring activity's clear intent to use any of these means of procurement;
  - (12) Identification of any specific Participant that the procuring activity contracting officer nominates for award of a sole source 8(a) contract, if appropriate, including a brief justification for the nomination, such as one of the following:
    - (i) The Participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) BD program; or
    - (ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;
  - (13) Bonding requirements, if applicable;
  - (14) Identification of all Participants which have expressed an interest in being considered for the acquisition;

- (15) Identification of all SBA field offices which have requested that the requirement be awarded through the 8(a) BD program;
- (16) A request, if appropriate, that a requirement whose estimated contract value is under the applicable competitive threshold be awarded as an 8(a) competitive contract;
- (17) A statement that the necessary justification and approval under the Federal Acquisition Regulation has occurred where a requirement whose estimated contract value exceeds \$25,000,000, or \$100,000,000 in the case of Department of Defense contracts, is offered to SBA as a sole source requirement on behalf of a specific Participant; and
- (18) Any other information that the procuring activity deems relevant or which SBA requests.

[63 FR 35739, June 30, 1998, as amended at 81 FR 48582, July 25, 2016; 86 FR 61672, Nov. 8, 2021; 88 FR 26206, Apr. 27, 2023]

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

- (a) Acceptance of the requirement. Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to the procuring activity in writing within 10 business days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two business days of receipt of the offering letter if the contract is valued at or below the simplified acquisition threshold, unless SBA requests, and the procuring activity grants, an extension. SBA and the procuring activity may agree to a shorter timeframe for SBA's review under a Partnership Agreement delegating 8(a) contract execution functions to the agency. SBA is not required to accept any particular procurement offered to the 8(a) BD program.
  - (1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant. As part of its acceptance of a sole source requirement, SBA will determine the eligibility of the Participant identified in the offering letter, using the same analysis set forth in § 124.501(g). Where a procuring agency offers a sole source 8(a) procurement on behalf of a joint venture, SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance, and will approve the joint venture prior to award pursuant to § 124.513(e).
  - (2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer on behalf of the 8(a) BD program. For a competitive 8(a) procurement, SBA will determine the eligibility of the apparent successful offeror pursuant to § 124.507(b).
  - (3) Where SBA has delegated its contract execution functions to a procuring activity, the procuring activity may assume that SBA accepts its offer for the 8(a) program if the procuring activity does not receive a reply to its offer within five days.
  - (4) In the case of procurement requirements valued at or below the Simplified Acquisition Procedures threshold:
    - (i) Where a procuring activity makes an offer to the 8(a) program on behalf of a specific Program Participant and does not receive a reply to its offer within two days, the procuring activity may assume the offer is accepted and proceed with award of an 8(a) contract;



- (ii) Where SBA has delegated its 8(a) contract execution functions to an agency through a signed Partnership Agreement, SBA may authorize the procuring activity to award an 8(a) contract below the simplified acquisition threshold without requiring an offer and acceptance of the requirement for the 8(a) BD program. However, the procuring activity must request SBA to determine the eligibility of the intended awardee prior to award. SBA shall review the 8(a) Participant's eligibility and issue an eligibility determination within two business days after a request from the procuring activity. If SBA does not respond within this timeframe, the procuring activity may assume the 8(a) Participant is eligible and proceed with award. The procuring activity shall provide a copy of the executed contract to the SBA servicing district office within fifteen business days of award.
- (5) Where SBA does not respond to an offering letter within the normal 10 business-day time period, the procuring activity may seek SBA's acceptance through the AA/BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/BD within 5 business days of his or her receipt of the procuring activity request.
- (b) **Verification of NAICS code.** As part of the acceptance process, SBA will verify the appropriateness of the NAICS code designation assigned to the requirement by the procuring activity contracting officer.
  - (1) SBA will accept the NAICS code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other NAICS codes may also be reasonable.
  - (2) If SBA and the procuring activity are unable to agree as to the proper NAICS code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to § 124.505, or appeal the NAICS code designation to OHA under part 134 of this title.
- (c) **Sole source award where procuring activity nominates a specific Participant.** SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award.
  - (1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that:
    - (i) The procurement is consistent with the Participant's business plan;
    - (ii) The Participant complies with its applicable non-8(a) business activity target imposed by § 124.509(d);
    - (iii) The Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer;
    - (iv) The Participant has submitted required financial statements to SBA; and
    - (v) The Participant can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 124.510.
  - (2) If an appropriate match exists, SBA will advise the procuring activity whether SBA will participate in contract negotiations or whether SBA will authorize the procuring activity to negotiate directly with the identified Participant. Where SBA has delegated its contract execution functions to a procuring activity, SBA will also identify that delegation in its acceptance letter.

- (3) If an appropriate match does not exist, SBA will notify the Participant and the procuring activity, and may then nominate an alternate Participant.
- (d) **Open requirements.** When a procuring activity does not nominate a particular concern for performance of a sole source 8(a) contract (open requirement), the following additional procedures will apply:
- (1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.
  - (2) If the procurement is not a construction requirement, SBA may select any eligible, responsible Participant nationally to perform the contract.
  - (3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts.
- (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).
- (f) **Formal technical evaluations.** Except for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity:

- (1) Must request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive threshold amount; and
  - (2) May conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.
- (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 repro cure 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.
- (1) SBA will not accept for award on a sole source basis any task order under a BOA or BPA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold amount set forth in [§ 124.506\(a\)](#).
  - (2) Where a procuring activity believes that task orders to be issued under a proposed BOA or BPA will exceed the applicable competitive threshold amount set forth in [§ 124.506\(a\)](#), the procuring activity must offer the requirement to the program to be competed among eligible Participants.
  - (3) Once a concern's program term expires, the concern otherwise exits the 8(a) BD program, or becomes other than small for the NAICS code assigned under the BOA or BPA, new orders will not be accepted for the concern.
  - (4) A procuring agency may offer, and SBA may accept, an order issued under a BOA or BPA to be awarded through the 8(a) BD program where the BOA or BPA itself was not accepted for the 8(a) BD program, but rather was awarded on an unrestricted basis.
- (i) **Task or Delivery Order Contracts, including Multiple Award Contracts –**
- (1) **Contracts set-aside for exclusive competition among 8(a) Participants.**

- (i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures. This includes an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, compliance with the performance of work requirements set forth in § 124.510, and compliance with the nonmanufacturer rule (see § 121.406(b)), if applicable.
- (ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract 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, and the individual order is to be competed among all 8(a) contract holders. However, where the order includes work that was previously performed through another 8(a) contract, the procuring agency must notify and consult with SBA prior to issuing the order that it intends to procure such specified work through an order under an 8(a) Multiple Award Contract. Consultation with SBA does not require SBA concurrence or approval. Where that work is critical to the business development of a current Participant that previously performed the work through another 8(a) contract and that Participant is not a contract holder of the 8(a) Multiple Award Contract, SBA may request that the procuring agency fulfill the requirement through a competition available to all 8(a) BD Program Participants. SBA will provide any feedback in response to the procuring agency's notification within 10 business days.
- (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) An agency may issue a sole source award against a Multiple Award Contract that has been set aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) BD Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met. Where an agency seeks to award an order on a sole source basis (i.e., to one particular 8(a) contract holder without competition among all 8(a) contract holders), the agency must offer, and SBA must accept, the order into the 8(a) program on behalf of the identified 8(a) contract holder.
  - (A) 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 of the order, qualify as small for the size standard corresponding to the NAICS code assigned to the order on the date the order is offered to the 8(a) BD program, and be in compliance with any applicable competitive

business mix target established or remedial measure imposed by § 124.509. Where the intended sole source recipient is a joint venture, the 8(a) managing partner to the joint venture is the concern whose eligibility is considered.

- (B) Where an agency seeks to issue a sole source order to a joint venture, the two-year restriction for joint venture awards set forth in § 121.103(h) does not apply and SBA will not review and approve the joint venture agreement as set forth in § 124.513(e)(1).
- (2) **Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.** In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a) award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met:
- (i) The order must be offered to and accepted into the 8(a) BD program;
  - (ii) The order must be either an 8(a) sole source award or be competed exclusively among only the 8(a) awardees of the underlying multiple award contract. Where an agency seeks to issue an 8(a) competitive order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, all eligible 8(a) BD Participants who are contract holders of the underlying multiple award contract must have the opportunity to compete for the order. Where an agency seeks to issue an 8(a) competitive order under the Federal Supply Schedule, an agency can utilize the procedures set forth in FAR subpart 8.4 (48 CFR part 8, subpart 8.4) to award to an eligible 8(a) BD Participant. Where an agency seeks to issue an 8(a) sole source order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, the identified 8(a) Participant that is a contract holder of the underlying multiple award contract must be an eligible Participant on the date of the issuance of the order.
  - (iii) The order must require the concern comply with applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule, if applicable, (see § 121.406(b)) in the performance of the individual order; and
  - (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.
- (3) **Reserves.** A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a) Participants (*i.e.*, an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) Participants under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since any such award to 8(a) Participants would not be considered an 8(a) contract award.
- (j) Requirements where SBA has delegated contract execution authority. Except as provided in paragraph (a)(4)(i) of this section, where SBA has delegated its 8(a) contract execution authority to the procuring activity, the procuring activity must still offer and SBA must still accept all requirements intended to be awarded as 8(a) contracts.
  - (k) **Contracting Among Small Business Programs –**

- (1) **Acquisitions Valued At or Below the Simplified Acquisition Threshold.** The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.
- (2) **Acquisitions Valued Above the Simplified Acquisition Threshold.**
- (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's System for Award Management (SAM) (or any successor system) certifications and associated representations were reviewed.
- (ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

[63 FR 35739, June 30, 1998, as amended at 70 FR 51248, Aug. 30, 2005; 71 FR 66444, Nov. 15, 2006; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 76 FR 8259, Feb. 11, 2011; 77 FR 1860, Jan. 12, 2012; 78 FR 61133, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 84 FR 65661, Nov. 29, 2019; 85 FR 66187, Oct. 16, 2020; 88 FR 26206, Apr. 27, 2023]

## § 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?

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

- (a) **Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.** The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. However, the AA/BD may permit the acceptance of the requirement under extraordinary circumstances.
- (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) **Adverse impact.** SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions. SBA will not consider adverse impact with respect to any requirement offered to the 8(a) program under the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101).
- (1) In determining whether the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.
- (i) In connection with a specific small business, SBA presumes adverse impact to exist where:
- (A) The small business concern has performed the specific requirement for at least 24 months;
- (B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and
- (C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates). For a multi-year requirement, the dollar value of the last 12 months of the requirement will be used to determine whether a small business would be adversely affected by SBA's acceptance.
- (ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is one which has not been previously procured by the relevant procuring activity.
- (A) Where a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.
- (B) Procurements for construction services (e.g., the building of a specific structure) are generally deemed to be new requirements. However, recurring indefinite delivery or indefinite quantity task or delivery order construction services are not considered new (e.g., a recurring procurement requiring all construction work at base X).
- (C) The expansion or modification of an existing requirement may be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.
- (D) SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.
- (2) In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

- (3) In determining whether the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry in the 8(a) BD program as compared with other small business programs.
- (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 coordinate with the SBA District Office servicing the 8(a) incumbent firm and the SBA Procurement Center Representative assigned to the contracting activity initiating a non-8(a) procurement action that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Such notification must identify the scope and dollar value of any work previously performed through another 8(a) contract and the scope and dollar value of the contract determined to be new. Additionally, a procuring agency must coordinate with SBA where it seeks to reprocur 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:
  - (i) Whether the agency has achieved its SDB goal;
  - (ii) Where the agency is in achieving its HUBZone, SDVO, WOSB, or small business goal, as appropriate; and
  - (iii) Whether the requirement is critical to the business development of the 8(a) Participant that is currently performing it.
- (2) SBA may decline to accept the offer of a follow-on or renewable 8(a) acquisition in order to give a concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside of the 8(a) BD program.
  - (i) SBA will consider release under paragraph (2) only where:
    - (A) The procurement awarded through the 8(a) BD program is being or was performed by either a Participant whose program term will expire prior to contract completion, or by a former Participant whose program term expired within one year of the date of the offering letter;
    - (B) The concern requests in writing that SBA decline to accept the offer prior to SBA's acceptance of the requirement for award as an 8(a) contract; and
    - (C) The concern qualifies as a small business for the requirement now offered to the 8(a) BD program.



- (ii) In considering release under paragraph (2), SBA will balance the importance of the requirement to the concern's business development needs against the business development needs of other Participants that are qualified to perform the requirement. This determination will include consideration of whether rejection of the requirement would seriously reduce the pool of similar types of contracts available for award as 8(a) contracts. SBA will also seek the views of the procuring agency.
- (3) SBA may release a requirement under this paragraph only where the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside or otherwise identifies a procurement strategy that would emphasize or target small business participation.
- (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.

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013; 81 FR 34260, May 31, 2016; 81 FR 48582, July 25, 2016; 85 FR 66188, Oct. 16, 2020; 88 FR 26207, Apr. 27, 2023]

### **§ 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) **What SBA may appeal.** The Administrator of SBA may appeal the following matters to the head of the procuring agency:
  - (1) A contracting officer's decision not to make a particular procurement available for award as an 8(a) contract;
  - (2) A contracting officer's decision to reject a specific Participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) BD program;
  - (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
  - (4) The terms and conditions of a proposed 8(a) contract, including the procuring activity's NAICS code designation and estimate of the fair market price.
- (b) **Procedures for appeal.**
  - (1) SBA must notify the contracting officer of the SBA Administrator's intent to appeal an adverse decision within 5 working days of SBA's receipt of the decision.
  - (2) Upon receipt of the notice of intent to appeal, the procuring activity must suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a consideration of the appeal.

- (3) The SBA Administrator must send a written appeal of the adverse decision to the head of the procuring agency within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.
- (4) By statute (15 U.S.C. 637(a)(1)(A)), the procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66189, Oct. 16, 2020]

## § 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

### (a) *Competitive thresholds.*

- (1) The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 124, Subpart A, 8(a) Business Development, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the FEDERAL REGISTER. The adjusted dollar thresholds shall take effect on the date of publication.
- (2) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:
  - (i) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;
  - (ii) The anticipated award price of the contract, including options, will exceed \$7,000,000 for contracts assigned manufacturing NAICS codes and \$4,500,000 for all other contracts; and
  - (iii) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.
- (3) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options.

*Example to paragraph (a)(3).* If the anticipated award price for a professional services requirement is determined to be \$3.8 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$4.2 million.

- (4) Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount.

- (5) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.
- (b) **Exemption from competitive thresholds for Participants owned by Indian Tribes, ANCs and NHOs.**
- (1) A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.
  - (2) A Participant concern owned and controlled by an NHO may be awarded a sole source Department of Defense (DoD) 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.
  - (3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts. However, a current procurement requirement may not be removed from competition and awarded to a tribally-owned, ANC-owned or NHO-owned concern on a sole source basis (*i.e.*, a procuring agency may not evidence its intent to fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant). A follow-on requirement to one that was previously awarded as a competitive 8(a) procurement may be offered, accepted and awarded on a sole source basis to a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts.
  - (4) A joint venture between one or more eligible Tribally-owned, ANC-owned or NHO-owned Participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that it meets the requirements of § 124.513.
  - (5) An agency may not award an 8(a) sole source contract for an amount exceeding \$25,000,000, or \$100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.
- (c) **Competition below thresholds.** The AA/BD, on a nondelegable basis, may approve a request from a procuring activity to compete a requirement that is below the applicable competitive threshold amount among eligible Participants.
- (1) This authority will be used primarily when technical competitions are appropriate or when a large number of potential awardees exist.
  - (2) The AA/BD may consider whether the procuring activity has made and will continue to make available a significant number of its contracts to the 8(a) BD program on a noncompetitive basis.
  - (3) The AA/BD may deny a request if the procuring activity previously offered the requirement to the 8(a) BD program on a noncompetitive basis and the request is made following the inability of the procuring activity and the potential sole source awardee to reach an agreement on price or some other material term or condition.

- (d) **Sole source above thresholds.** Where a contract opportunity exceeds the applicable threshold amount and there is not a reasonable expectation that at least two eligible 8(a) Participants will submit offers at a fair price, the AA/BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price. The AA/BD may also accept a requirement that exceeds the applicable competitive threshold amount for a sole source 8(a) award if he or she determines that a FAR exception (48 CFR 6.302) to full and open competition exists (e.g., unusual and compelling urgency). An agency may not award an 8(a) sole source contract under this paragraph for an amount exceeding \$25,000,000, or \$100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under FAR § 19.808-1 or DFAR § 219.808-1(a).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 74 FR 46887, Sept. 14, 2009; 76 FR 8260, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 86 FR 61672, Nov. 8, 2021; 88 FR 26208, Apr. 27, 2023]

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

- (a) **FAR procedures.** Procuring activities will conduct competitions among and evaluate offers received from Participants in accordance with the Federal Acquisition Regulation (48 CFR, chapter 1).
- (b) **Eligibility determination by SBA.** In either a negotiated or sealed bid competitive 8(a) acquisition, the procuring activity will request that the SBA district office servicing the apparent successful offeror determine that firm's eligibility for award.
- (1) Within 5 working days after receipt of a procuring activity's request for an eligibility determination, SBA will determine whether the firm identified by the procuring activity is eligible for award.
  - (2) SBA determines a Participant's eligibility pursuant to § 124.501(g).
  - (3) If SBA determines that the apparent successful offeror is ineligible, SBA will notify the procuring activity. The procuring activity will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.
  - (4) Except to the extent set forth in paragraph (d) of this section, SBA determines whether a Participant is eligible for a specific 8(a) competitive requirement as of the date that the Participant submitted its initial offer which includes price.
  - (5) If the procuring activity contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to SBA for a possible Certificate of Competency in accord with § 125.5 of this title.
- (c) **Restricted competition –**
- (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.

- (2) **Competition for all non-construction requirements.** Except for construction requirements, all eligible Participants regardless of location may submit offers in response to competitive 8(a) solicitations. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, are any imposed by the solicitations themselves.
- (d) **Award to firms whose program terms have expired.** A concern that has completed its term of participation in the 8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.
  - (1) Amendments to the solicitation extending the date for submissions of offers will be disregarded.

*Example to paragraph (d)(1).* The program term for 8(a) Participant X is scheduled to expire on December 19. A solicitation for a competitive 8(a) procurement specifies that initial offers are due on December 15. The procuring activity amends the solicitation to extend the date for the receipt of offers to January 5. X submits its offer on January 5 and is selected as the apparent successful offeror. X is eligible for award because it was an eligible 8(a) Participant on the initial date set forth in the solicitation for the receipt of offers.

- (2) For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.
- (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.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8260, Feb. 11, 2011; 81 FR 48582, July 25, 2016; 84 FR 65661, Nov. 29, 2019; 85 FR 66189, Oct. 16, 2020]

## § 124.508 How is an 8(a) contract executed?

- (a) An 8(a) contract can be awarded in the following ways:
  - (1) As a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. There may be separate prime and subcontract documents (i.e., a prime contract between the procuring activity and SBA and a subcontract between SBA and the selected 8(a) concern) or a combined contract document representing both the prime and subcontract relationships; or
  - (2) Where SBA has delegated contract execution authority to the procuring activity, directly by the procuring activity through a contract between the procuring activity and the Participant.
- (b) Where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt.
- (c) In order to be eligible to receive a sole source 8(a) contract, a firm must be a current Participant on the date of award. (See § 124.507(d) for competitive 8(a) awards.)

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

(a) **General.**

- (1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make good faith efforts to obtain business outside the 8(a) BD program. Work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.
- (2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make good faith efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the firm for economic viability when program benefits are no longer available.

(b) **Required non-8(a) business activity targets during transitional stage –**

- (1) **General.** During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non-8(a) revenue over time.
- (2) **Non-8(a) business activity targets –**
  - (i) During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

Table 1 to Paragraph (b)(2)(i)

Participant's 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

- (ii) Any Participant that extended its program term pursuant to § 124.2(b) of this chapter must meet the business activity target for year 5 or meet the applicable requirements of paragraph (d) or (e) of this section in order to preserve its eligibility for sole source 8(a) contracts during the extended program period. The applicable business activity target for the extended program period will be the same as that for year 5 of the transitional stage (i.e., 50% non-8(a) revenue).

(3) **Compliance with non-8(a) business activity targets.** SBA will measure the Participant's compliance with the applicable non-8(a) business activity target at the end of each program year in the transitional stage by comparing the Participant's non-8(a) revenue to its total revenue during the program year just completed. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non-8(a) revenue to its total revenue during that first year. If appropriate, SBA will require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non-8(a) business activity target in year one of the transitional stage would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) **Certification of compliance.** A Participant must certify as part of its offer that it complies with the applicable non-8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) **Reporting and verification of business activity.**

(1) As part of its annual review after being admitted to the 8(a) BD program, a Participant must provide to SBA within 30 days from the end of its program year:

- (i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with § 124.602; and
- (ii) An estimate of 8(a) and non-8(a) revenue derived during the program year, which may be obtained from monthly, quarterly or semi-annual interim financial statements or otherwise.

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues received during the year, including those from options and modifications, to all non-8(a) revenues received during the year.

(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.

(i) SBA will determine whether the Participant made good faith efforts to attain the targeted non-8(a) revenues during the just completed program year. A Participant may establish that it made good faith efforts by demonstrating to SBA that:

(A) It submitted offers for one or more non-8(a) procurements which, if awarded to the Participant during its just completed program year, would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target during that same program year. In such a case, the Participant must provide copies of offers submitted in response to solicitations and documentary evidence of its projected revenues under these missed contract opportunities; or

(B) Individual extenuating circumstances adversely impacted its efforts to obtain non-8(a) revenues, including but not limited to a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, or having

one or more prime contractors award less work to the Participant than originally contemplated. Where available, supporting information and documentation must be included to show how such extenuating circumstances specifically prevented the Participant from attaining its targeted non-8(a) revenues during the just completed program year.

- (ii) The Participant bears the burden of establishing that it made good faith efforts to meet its non-8(a) business activity target. SBA's determination as to whether a Participant made good faith efforts is final and no appeal may be taken with respect to that decision.
- (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.

*Example 3 to paragraph (d)(4).* Firm C elected to extend its participation in the 8(a) BD program as set forth in § 124.2 of this chapter. Firm C had \$10 million in total revenue during year 5 in the transitional stage (year 9 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 C did not make good faith efforts to meet its non-8(a) business activity target. In order to be eligible for sole source 8(a) contracts during year 6 of the transitional stage (year 10 in the program), Firm C must demonstrate at its first or second quarterly review that it had received at least \$3.5 million in non-8(a) revenue and new non-8(a) awards (the amount by which it failed to meet the 50% non-8(a) business activity target for year 5 in the transitional stage). If, at

its first two quarterly reviews during year 6 of the transitional stage (year 10 in the program), Firm C could not demonstrate that it had received at least \$3.5 million in non-8(a) revenue and new non-8(a) awards, Firm C would not be eligible for sole source 8(a) contracts for the remainder of its program term.

- (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.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009; 76 FR 8261, Feb. 11, 2011; 85 FR 66189, Oct. 16, 2020; 86 FR 2533, Jan. 13, 2021; 86 FR 38538, July 22, 2021; 88 FR 26208, Apr. 27, 2023]

## § 124.510 What limitations on subcontracting apply to an 8(a) contract?

- (a) To assist the business development of Participants in the 8(a) BD program, there are limitations on the percentage of an 8(a) contract award amount that may be spent on subcontractors. The prime contractor recipient of an 8(a) contract must comply with the limitations on subcontracting at § 125.6 of this chapter.

- (b) Indefinite delivery and indefinite quantity contracts. In order to ensure that the required limitations on subcontracting requirements on an indefinite delivery or indefinite quantity 8(a) award are met by the Participant, the Participant cannot subcontract more than the required percentage to subcontractors that are not similarly situated entities for each performance period of the contract (*i.e.*, during the base term and then during each option period thereafter). However, the contracting officer, in his or her discretion, may require the Participant to meet the applicable limitation on subcontracting or comply with the nonmanufacturer rule for each order.
- (1) This includes Multiple Award Contracts that were set-aside or partially set-aside for 8(a) BD Participants.
- (2) For orders that are set aside for eligible 8(a) Participants under full and open contracts or reserves, the Participant must meet the applicable limitation on subcontracting requirement and comply with the nonmanufacturer rule, if applicable, for each order.

[81 FR 34260, May 31, 2016]

### § 124.511 How is fair market price determined for an 8(a) contract?

- (a) The procuring activity determines what constitutes a "fair market price" for an 8(a) contract.
- (1) The procuring activity must derive the estimate of a current fair market price for a new requirement, or a requirement that does not have a satisfactory procurement history, from a price or cost analysis. This analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. The analysis must also consider any cost or pricing data that is timely submitted by SBA.
- (2) The procuring activity must base the estimate of a current fair market price for a requirement that has a satisfactory procurement history on recent award prices adjusted to ensure comparability. Adjustments will take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be appropriate.
- (b) Upon the request of SBA, a procuring activity will provide to SBA a written statement detailing the method it has used to estimate the current fair market price for the 8(a) requirement. This statement must be submitted within 10 working days of SBA's request. The procuring activity must identify the information, studies, analyses, and other data it used in making its estimate.
- (c) The procuring activity's estimate of fair market price and any supporting data may not be disclosed by SBA to any Participant or potential contractor.
- (d) The concern selected to perform an 8(a) contract may request SBA to protest the procuring activity's estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

### § 124.512 Delegation of contract administration to procuring agencies.

- (a) SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25). Tracking compliance with the performance of work requirements set forth in § 124.510 is included within the functions performed by the procuring activity as part of contract administration.

- (b) This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, submit copies to the SBA servicing district office of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.
- (c) SBA may conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8261, Feb. 11, 2011]

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

(a) **General.**

- (1) A Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.
- (2) A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture to receive an 8(a) sole source contract award and will find the joint venture to be ineligible for a competitive 8(a) award if it is determined to be the apparent successful offeror.
- (3) As long as a joint venture qualifies as small under the size standard corresponding to the NAICS code assigned to a specific contract or order (see § 124.513(b)), it will be eligible for award based on the status of its 8(a) managing venturer.
- (4) A Program Participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific 8(a) contract or for an 8(a) order under a multiple award contract that is not itself an 8(a) contract.

(b) **Size of concerns to an 8(a) joint venture.**

- (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement, or be awarded a sole source 8(a) procurement, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement.
- (2) Notwithstanding the provisions of paragraph (b)(1) of this section, a joint venture between a protégé firm and its approved mentor (see § 124.520) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the contract and has not reached the dollar limits set forth in § 124.519.
- (3) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. See § 124.517(b).

- (c) **Contents of joint venture agreement.** Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

- (1) Setting forth the purpose of the joint venture;
- (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;
- (3) Stating that with respect to a separate legal entity joint venture the 8(a) Participant(s) must own at least 51% of the joint venture entity;
- (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) Providing for the establishment and administration of a special bank account in the name of the joint venture. 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. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;
- (6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;
- (7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract

performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

- (8) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;
- (9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the 8(a) Participant managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;
- (10) Requiring the final original records be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;
- (11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
- (12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) **Performance of work.**

- (1) For any 8(a) contract, including those between a protégé and a mentor authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.
- (2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.
  - (i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.
  - (ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(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.

- (f) **Capabilities, past performance, and experience.** When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an 8(a) contract 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 8(a) Participant 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.

- (g) **Contract execution.** Where an 8(a) award will be made to a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protégé joint venture, as appropriate.
- (h) **Amendments to joint venture agreement.** Where SBA has approved a joint venture for a sole source 8(a) contract, all amendments to the joint venture agreement must be approved by SBA.
- (i) **Inspection of records.** The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.
- (j) **Certification of compliance.** Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:
  - (1) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section; and
  - (2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.
  - (3) For a sole source 8(a) contract, the parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.
- (k) **Performance of work reports.** An 8(a) Participant to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each 8(a) contract it performs as a joint venture.
  - (1) As part of its annual review, the 8(a) Participant(s) to the joint venture must explain for each 8(a) contract performed during the year how the performance of work requirements are being met for the contract.
  - (2) At the completion of every 8(a) contract awarded to a joint venture, the 8(a) Participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.
- (l) **Basis for suspension or debarment.** The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:
  - (1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;
  - (2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or
  - (3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

[63 FR 35739, June 30, 1998, as amended at 69 FR 29208, May 21, 2004; 76 FR 8261, Feb. 11, 2011; 77 FR 28238, May 14, 2012; 81 FR 34261, May 31, 2016; 81 FR 48582, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66190, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26208, Apr. 27, 2023]

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

- (a) **Unpriced options.** The exercise of an unpriced option is considered to be a new contracting action.
- (1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.
  - (2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.
  - (3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.
- (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.
- (c) **Modifications beyond the scope.** A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.
- (d) **Modifications within the scope.** The procuring activity contracting officer may exercise a modification within the scope of the initial 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.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66191, Oct. 16, 2020]

## § 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?

- (a) An 8(a) contract (or 8(a) order where the underlying contract is not an 8(a) contract) must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.
- (1) An 8(a) contract or order, whether in the base or an option year, must be terminated for the convenience of the Government if one or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals.
  - (2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.
- (b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:



- (1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;
  - (2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;
  - (3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;
  - (4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or
  - (5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if—
    - (i) The concern has graduated from the 8(a) BD program;
    - (ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and
    - (iii) The disadvantaged owners will maintain control of the daily business operations of the concern.
- (c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 calendar days after such occurrence.
- (1) A request for a waiver to the termination for convenience requirement must be sent to the AA/BD.
  - (2) The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver and must demonstrate that the proposed transaction would meet such grounds.
  - (3) If a Participant seeks a waiver based on the impairment of the agency's objectives under paragraph (b)(4) of this section, it must identify and provide a certification from the procuring agency relating to each 8(a) contract for which a waiver is sought.
  - (4) SBA will process a request for waiver within 90 days of receipt of a complete waiver package by the AA/BD.
- (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.
- (e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.
- (f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:

- (1) Voluntarily graduates from the 8(a) BD program; and
  - (2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.
- (g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.
- (h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.
- (i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this chapter within 45 days after the contractor receives the Administrator's decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 81 FR 48584, July 25, 2016; 85 FR 66191, Oct. 16, 2020; 88 FR 26208, Apr. 27, 2023]

## § 124.516 [Reserved]

### § 124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

- (a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.
- (b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to § 121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.
- (c) A Participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in § 124.501(h) to request a formal size determination where SBA cannot verify it to be small.
- (d)
- (1) The NAICS code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/BD may appeal a NAICS code designation with respect to a sole source 8(a) requirement.
  - (2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a NAICS code designation may appeal the designation to SBA's OHA pursuant to § 121.1103 of this title.
- (e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under § 124.112(c).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009]

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

- (a) **Termination for default.** A decision to terminate a specific 8(a) contract for default can be made by the procuring activity contracting officer after consulting with SBA. The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the contracting officer of this effort. Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default, in accordance with the Federal Acquisition Regulations (48 CFR chapter 1). SBA will have no liability for termination costs or reprocurement costs.
- (b) **Termination for convenience.** After consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any disadvantaged owner of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to § 124.515.
- (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.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66191, Oct. 16, 2020]

### § 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 \$168,500,000 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.
- (c) Once the limit is reached, a firm may not receive any more 8(a) sole source contracts, but may remain eligible for competitive 8(a) awards.
- (d) A Participant's eligibility for a sole source award in terms of whether it has exceeded the dollar limit for 8(a) contracts is measured as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.
- (e) The AA/BD may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring activity represents that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8262, Feb. 11, 2011; 77 FR 28238, May 14, 2012; 85 FR 66191, Oct. 16, 2020; 87 FR 69154, Nov. 17, 2022]

### § 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).

[85 FR 66191, Oct. 16, 2020]

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

- (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 8(a) Participants, 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 an 8(a) Participant willfully sought and received the award by misrepresentation.
- (b) **Deemed Certifications.** The following actions shall be deemed affirmative, willful and intentional certifications of 8(a) status:
  - (1) Submission of a bid or proposal for an 8(a) sole source or competitive contract.
  - (2) 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 disadvantaged business (SDB).
- (c) **Signature Requirement.** Each offer for an 8(a) contract shall contain a certification concerning the 8(a) status of a business concern seeking the contract. An authorized official must sign the certification on the same page containing the 8(a) status claimed by the concern.
- (d) **Limitation of Liability.** Paragraphs (a)-(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 8(a) status 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' 8(a) status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing representation or certification as an eligible 8(a) Participant, 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 an eligible 8(a) Participant 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) **Recertification.**

- (1) Generally, a concern that is an eligible 8(a) Participant at the time of initial offer or response, which includes price, for an 8(a) contract, including a Multiple Award Contract, is considered an 8(a) Participant throughout the life of that contract. For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award 8(a) Contract, where concerns are not required to submit price as part of the offer for the contract, a concern that is an eligible 8(a) Participant at the time of initial offer, which may not include price, is considered an 8(a) Participant throughout the life of that contract. This means that if an 8(a) Participant is qualified at the time of initial offer for a Multiple Award 8(a) Contract, then it will be considered an 8(a) Participant for each order issued against the contract, unless a contracting officer requests a new 8(a) eligibility determination in connection with a specific order. 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).
  - (i) Where an 8(a) contract is novated to another business concern, or where the concern performing the 8(a) contract is acquired by, acquires, or merges with another concern and contract novation is not required, the concern must comply with the process outlined at §§ 124.105(i) and 124.515.
  - (ii) Where an 8(a) Participant that was initially awarded a non-8(a) contract that is subsequently novated to another business concern, the concern that will continue performance on the contract must certify its SDB status to the procuring agency, or inform the procuring agency that it does not qualify as an SDB, within 30 days of the novation approval. If the concern is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.
  - (iii) Where an 8(a) Participant receives a non-8(a) contract, and that Participant 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 SDB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDB. If the contractor is no longer a current 8(a) Participant, the contractor is not eligible for orders limited to 8(a) awardees. If the contractor is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases for which they directly certify information to reflect the new status.
- (2) For the purposes of 8(a) contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must verify in *SAM.gov* (or successor system) whether a business concern continues to be an eligible 8(a) Participant 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. Where a concern fails to qualify or will no longer qualify as an eligible 8(a) Participant at any point during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.
- (3) 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.
- (4) Where the contracting officer explicitly requires concerns to qualify as eligible 8(a) Participants in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

- (5) A concern's status will be determined at the time of a response to a solicitation for a basic ordering agreement (BOA), basic agreement (BA), or blanket purchase agreement (BPA) and each order issued pursuant to the BOA, BA, or BPA.

[78 FR 38818, June 28, 2013, as amended at 84 FR 65661, Nov. 29, 2019; 85 FR 66191, Oct. 16, 2020; 88 FR 26209, Apr. 27, 2023]

#### MISCELLANEOUS REPORTING REQUIREMENTS

### § 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

- (a) Each Participant must submit semi-annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such Participant in obtaining or seeking to obtain a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.
- (b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

### § 124.602 What kind of annual financial statement must a Participant submit to SBA?

- (a) Except as set forth in paragraph (a)(1) of this section, Participants with gross annual receipts of more than \$10,000,000 must submit to SBA audited annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.
  - (1) Participants with gross annual receipts of more than \$10,000,000 which are owned by a Tribe, ANC, NHO, or CDC may elect to submit unaudited financial statements within 120 days after the close of the concern's fiscal year, provided the following additional documents are submitted simultaneously:
    - (i) Audited annual financial statements for the parent company owner of the Participant, prepared by a licensed independent public accountant, for the equivalent fiscal year;
    - (ii) Certification from the Participant's Chief Executive Officer and Chief Financial Officer (or comparable positions) that each individual has read the unaudited financial statements, affirms that the statements do not contain any material misstatements, and certifying that the statements fairly represent the Participant's financial condition and result of operations.
  - (2) In the first year that a Participant's gross receipts exceed \$10,000,000, a Participant may provide an audited balance sheet, with the income and cash flow statements receiving the level of service required for the previous year (review or none, depending on sales the year before the audit is required).
  - (3) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.
  - (4) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

- (i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;
  - (ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and
  - (iii) The concern has been a Participant less than 12 months.
- (b)
- (1) Participants with gross annual receipts between \$2,000,000 and \$10,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.
  - (2) The servicing SBA District Director may waive the requirement for reviewed financial statements for good cause shown by the Participant.
- (c) Participants with gross annual receipts of less than \$2,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.
- (d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.
- (e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.
- (f) Notwithstanding the amount of a Participant's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.
- (g) Participants owned by Tribes, ANCs, NHOs and CDCs may submit consolidated financial statements prepared by the parent entity that include schedules for each 8(a) Participant instead of separate audited financial statements for each individual 8(a) Participant. If one Participant must submit an audited financial statement, then the consolidated statement and the schedules for each 8(a) Participant must be audited.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

### **§ 124.603 What reports regarding the continued business operations of former Participants does SBA require?**

Former Participants must provide such information as SBA may request concerning the former Participant's continued business operations, contracts, and financial condition for a period of three years following the date on which the concern leaves the 8(a) BD program (either through the expiration of the firm's program term, graduation, or termination). Failure to provide such information when requested will constitute a violation of the regulations set forth in this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

[63 FR 35739, June 30, 1998, as amended at 88 FR 26209, Apr. 27, 2023]

### **§ 124.604 Report of benefits for firms owned by Tribes, ANCs, NHOs and CDCs.**

As part of its annual financial statement submission (see § 124.602), each Participant owned by a Tribe, ANC, NHO or CDC must submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.

[76 FR 8264, Feb. 11, 2011, as amended at 81 FR 48585, July 25, 2016]

#### MANAGEMENT AND TECHNICAL ASSISTANCE PROGRAM

### **§ 124.701 What is the purpose of the 7(j) management and technical assistance program?**

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

### **§ 124.702 What types of assistance are available through the 7(j) program?**

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

- (a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and
- (b) The identification and development of new business opportunities.

### **§ 124.703 Who is eligible to receive 7(j) assistance?**

The following businesses are eligible to receive assistance from SBA through its service providers:

- (a) Businesses which qualify as small under part 121 of this title, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and
- (b) Businesses eligible to receive 8(a) contracts.

### **§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?**

In addition to the management and technical assistance available under § 124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

- (a) Assistance to develop comprehensive business plans with specific business targets, objectives, and goals;



- (b) Other nonfinancial services necessary for a Participant's growth and development, including loan packaging; and
- (c) Assistance in obtaining equity and debt financing.

## Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs

Source: 63 FR 35772, June 30, 1998, unless otherwise noted.

### § 124.1001 What is a Small Disadvantaged Business?

- (a) **General.** A Small Disadvantaged Business (SDB) for purposes of any Federal subcontracting program is a concern that qualifies as small under part 121 of this title for the size standard corresponding to the six-digit North American Industry Classification System (NAICS) code that is assigned by the contracting officer to the procurement at issue, and that is owned and controlled by one or more socially and economically disadvantaged individuals. Unless specifically stated otherwise, the phrase “socially and economically disadvantaged individuals” includes Indian tribes, ANCs, CDCs, and NHOs. A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.
- (b) **Reliance on 8(a) criteria.** In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. All current Participants in the 8(a) BD program qualify as SDBs.

[85 FR 27292, May 8, 2020]

### § 124.1002 Reviews and protests of SDB status.

- (a) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a prime contract (for goaling purposes or otherwise) or subcontract to a federal prime contract whenever SBA receives credible information calling into question the SDB status of the firm.
- (b) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, Associate Administrator for Business Development (AA/BD), 409 Third Street SW, Washington, DC 20416.
- (c) The contracting officer or the SBA may protest the SDB status of a proposed subcontractor or subcontract awardee. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.
  - (1) SBA will request relevant information from the protested concern pertaining to:
    - (i) the social and economic disadvantage of the individual(s) claiming to own and control the protested concern;
    - (ii) the ownership and control of the protested concern; and
    - (iii) the size of the protested concern.

## 8(a) Business Development/Small Disadvantaged Business Status...

- (2) The concern whose disadvantaged status is under consideration has the burden of establishing that it qualifies as an SDB.
  - (3) Where SBA requests specific information and the concern does not submit it, SBA may draw adverse inferences against the concern.
  - (4) SBA will base its SDB determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.
- (d) Where SBA determines that a subcontractor does not qualify as an SDB, the prime contractor must not include subcontracts to that subcontractor as subcontracts to an SDB in its subcontracting reports, starting from the time that the protest was decided.

[88 FR 26209, Apr. 27, 2023]

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This content is from the eCFR and is authoritative but unofficial.

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## Title 13 – Business Credit and Assistance

### Chapter I – Small Business Administration

#### Part 126 HUBZone Program

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## PART 126—HUBZONE PROGRAM

**Authority:** 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

**Source:** 63 FR 31908, June 11, 1998, unless otherwise noted.

**Editorial Note:** Nomenclature changes to part 126 appear at 72 FR 50041, Aug. 30, 2007.

### Subpart A—Provisions of General Applicability

### § 126.100 What is the purpose of the HUBZone program?

The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas.

### § 126.101 Which government departments or agencies are affected directly by the HUBZone program?

- (a) The HUBZone Program applies to all federal departments or agencies that employ one or more contracting officers.
- (b) The HUBZone program does not apply to contracts awarded by state and local governments. However, state and local governments may use the List of certified HUBZone small business concerns to identify certified HUBZone small business concerns for similar programs authorized under state or local law.

[63 FR 31908, June 11, 1998, as amended at 66 FR 4645, Jan. 18, 2001; 69 FR 29420, May 24, 2004; 84 FR 65239, Nov. 26, 2019]

### § 126.102 What is the effect of the HUBZone program on the section 8(d) subcontracting program?

The HUBZone Act of 1997 amended the section 8(d) subcontracting program to include qualified HUBZone SBCs in the formal subcontracting plans described in § 125.3 of this title.

### § 126.103 What definitions are important in the HUBZone program?

**Administrator** means the Administrator of the United States Small Business Administration (SBA).

**AA/BD** means SBA's Associate Administrator for Business Development.

**Agricultural commodity** has the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

**Alaska Native Corporation (ANC)** has the same meaning as the term "Native Corporation" in section 3 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1602.

**Attempt to maintain** means making substantive and documented efforts, such as written offers of employment, published advertisements seeking employees, and attendance at job fairs and applies only to concerns during the performance of any HUBZone contract. A certified HUBZone small business concern that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement.

**Base closure area** means:

- (1) Lands within the external boundaries of a military installation that were closed through a privatization process under the authority of:
  - (i) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of division B of Pub. L. 101-510; 10 U.S.C. 2687 note);
  - (ii) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526; 10 U.S.C. 2687 note);

- (iii) 10 U.S.C. 2687; or
  - (iv) Any other provision of law authorizing or directing the Secretary of Defense or the Secretary of a military department to dispose of real property at the military installation for purposes relating to base closures of redevelopment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use;
- (2) The census tract or nonmetropolitan county (excluding any qualified census tract and any qualified non-metropolitan county) in which the lands described in paragraph (1) of this definition are wholly contained;
  - (3) A census tract or nonmetropolitan county (excluding any qualified census tract and any qualified non-metropolitan county) the boundaries of which intersect the area described in paragraph (1) of this definition; and
  - (4) A census tract or nonmetropolitan county (excluding any qualified census tract and any qualified non-metropolitan county) the boundaries of which are contiguous to the area described in paragraph (2) or paragraph (3) of this definition.

**Certify** means the process by which SBA determines that a concern is qualified for the HUBZone program and eligible to be designated by SBA as a certified HUBZone small business concern in the Dynamic Small Business Search (DSBS) system (or successor system).

**Citizen** means a person born or naturalized in the United States. SBA does not consider holders of permanent visas and resident aliens to be citizens.

**Community Development Corporation (CDC)** means a corporation that has received financial assistance under Part 1 of Subchapter A of the Community Economic Development Act of 1981, 42 U.S.C. 9805-9808.

**Concern** means a firm which satisfies the requirements in §§ 121.105(a) and (b) of this title.

**Contract opportunity** means a situation in which a requirement for a procurement exists, none of the exclusions from § 126.605 applies, and any applicable conditions in § 126.607 are met.

**Contracting Officer (CO)** has the meaning given that term in 41 U.S.C. 423(f)(5), which defines a CO as a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

**County** means the political subdivisions recognized as a county by a state or commonwealth or which is an equivalent political subdivision such as a parish, borough, independent city, or *municipio*, where such subdivisions are not subdivisions within counties.

**D/HUB** means the Director of SBA's Office of HUBZone.

**Decertify** means the process by which SBA determines that a concern no longer qualifies as a HUBZone small business concern and removes that concern as a certified HUBZone small business concern from DSBS (or successor system), or the process by which SBA removes a concern as a certified HUBZone small business concern from DSBS (or successor system) after receiving a request to voluntarily withdraw from the HUBZone program.

*Dynamic Small Business Search (DSBS)* means the database that government agencies use to find small business contractors for upcoming contracts. The information a business provides when registering in the System for Award Management (SAM) is used to populate DSBS. For HUBZone Program purposes, a concern's DSBS profile will indicate whether it is a certified HUBZone small business concern, and if so, the date it was certified or recertified.

*Employee* means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, which is either the date the concern submits its HUBZone application to SBA or the date of recertification. SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition. To determine if an individual is an employee, SBA reviews the totality of circumstances, including criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes and the factors set forth in SBA's Size Policy Statement No. 1 (51 FR 6099, February 20, 1986).

(1) In general, the following are considered employees:

- (i) Individuals obtained from a temporary employee agency, leasing concern, or through a union agreement, or co-employed pursuant to a professional employer organization agreement;
- (ii) An individual who has an ownership interest in the concern and who works for the concern a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, whether or not the individual receives compensation;
- (iii) The sole owner of a concern who works less than 40 hours during the four-week period immediately prior to the relevant date of review, but who has not hired another individual to direct the actions of the concern's employees;
- (iv) Individuals who receive in-kind compensation commensurate with work performed. Such compensation must provide a demonstrable financial value to the individual and must be compliant with all relevant federal and state laws.

(2) In general, the following are not considered employees:

- (i) Individuals who are not owners and receive no compensation (including no in-kind compensation) for work performed;
- (ii) Individuals who receive deferred compensation for work performed;
- (iii) Independent contractors that receive payment via IRS Form 1099 and are not considered employees under SBA's Size Policy Statement No. 1; and
- (iv) Subcontractors.

(3) Employees of an affiliate may be considered employees, if the totality of the circumstances shows that there is no clear line of fracture between the HUBZone applicant (or certified HUBZone small business concern) and its affiliate(s) (see § 126.204).

*Governor-designated covered area* means an area that the Administrator has designated as a HUBZone by approving a Governor-generated petition as described in § 126.104.

*HUBZone* means a historically underutilized business zone, which is an area located within one or more:

(1) Qualified census tracts;



- (2) Qualified non-metropolitan counties;
- (3) Lands within the external boundaries of an Indian reservation;
- (4) Redesignated areas;
- (5) Qualified base closure areas;
- (6) Qualified disaster areas; or
- (7) Governor-designated covered areas.

**HUBZone small business concern or certified HUBZone small business concern** means a small business concern that meets the requirements described in § 126.200 and that SBA has certified as eligible for federal contracting assistance under the HUBZone program. A concern that was a certified HUBZone small business concern as of December 12, 2017, and that had its principal office located in a redesignated area set to expire prior to January 1, 2020, shall remain a certified HUBZone small business concern until June 30, 2023, so long as all other HUBZone eligibility requirements are met.

**Indian reservation**

- (1) Has the same meaning as the term "Indian country" in 18 U.S.C. 1151, except that such term does not include:
  - (i) Any lands that are located within a State in which a tribe did not exercise governmental jurisdiction as of December 21, 2000, unless that tribe is recognized after that date by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (25 CFR part 83); and
  - (ii) Lands taken into trust or acquired by an Indian tribe after December 21, 2000 if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status as of December 21, 2000; and
- (2) In the State of Oklahoma, means lands that:
  - (i) Are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and
  - (ii) Are recognized by the Secretary of the Interior as of December 21, 2000, as eligible for trust land status under 25 CFR part 151.

**Indian Tribal Government** means the governing body of any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

**Interested party** means any concern that submits an offer for a specific HUBZone set-aside contract (including Multiple Award Contracts) or order, any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone small business concern, any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a qualified HUBZone small business concern, the contracting activity's contracting officer, or SBA.

*Lands within the external boundaries of an Indian reservation* include all lands within the perimeter of an Indian reservation, whether tribally owned and governed or not. For example, land that is individually owned and located within the perimeter of an Indian reservation is “lands within the external boundaries of an Indian reservation.” By contrast, an Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not “lands within the external boundaries of an Indian reservation.”

*Native Hawaiian Organization (NHO)* 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.

*Non-metropolitan* has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, “1990 Census of Population, Social and Economic Characteristics,” Report Number CP-2, page A-9. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository Library, call toll-free (888) 293-6498 or contact the Bureau of the Census, Population Distribution Branch, Population Division, Washington D.C. 20233-8800.

*Person* means a natural person.

*Primary industry classification or primary industry* means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the HUBZone applicant or certified HUBZone small business concern. SBA utilizes § 121.107 of this chapter in determining a concern's primary industry classification.

*Principal office* means the location where the greatest number of the concern's employees at any one location perform their work.

- (1) If an employee works at multiple locations, then the employee will be deemed to work at the location where the employee spends more than 50% of his or her time. If an employee does not spend more than 50% of his or her time at any one location and at least one of those locations is a non-HUBZone location, then the employee will be deemed to work at a non-HUBZone location.
- (2) In order for a location to be considered the principal office, the concern must conduct business at this location.
- (3) For those concerns whose “primary industry classification” is services or construction (see § 121.201 of this chapter), the determination of principal office excludes the concern's employees who perform more than 50% of their work at job-site locations to fulfill specific contract obligations. If all of a concern's employees perform more than 50% of their work at job sites, the concern does not comply with the principal office requirement.
  - (i) **Example 1:** A business concern whose primary industry is construction has a total of 78 employees, including the owners. The business concern has one office (Office A), which is located in a HUBZone, with 3 employees working at that location. The business concern also has a job-site for a current contract, where 75 employees perform more than 50% of their work. The 75 job-site employees are excluded for purposes of determining principal office. Since the remaining 3 employees all work at Office A, Office A is the concern's principal office. Since Office A is in a HUBZone, the business concern complies with the principal office requirement.
  - (ii) **Example 2:** A business concern whose primary industry is services has a total of 4 employees, including the owner. The business concern has one office located in a HUBZone (Office A), where 2 employees perform more than 50% of their work, and a second office not located in a

HUBZone (Office B), where 2 employees perform more than 50% of their work. Since there is not one location where the greatest number of the concern's employees at any one location perform their work, the business concern would not have a principal office in a HUBZone.

- (iii) **Example 3:** A business concern whose primary industry is services has a total of 6 employees, including the owner. Five of the employees perform all of their work at job-sites fulfilling specific contract obligations. The business concern's owner performs 45% of her work at job-sites, and 55% of her work at an office located in a HUBZone (Office A) conducting tasks such as writing proposals, generating payroll, and responding to emails. Office A would be considered the principal office of the concern since it is the only location where any employees of the concern work that is not a job site and the 1 individual working there spends more than 50% of her time at Office A. Since Office A is located in a HUBZone, the small business concern would meet the principal office requirement.

**Qualified base closure area** means a base closure area that is treated by SBA as a HUBZone for a period of at least 8 years, beginning on the date on which the Administrator designates the base closure area as a HUBZone and ending on the date on which the base closure area ceases to be a qualified census tract or a qualified nonmetropolitan county in accordance with the online tool prepared by the Administrator.

**Qualified census tract.**

- (1) Qualified census tract means a census tract which is designated by the Secretary of Housing and Urban Development, and for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent. See 26 U.S.C. 42(d)(5)(B)(ii)(I).
- (2) The portion of a metropolitan statistical area (as defined by the Bureau of the Census, United States Department of Commerce, in its publications on the Census of Population, Social and Economic Characteristics) which may be designated as "qualified census tracts" shall not exceed an area having 20 percent of the population of such metropolitan statistical area. See 26 U.S.C. 42(d)(5)(B)(ii)(II). This paragraph does not apply to any metropolitan statistical area in the Commonwealth of Puerto Rico until December 22, 2027, or the date on which the Financial Oversight and Management Board for the Commonwealth of Puerto Rico created by the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) (Pub. L. 114-187, June 30, 2016) ceases to exist, whichever event occurs first.
- (3) Qualified census tracts are reflected in a publicly accessible online tool that depicts HUBZones and will be updated every 5 years.

**Qualified disaster area.**

- (1) Qualified disaster area means any census tract or nonmetropolitan county located in an area where a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) has occurred or an area in which a catastrophic incident has occurred if such census tract or nonmetropolitan county ceased to be a qualified census tract or qualified nonmetropolitan county during the period beginning 5 years before the date on which the President declared the major disaster or the catastrophic incident occurred.

- (2) A census tract or nonmetropolitan county shall be considered to be a qualified disaster area only for the period of time ending on the date the area ceases to be a qualified census tract or a qualified nonmetropolitan county, in accordance with the publicly accessible online tool that depicts HUBZones, and beginning—
  - (i) In the case of a major disaster, on the date on which the President declared the major disaster for the area in which the census tract or nonmetropolitan county, as applicable, is located; or
  - (ii) In the case of a catastrophic incident, on the date on which the catastrophic incident occurred in the area in which the census tract or nonmetropolitan county, as applicable, is located.

**Qualified non-metropolitan county** means any county that was not located in a metropolitan statistical area (as defined by the Bureau of the Census, United States Department of Commerce, in its publications on the Census of Population, Social and Economic Characteristics) at the time of the most recent census taken for purposes of selecting qualified census tracts under section 26 U.S.C. 42(d)(5)(B)(ii), and in which:

- (1) The median household income is less than 80% of the State median household income, based on a 5-year average of the available data from the Bureau of the Census of the Department of Commerce;
- (2) The unemployment rate is not less than 140% of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on a 5-year average of the data available from the Local Area Unemployment Statistics report, produced by the Department of Labor's Bureau of Labor Statistics; or
- (3) There is located a Difficult Development Area within Alaska, Hawaii, or any territory or possession of the United States outside the 48 contiguous States. A Difficult Development Area (DDA) is an area designated by the Secretary of the Department of Housing and Urban Development, in accordance with section 26 U.S.C. 42(d)(5)(B)(iii), with high construction, land, and utility costs relative to its area median gross income.
- (4) Qualified non-metropolitan counties are reflected in a publicly accessible online tool that depicts HUBZones and will be updated every 5 years.

**Redesignated area** means any census tract that ceases to be a "qualified census tract" or any non-metropolitan county that ceases to be a "qualified non-metropolitan county." A redesignated area generally shall be treated as a HUBZone for a period of three years, starting from the date on which the area ceased to be a qualified census tract or a qualified non-metropolitan county. The date on which the census tract or non-metropolitan county ceases to be qualified is the date on which the official government data affecting the eligibility of the HUBZone is released to the public. However, an area that was a redesignated area on or after December 12, 2017 shall remain a redesignated area until June 30, 2023.

**Reside** means to live at a location full-time and for at least 180 days immediately prior to the date of application (or date of recertification where the individual is being treated as a HUBZone resident for the first time).

- (1) To determine residence, SBA will first look to an individual's address identified on his or her driver's license or voter's registration card. Where such documentation is not available, SBA will require other specific proof of residency, such as deeds, leases, or utility bills. Where the documentation provided does not demonstrate 180 days of residency, SBA will require a signed statement attesting to an individual's dates of residency.
- (2) For HUBZone purposes, SBA will consider individuals temporarily residing overseas in connection with the performance of a contract to reside at their U.S. residence.

- (i) **Example 1:** A person possesses the deed to a residential property and pays utilities and property taxes for that property. However, the person does not live at this property, but instead rents out this property to another individual. For HUBZone purposes, the person does not reside at the address listed on the deed.
- (ii) **Example 2:** A person moves into an apartment under a month-to-month lease and lives in that apartment full-time. SBA would consider the person to reside at the address listed on the lease if the person can show that he or she has lived at that address for at least 180 days immediately prior to the date of application or date of recertification.
- (iii) **Example 3:** A person is working overseas on a contract for the small business and is therefore temporarily living abroad. The employee can provide documents showing he is paying rent for an apartment located in a HUBZone. That person is deemed to reside in a HUBZone.

**Small agricultural cooperative** means an association (corporate or otherwise), comprised exclusively of other small agricultural cooperatives, small business concerns, or U.S. citizens, pursuant to the provisions of the Agricultural Marketing Act, 12 U.S.C. 1141j, whose size does not exceed the applicable size standard pursuant to part 121 of this chapter. In determining such size, an agricultural cooperative is treated as a "business concern" and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

**Small business concern (SBC)** means a concern that, with its affiliates, meets the size standard for its primary industry, pursuant to part 121 of this chapter.

[63 FR 31908, June 11, 1998, as amended at 66 FR 4645, Jan. 18, 2001; 69 FR 29421, May 24, 2004; 70 FR 51248, Aug. 30, 2005; 72 FR 50041, Aug. 30, 2007; 74 FR 45754, Sept. 4, 2009; 74 FR 56702, Nov. 3, 2009; 78 FR 61144, Oct. 2, 2013; 81 FR 51313, Aug. 4, 2016; 82 FR 48904, Oct. 23, 2017; 84 FR 62449, Nov. 15, 2019; 84 FR 65239, Nov. 26, 2019; 86 FR 23864, May 5, 2021; 88 FR 21088, Apr. 10, 2023]

## § 126.104 How can a Governor petition for the designation of a Governor-designated covered area?

- (a) For a specific covered area to receive a designation as a Governor-designated covered area, the Governor of the State in which the identified covered area is wholly contained shall include such area in a petition to the Administrator requesting such a designation. In reviewing a request for designation included in such a petition, the Administrator may consider—
  - (1) The potential for job creation and investment in the covered area;
  - (2) The demonstrated interest of small business concerns in the covered area to be designated as a Governor-designated covered area;
  - (3) How State and local government officials have incorporated the covered area into an economic development strategy; and
  - (4) If the covered area was a HUBZone before becoming the subject of the petition, the impact on the covered area if the Administrator did not approve the petition.
- (b) Each calendar year, a Governor may submit not more than 1 petition described in this section. Such petition shall include all covered areas in a State for which the Governor seeks designation as a Governor-designated covered area, except that the total number of covered areas included in such petition may not exceed 10 percent of the total number of covered areas in the State.

- (c) If the Administrator grants a petition described in this section, the Governor of the Governor-designated covered area shall, not less frequently than annually, submit data to the Administrator certifying that each Governor-designated covered area continues to meet the requirements of paragraph (d)(1) of this section.
- (d) In this section:
  - (1) The term “covered area” means an area in a State—
    - (i) That is located outside of an urbanized area, as determined by the Bureau of the Census;
    - (ii) With a population of not more than 50,000; and
    - (iii) For which the average unemployment rate is not less than 120 percent of the average unemployment rate of the United States or of the State in which the covered area is located, whichever is less, based on the most recent data available from the American Community Survey conducted by the Bureau of the Census.
  - (2) The term “Governor” means the chief executive of a State.
  - (3) The term “State” means each of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

[84 FR 62449, Nov. 15, 2019]

## Subpart B—Requirements To Be a Certified HUBZone Small Business Concern

### § 126.200 What requirements must a concern meet to be eligible as a certified HUBZone small business concern?

- (a) **Ownership.** In order to be eligible for HUBZone certification and to remain certified, a small business concern must be owned in accordance with this paragraph. The concern must be:
  - (1) At least 51% owned and controlled by one or more individuals who are United States citizens;
  - (2) An ANC or at least 51% owned by an ANC or a wholly-owned business entity of an ANC;
  - (3) At least 51% owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments;
  - (4) At least 51% owned by one or more CDCs;
  - (5) A small agricultural cooperative organized or incorporated in the United States, or at least 51% owned by one or more small agricultural cooperatives organized or incorporated in the United States; or
  - (6) At least 51% owned by one or more NHOs, or by a corporation that is wholly owned by one or more NHOs.
- (b) **Size.**
  - (1) In order to be eligible for HUBZone certification and remain eligible as a certified HUBZone small business concern, a concern, together with its affiliates, must qualify as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its profile in the System for Award Management (*SAM.gov*).

- (2) In order to be eligible for a HUBZone contract, a certified HUBZone small business concern must qualify as small under the size standard corresponding to the NAICS code assigned to the HUBZone contract.
  - (3) If the concern is a small agricultural cooperative, in determining size, the small agricultural cooperative is treated as a "business concern" and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.
- (c) **Principal office.** In order to be eligible for HUBZone certification, a concern's principal office must be located in a HUBZone, except for concerns owned in whole or in part by one or more Indian Tribal Governments.
- (1) A concern that owns or makes a long-term investment (*i.e.*, a lease of at least 10 years) in a principal office in an area that qualifies as a HUBZone at the time of its initial certification will be deemed to have its principal office located in a HUBZone for at least 10 years from the date of that certification as long as the firm maintains the long-term lease or continues to own the property upon which the principal office designation was made. This does not apply to leases of office space that are shared with one or more other concerns or individuals.
  - (2) A concern that is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by Indian Tribal Governments) must either:
    - (i) Maintain a principal office located in a HUBZone and ensure that at least 35% of its employees reside in a HUBZone as provided in paragraph (d)(1) of this section; or
    - (ii) Certify that when performing a HUBZone contract, at least 35% of its employees engaged in performing that contract will reside within any Indian reservation governed by one or more of the Indian Tribal Government owners, or reside within any HUBZone adjacent to such Indian reservation.
- (d) **Employees.**
- (1) In order to be eligible for HUBZone certification, at least 35% of a concern's employees must reside in a HUBZone. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction, SBA rounds to the nearest whole number.
    - (i) **Example 1 to paragraph (d)(1):** A concern has 25 employees; 35% of 25, or 8.75, employees must reside in a HUBZone. The number 8.75 rounded to the nearest whole number is 9. Thus, 9 employees must reside in a HUBZone.
    - (ii) **Example 2 to paragraph (d)(1):** A concern has 95 employees; 35% of 95, or 33.25, employees must reside in a HUBZone. The number 33.25 rounded to the nearest whole number is 33. Thus, 33 employees must reside in a HUBZone.
  - (2) If the concern is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by one or more Indian Tribal Governments), see paragraph (c)(2) of this section.
  - (3) An employee who resides in a HUBZone at the time of certification (or time of recertification where the individual is being treated as a HUBZone resident for the first time) shall continue to count as a HUBZone resident employee if the individual continues to live in the HUBZone for at least 180 days immediately after certification (or recertification) and remains an employee of the concern, even if the employee subsequently moves to a location that is not in a HUBZone or the area in which the

employee's residence is located no longer qualifies as a HUBZone. The certified HUBZone small business concern must maintain records of the employee's original HUBZone address, as well as records of the individual's continued and uninterrupted employment by the HUBZone small business concern, for the duration of the concern's participation in the HUBZone program.

(i) **Example to paragraph (d)(3):** As part of its application for HUBZone certification, a concern provides documentation showing that 35% of its employees have lived in a HUBZone for more than 180 days. SBA certifies the concern as a certified HUBZone small business concern. Within 180 after being certified, an individual critical to the concern's meeting the 35% residency requirement moves out of the HUBZone area. That individual will continue to be treated as a HUBZone resident during the first year after the concern's certification; however, at the time of the firm's recertification, that individual will not be counted as a resident of a HUBZone.

(ii) [Reserved]

(e) **Attempt to maintain.**

(1) At the time of application, a concern must certify that it will "attempt to maintain" (see § 126.103) having at least 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(2) If the concern is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by one or more Indian Tribal Governments), the concern must certify that it will "attempt to maintain" (see § 126.103) the applicable employment percentage described in paragraph (c)(2) of this section during the performance of any HUBZone contract it receives.

(f) **Subcontracting.** At the time of application, an applicant concern must certify that it will comply with the applicable limitations on subcontracting requirements in connection with any procurement that it receives as a certified HUBZone small business concern (see §§ 125.6 and 126.700).

(g) **Suspension and Debarment.** In order to be eligible for HUBZone certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management, available at [www.SAM.gov](http://www.SAM.gov), at the time of application.

[84 FR 65242, Nov. 26, 2019, as amended at 86 FR 61673, Nov. 8, 2021; 88 FR 26212, Apr. 27, 2023]

## § 126.201 Who does SBA consider to own a HUBZone SBC?

An owner of a SBC seeking HUBZone certification or a qualified HUBZone SBC is a person who owns any legal or equitable interest in such SBC. If an Employee Stock Ownership Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner. If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner. In addition:

(a) **Corporations.** SBA considers any person who owns stock, whether voting or non-voting, to be an owner. SBA considers options to purchase stock and the right to convert debentures into voting stock to have been exercised.

*Example:* U.S. citizens own all of the stock of a corporation. A corporate officer, a non-U.S. citizen, owns no stock in the corporation but owns options to purchase stock in the corporation. SBA will consider the options exercised and the individual to be an owner. Therefore, if that



corporate officer has options to purchase 50% or more of the corporate stock, pursuant to § 126.200, the corporation would not be eligible to be a qualified HUBZone SBC because it is not at least 51% owned and controlled by persons who are U.S. citizens.

- (b) **Partnerships.** SBA considers all partners, whether general or limited, to be owners in a partnership.
- (c) **Sole proprietorships.** The proprietor is the owner.
- (d) **Limited liability companies.** SBA considers each member to be an owner of a limited liability company.

[69 FR 29422, May 24, 2004, as amended at 70 FR 51249, Aug. 30, 2005; 71 FR 69183, Nov. 30, 2006]

### § 126.202 Who does SBA consider to control a HUBZone SBC?

Control means both the day-to-day management and long-term decision-making authority for the HUBZone SBC. Many persons may share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.

[69 FR 29422, May 24, 2004, as amended at 84 FR 65243, Nov. 26, 2019]

### § 126.203 [Reserved]

### § 126.204 May a HUBZone small business concern have affiliates?

- (a) A HUBZone small business concern may have affiliates, provided that the aggregate size of the concern together with all of its affiliates is small as defined in part 121 of this title, except as otherwise provided for small agricultural cooperatives in § 126.103.
- (b) Employees of affiliates are not automatically considered employees of a HUBZone applicant or HUBZone small business concern solely on the basis of affiliation.
- (c) The employees of an affiliate may be counted as employees of a HUBZone applicant or HUBZone small business concern for purposes of determining compliance with the HUBZone program's principal office and 35% residency requirements in certain circumstances. In determining whether individuals should be counted as employees of a HUBZone applicant or HUBZone small business concern, SBA will consider all information, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1. Employees of the concern's affiliate will not be counted as the concern's employees if there is a clear line of fracture between the concern and its affiliate.
  - (1) SBA generally will find that there is a clear line of fracture where the concern demonstrates that it does not share employees, facilities, or equipment with the affiliate; has different customers or lines of business (or is distinctly segregated geographically); and does not receive significant contracts or financial assistance from the affiliate.
  - (2) The use of common administrative services between parent and/or sister concerns by itself will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.

- (3) Minimal business activity between the concern and its affiliate will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.
- (i) **Example to paragraph (c):** X owns 100% of Company A and 51% of Company B. Based on X's common ownership of A and B, the two companies are affiliated under SBA's size regulations. SBA will look at the totality of circumstances to determine whether it would be reasonable to treat the employees of B as employees of A for HUBZone program purposes. If both companies do construction work and share office space and equipment, then SBA would find that there is not a clear line of fracture between the two concerns and would treat the employees of B as employees of A for HUBZone program purposes. In order to be eligible for the HUBZone program, at least 35% of the combined employees of A and B must reside in a HUBZone.
- (ii) [Reserved]

[84 FR 65243, Nov. 26, 2019]

### **§ 126.205 May participants in other SBA programs be certified as HUBZone small business concerns?**

Participants in other SBA programs may be certified as HUBZone small business concerns if they meet all of the requirements set forth in this part.

[84 FR 65243, Nov. 26, 2019]

### **§ 126.206 May nonmanufacturers be certified as HUBZone small business concerns?**

Nonmanufacturers (referred to in the HUBZone Act of 1997 as “regular dealers”) may be certified as HUBZone small business concerns if they meet all of the requirements set forth in § 126.200. For purposes of this part, a “nonmanufacturer” is defined in § 121.406(b) of this chapter.

[84 FR 65243, Nov. 26, 2019]

### **§ 126.207 Do all of the offices or facilities of a certified HUBZone small business concern have to be located in a HUBZone?**

A HUBZone small business concern may have offices or facilities in multiple HUBZones or even outside a HUBZone. However, in order to be certified as a HUBZone small business concern, the concern's principal office must be located in a HUBZone (except see § 126.200(c)(2) for concerns owned by Indian Tribal Governments).

[84 FR 65243, Nov. 26, 2019]

## **Subpart C—Certification**

### **§ 126.300 How may a concern be certified as a HUBZone small business concern?**

- (a) A concern must apply to SBA for HUBZone certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies.

- (b) SBA, at its discretion, may rely solely upon the information submitted, may request additional information, may conduct independent research, or may verify the information before making an eligibility determination.
- (c) If SBA determines that a concern meets the eligibility requirements of a HUBZone small business concern, it will notify the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system).

[84 FR 65243, Nov. 26, 2019]

### **§ 126.301 Is there any other way for a concern to obtain certification?**

No. SBA certification is the only way to qualify for HUBZone program status.

### **§ 126.302 When may a concern apply for certification?**

A concern may apply to SBA and submit the required information whenever it can represent that it meets the eligibility requirements, subject to § 126.309. 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.

### **§ 126.303 Where must a concern submit its application for certification?**

A concern seeking certification as a HUBZone small business concern must submit an electronic application to SBA's HUBZone Program Office via SBA's web page at [www.SBA.gov](http://www.SBA.gov). The application and any supporting documentation must be submitted by a person authorized to represent the concern.

[84 FR 65243, Nov. 26, 2019]

### **§ 126.304 What must a concern submit to SBA in order to be certified as a HUBZone small business concern?**

- (a) **General.** To be certified by SBA as a HUBZone small business concern, a concern must submit a completed application and all documents requested by SBA. The concern must also represent to SBA that it meets the requirements set forth in § 126.200 and that all of the information provided as of the date of the application (and any subsequent information provided) is complete, true and accurate. The representation must be signed by an owner or officer of the applicant.
- (b) **Supporting documents.**
  - (1) SBA may request documents to verify that the applicant meets the HUBZone program's eligibility requirements. The documents must show that the concern meets the program's requirements at the time it submits its application to SBA.
  - (2) The concern must document compliance with the requirements listed in § 126.200, including but not limited to employment records and documentation showing the address of each HUBZone resident employee. Records sufficient to demonstrate HUBZone residency include copies of driver's licenses and voter registration cards; only where such documentation is unavailable will SBA accept alternative documentation (such as copies of leases, deeds, and/or utility bills) accompanied by signed statements explaining why the alternative documentation is being provided.

- (c) **Changes after submission of application.** After submitting an application, a concern applying for HUBZone certification must immediately notify SBA of any changes that could affect its eligibility and provide information and documents to verify the changes. If the changed information indicates that the concern is not eligible, the applicant will be given the option to withdraw its application, or SBA will decline certification and the concern must wait 90 days to reapply.
- (d) **HUBZone areas.** Concerns applying for HUBZone status must use SBA's website (e.g., maps or other tools showing qualified HUBZones) to verify that the location of the concern's principal office and the residences of at least 35% of the concern's employees are within HUBZones. If SBA's website indicates that a particular location is not within a HUBZone and the applicant disagrees, then the applicant must note this on the application and submit relevant documents showing why the applicant believes the area meets the statutory criteria of a HUBZone. SBA will determine whether the location is within a HUBZone using available methods (e.g., by contacting Bureau of Indian Affairs for Indian reservations or Department of Defense for BRACs).
- (e) **Record maintenance.** HUBZone small business concerns must retain documentation demonstrating satisfaction of all qualifying requirements for 6 years from date of submission of all initial and continuing eligibility actions as required by this part. In addition, HUBZone small business concerns must retain documentation as required in § 126.200(d)(3).

[84 FR 65244, Nov. 26, 2019]

## § 126.305 [Reserved]

## § 126.306 How will SBA process an application for HUBZone certification?

- (a) The D/HUB or designee is authorized to approve or decline applications for HUBZone certification. SBA will receive and review all applications and request supporting documents. SBA must receive all required information, supporting documents, and a completed HUBZone representation before it will begin processing a concern's application. SBA will not process incomplete packages. SBA will make its determination within 60 calendar days after receipt of a complete package.
- (b) 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 draw an adverse inference and presume that the information that the applicant failed to provide would demonstrate ineligibility and deny certification on this basis.
  - (1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the HUBZone eligibility requirements, SBA will decline the concern's application.
  - (2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.
- (c) SBA's decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification, any independent research conducted by SBA, and any changed circumstances.

- (d) In order to be certified into the program, the applicant must be eligible as of the date it submitted its application and at the time the D/HUB issues a decision. An applicant must inform SBA of any changes to its circumstances that occur after its application and before its certification that may affect its eligibility. SBA will consider such changed circumstances in determining whether to certify the concern.
- (e) If SBA approves the application, it will send a written notice to the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system) as described in § 126.307.
- (f) If SBA denies the application, it will send a written notice to the concern and state the specific reasons for denial.
- (g) SBA will presume that notice of its decision was provided to an applicant if SBA sends a communication to the concern at a mailing address, email address, or fax number provided in the concern's profile in the System for Award Management (or successor system).

[84 FR 65244, Nov. 26, 2019, as amended at 88 FR 26212, Apr. 27, 2023]

### **§ 126.307 Where is there a list of certified HUBZone small business concerns?**

SBA designates concerns as certified HUBZone small business concerns in DSBS (or successor system).

[84 FR 65244, Nov. 26, 2019]

### **§ 126.308 What happens if a HUBZone small business concern receives notice of its certification but it does not appear in DSBS as a certified HUBZone small business concern?**

- (a) A certified HUBZone small business concern that has received SBA's notice of certification, but does not appear in DSBS (or successor system) as a certified HUBZone small business concern within 10 business days, should immediately notify the D/HUB via email at [hubzone@sba.gov](mailto:hubzone@sba.gov).
- (b) A certified HUBZone small business concern that has received SBA's notice of certification must appear as a certified HUBZone small business concern in DSBS (or successor system) in order to be eligible for HUBZone contracts (*i.e.*, it cannot "opt out" of a public display in the System for Award Management (SAM.gov) or DSBS (or successor systems)).

[84 FR 65244, Nov. 26, 2019]

### **§ 126.309 May a declined or decertified concern seek certification at a later date?**

A concern that SBA has declined or decertified may seek certification after ninety (90) calendar days from the date of decline or decertification if it believes that it has overcome all reasons for decline or decertification through changed circumstances and is currently eligible. A concern found to be ineligible during a HUBZone status protest is precluded from applying for HUBZone certification for ninety (90) calendar days from the date of the final agency decision (*i.e.*, the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed) pursuant to [13 CFR 126.803\(d\)\(5\)](#).

[76 FR 43574, July 21, 2011, as amended at 88 FR 21088, Apr. 10, 2023]

## **Subpart D—Program Examinations**

## § 126.400 Who will conduct program examinations?

SBA field staff or others designated by the D/HUB will conduct program examinations.

### § 126.401 What is a program examination?

A program examination is an investigation by SBA officials, which verifies the accuracy of any certification made or information provided as part of the HUBZone application or recertification process. Examiners may verify that the concern met the program's eligibility requirements at the time of its certification or, if applicable, at the time of its most recent recertification.

[84 FR 65244, Nov. 26, 2019]

### § 126.402 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 HUBZone small business concern.
- (b) SBA will conduct program examinations periodically as part of the recertification process set forth in § 126.500.
- (c) Upon receipt of specific and credible information alleging that a certified HUBZone small business concern no longer meets the eligibility requirements for continued program eligibility, SBA will examine the concern's eligibility for continued participation in the program.

[84 FR 65245, Nov. 26, 2019]

### § 126.403 What will SBA review during a program examination?

- (a) SBA may conduct a program examination, or parts of an examination, at one or more of the concern's offices. SBA will determine the location and scope of the examination and may review any information related to the concern's HUBZone eligibility including, but not limited to, documentation related to the location and ownership of the concern, compliance with the 35% HUBZone residency requirement, and the concern's "attempt to maintain" (see § 126.103) this percentage.
- (b) SBA may require that a HUBZone small business concern (or applicant) submit additional information as part of the program examination. If SBA requests additional information, SBA will presume that written notice of the request was provided when SBA sends such request to the concern at a mailing address, email address or fax number provided in the concern's profile in the Dynamic Small Business Search (DSBS) or the System for Award Management (SAM) (or successor systems). SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the HUBZone small business concern (or applicant) failed to provide would demonstrate ineligibility, and decertify (or deny certification) on this basis.
- (c) The concern must retain documentation provided in the course of a program examination for 6 years from the date of submission.

[84 FR 65245, Nov. 26, 2019]

### § 126.404 What are the possible outcomes of a program examination and when will SBA make

## its determination?

- (a) **Timing.** SBA will make its determination within 90 calendar days after SBA receives all requested information, when practicable.
- (b) **Program examinations on certified HUBZone small business concerns.** If the program examination was conducted on a certified HUBZone small business concern—
  - (1) And the D/HUB (or designee) determines that the concern is eligible, SBA will send a written notice to the HUBZone small business concern and continue to designate the concern as a certified HUBZone small business concern in DSBS (or successor system).
  - (2) And the D/HUB (or designee) determines that the concern is not eligible, the concern will have 30 days to submit documentation showing that it is eligible. During the 30-day period, such concern may not compete for or be awarded a HUBZone contract. If such concern fails to demonstrate its eligibility by the last day of the 30-day period, the concern will be decertified.
- (c) **Program examinations on applicants.** If the program examination was conducted on an applicant to the HUBZone program—
  - (1) And the D/HUB (or designee) determines that the concern is eligible, SBA will send a written certification notice to the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system).
  - (2) And the D/HUB (or designee) determines that the concern is ineligible, SBA will send a written decline notice to the concern.

[84 FR 65245, Nov. 26, 2019]

## Subpart E—Maintaining HUBZone Status

### § 126.500 How does a concern maintain HUBZone certification?

- (a) Any concern seeking to remain a certified HUBZone small business concern in DSBS (or successor system) must annually represent to SBA that it continues to meet all HUBZone eligibility criteria (see § 126.200).
  - (1) If at the time of its recertification the certified HUBZone small business concern is not currently performing a HUBZone contract, its representation means that at least 35% of its employees continue to reside in a HUBZone and the principal office of the concern continues to be located in a HUBZone.
  - (2) If at the time of its recertification the certified HUBZone small business concern is currently performing a HUBZone contract, its representation means that at least 20% of its employees continue to reside in a HUBZone and the principal office of the concern continues to be located in a HUBZone.
  - (3) 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 HUBZone small business concern to submit any supporting information or documentation.

- (4) The concern's recertification must be submitted within 30 days of the anniversary date of its original HUBZone certification. The date of HUBZone certification is the date specified in the concern's certification letter. If the business fails to recertify, SBA may propose the concern for decertification pursuant to § 126.503.
- (b) SBA will conduct a program examination of each certified HUBZone small business concern pursuant to § 126.403 at least once every three years to ensure continued program eligibility. Specifically, SBA will conduct a program examination as part of the recertification process three years after the concern's initial HUBZone certification or three years after the date of the concern's last program examination, whichever date is later.
  - (1) **Example:** Concern A is certified by SBA to be eligible for the HUBZone program on September 27, 2020. During that year, Concern A does not receive a HUBZone contract. Concern A must recertify its eligibility to SBA between August 27, 2021 and September 26, 2021. Concern A must represent that at least 35% of its employees continue to reside in a HUBZone and that its principal office continues to be located in a HUBZone. Concern A will continue to be a certified HUBZone small business concern that is eligible to receive HUBZone contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2022. On June 28, 2022, Concern A is awarded a HUBZone contract. Concern A must recertify its eligibility to SBA between August 27, 2022 and September 26, 2022. Because Concern A is performing a HUBZone contract, Concern A must represent that at least 20% of its employees continue to reside in a HUBZone and that its principal office continues to be located in a HUBZone. Concern A will continue to be a certified HUBZone small business concern that is eligible to receive HUBZone contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2023. Concern A must recertify its eligibility to SBA between August 27, 2023 and September 26, 2023. 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 eligible as a certified HUBZone small business concern, Concern A must provide additional information as requested by SBA to demonstrate that it continues to meet all the eligibility requirements of the HUBZone Program.

(2) [Reserved]

[84 FR 65245, Nov. 26, 2019, as amended at 85 FR 66197, Oct. 16, 2020]

## § 126.501 How long does HUBZone certification last?

- (a) **One-year certification.** Once SBA certifies a concern as eligible to participate in the HUBZone program, the concern will be treated as a certified HUBZone small business concern eligible for all HUBZone contracts for which the concern qualifies as small, for a period of one year from the date of its initial certification or recertification, unless the concern acquires, is acquired by, or merges with another firm during that one-year period, or the concern is performing a HUBZone contract and fails to attempt to maintain the minimum employee HUBZone residency requirement (see § 126.103).
  - (1) A certified HUBZone small business concern that acquires, is acquired by, or merges with another business entity must notify SBA within 30 days of the transaction becoming final. The concern must then demonstrate to SBA that it continues to meet the HUBZone eligibility requirements in order for it to remain eligible as a certified HUBZone small business concern.



- (2) A certified HUBZone small business concern that is performing a HUBZone contract and fails to attempt to maintain the minimum employee HUBZone residency requirement (see § 126.103) must notify SBA within 30 days of such occurrence. A concern that cannot meet the requirement may voluntarily withdraw from the program, or it will be removed by SBA pursuant to program decertification procedures.
- (b) **Annual recertification.** On the annual anniversary of a concern's certification or recertification, the concern must recertify that it is fully compliant with all HUBZone eligibility requirements (see § 126.200), or it can request to voluntarily withdraw from the HUBZone program.
- (c) **Review of recertification.** SBA may review the concern's recertification through the program examination process when deemed appropriate and will do so every three years pursuant to § 126.500.
  - (1) If SBA determines that the concern is no longer eligible at the time of its recertification, SBA will propose the HUBZone small business concern for decertification pursuant to § 126.503.
  - (2) If SBA determines that the concern continues to be eligible, SBA will notify the concern of this determination. In such case, the concern will:
    - (i) Continue to be designated as a certified HUBZone small business concern in DSBS (or successor system); and
    - (ii) Be treated as an eligible HUBZone small business concern for all HUBZone contracts for which the concern qualifies as small for a period of one year from the date of the recertification.
- (d) **Voluntary withdrawal.** A HUBZone small business concern may request to voluntarily withdraw from the HUBZone program at any time. Once SBA concurs, SBA will decertify the concern and no longer designate it as a certified HUBZone small business concern in DSBS (or successor system). The concern may apply again for certification at any point ninety (90) calendar days after the date of decertification. At that point, the concern would have to demonstrate that it meets all HUBZone eligibility requirements.

[84 FR 65246, Nov. 26, 2019]

### **§ 126.502 Is there a limit to the length of time a concern may be a certified HUBZone small business concern?**

There is no limit to the length of time a concern may remain designated as a certified HUBZone small business concern in DSBS (or successor system) so long as it continues to comply with the provisions of §§ 126.200, 126.500, and 126.501.

[84 FR 65246, Nov. 26, 2019]

### **§ 126.503 What happens if SBA is unable to verify a HUBZone small business concern's eligibility or determines that a concern is no longer eligible for the program?**

- (a) **Proposed decertification** –
  - (1) **General.** If SBA is unable to verify a certified HUBZone small business concern's eligibility or has information indicating that a concern was not eligible for the program at the time of certification or recertification, SBA may propose decertification of the concern. In addition, if during the one-year period of time after certification or recertification SBA believes that a HUBZone small business

concern that is performing one or more HUBZone contracts no longer has at least 20% of its employees living in a HUBZone, SBA will propose the concern for decertification based on the concern's failure to attempt to maintain compliance with the HUBZone residency requirement.

- (i) **Notice of proposed decertification.** SBA will notify the HUBZone small business concern in writing that SBA is proposing to decertify it and state the reasons for the proposed decertification. The notice of proposed decertification will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at a mailing address, email address, or fax number provided in the concern's profile in the System for Award Management (*SAM.gov*) or the Dynamic Small Business Search (DSBS) (or successor systems).
  - (ii) **Response to notice of proposed decertification.** The HUBZone small business concern must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the HUBZone small business concern must rebut each of the reasons set forth by SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include documents showing that the concern is eligible for the HUBZone program as of the date specified in the notice.
  - (iii) **Adverse inference.** If a HUBZone small business concern fails to cooperate with SBA or fails to provide the information requested, the D/HUB may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.
- (2) **SBA's decision.** SBA will determine whether the HUBZone small business concern remains eligible for the program within 90 calendar days after receiving all requested information, when practicable. The D/HUB will provide written notice to the concern stating the basis for the determination.
- (i) If SBA finds that the concern is not eligible, the D/HUB will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS and the System for Award Management (or successor system) within four business days of the determination.
  - (ii) If SBA finds that the concern is eligible, the concern will continue to be designated as a certified HUBZone small business concern in DSBS (or successor system).
- (b) **Decertification pursuant to a protest.** The procedures described in paragraph (a) of this section do not apply to HUBZone status protests. If the D/HUB sustains a protest pursuant to § 126.803, SBA will decertify the HUBZone small business concern immediately and change the concern's status in DSBS (or successor system) to reflect that it no longer qualifies as a certified HUBZone small business concern without first proposing it for decertification.
- (c) **Decertification due to submission of false information.** If SBA discovers that a certified HUBZone small business concern or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.
- (d) **Effect of decertification.** Once SBA has decertified a concern, the concern cannot submit an offer or quote as a HUBZone small business concern. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified as a HUBZone small business on a pending procurement, the concern must immediately inform the

contracting officer for the procuring agency of the adverse eligibility determination. A contracting officer shall not award a HUBZone contract to a concern that the D/HUB has determined is not an eligible HUBZone small business concern for the procurement in question.

[84 FR 65246, Nov. 26, 2019, as amended at 88 FR 26212, Apr. 27, 2023]

### **§ 126.504 When will SBA remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern?**

- (a) SBA will remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern if the concern has:
  - (1) Been decertified as a result of a HUBZone status protest pursuant to § 126.803;
  - (2) Been decertified as a result of the procedures set forth in § 126.503; or
  - (3) Voluntarily withdrawn from the HUBZone program pursuant to § 126.501(b).
- (b) SBA will remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern as soon as the D/HUB issues a decision decertifying the concern from the program.
- (c) After a concern has been removed as a certified HUBZone small business concern in DSBS (or successor system), it is ineligible for the HUBZone program and may not submit an offer for a HUBZone contract.
  - (1) As long as the concern was eligible at the time of its offer (and eligibility relates back to the date of its certification or recertification), it could be awarded a HUBZone contract even if it no longer appears as a certified HUBZone small business concern on DSBS on the date of award.
  - (2) If SBA determines that the concern's recertification was invalid (*i.e.*, based on a protest or program examination SBA determines that the concern did not qualify as a HUBZone small business concern on the date of its recertification), the concern will be ineligible for the award of any HUBZone contract for which it previously certified its HUBZone status.

[84 FR 65247, Nov. 26, 2019]

## **Subpart F—Contracting With Certified HUBZone Small Business Concerns**

### **§ 126.600 What are HUBZone contracts?**

HUBZone contracts are contracts awarded to a certified HUBZone small business concern, regardless of the place of performance, through any of the following procurement methods:

- (a) Sole source awards to certified HUBZone small business concerns;
- (b) Set-aside awards, including partial set-asides, based on competition restricted to certified HUBZone small business concerns;
- (c) Awards to certified HUBZone small business concerns through full and open competition after a price evaluation preference is applied to an other than small business in favor of certified HUBZone small business concerns;

- (d) Awards based on a reserve for certified HUBZone small business concerns in a solicitation for a Multiple Award Contract (see § 125.1); or
- (e) Orders set-aside for certified HUBZone small business concerns under a Multiple Award Contract that was awarded in full and open competition.

[78 FR 61144, Oct. 2, 2013, as amended at 81 FR 48591, July 25, 2016; 84 FR 65247, Nov. 26, 2019]

### **§ 126.601 What additional requirements must a certified HUBZone small business concern meet to submit an offer on a HUBZone contract?**

- (a) Only certified HUBZone small business concerns are eligible to submit offers for a HUBZone contract or to receive a price evaluation preference under § 126.613.
- (b) At the time a certified HUBZone small business concern submits its initial offer (including price) on a specific HUBZone contract, it must certify to the contracting officer that it:
  - (1) Is a certified HUBZone small business concern in DSBS (or successor system);
  - (2) Is small, together with its affiliates, at the time of its offer under the size standard corresponding to the NAICS code assigned to the procurement;
  - (3) Will “attempt to maintain” having at least 35% of its employees residing in a HUBZone during the performance of the contract, as set forth in § 126.200(e); and
  - (4) Will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in § 125.6 of this chapter and §§ 126.200(f) and 126.700.
- (c) A certified HUBZone small business concern may submit an offer on a HUBZone contract for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at § 121.406 of this chapter.
- (d) Where a subcontractor that is not a certified HUBZone small business will perform the primary and vital requirements of a HUBZone contract, or where a HUBZone prime contractor is unduly reliant on one or more small businesses that are not HUBZone-certified to perform the HUBZone contract, the prime contractor is not eligible for award of that HUBZone contract.
  - (1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a HUBZone status protest, as described in § 126.801. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(3) of this chapter.
  - (2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime HUBZone contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not HUBZone-certified, where the prime contractor can demonstrate that it, together with any subcontractors that are certified HUBZone small business concerns, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.
  - (3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

- (e) For two-step procurements (including architect-engineering and design-build procurements) to be awarded as HUBZone contracts, a concern must be a certified HUBZone small business concern as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

[84 FR 65247, Nov. 26, 2019, as amended at 84 FR 65664, Nov. 29, 2019; 85 FR 5304, Jan. 30, 2020; 88 FR 26212, Apr. 27, 2023]

### **§ 126.602 Must a certified HUBZone small business concern maintain the employee residency percentage during contract performance?**

- (a) A certified HUBZone small business concern that has not received a HUBZone contract must have at least 35% of its employees residing within a HUBZone at the time of certification and annual recertification. Such a concern need not meet the 35% HUBZone residency requirement at all times while certified in the program. A certified HUBZone small business concern that has received a HUBZone contract must “attempt to maintain” (see § 126.103) having 35% of its employees residing in a HUBZone during the performance of any HUBZone contract awarded to the concern on the basis of its HUBZone status. Such a concern must have at least 20% of its employees residing within a HUBZone at the time of its annual recertification.
- (b) For orders under indefinite delivery, indefinite quantity contracts, including orders under multiple award contracts, a certified HUBZone small business concern must “attempt to maintain” the HUBZone residency requirement during the performance of each order that is set aside for HUBZone small business concerns.
- (c) A certified HUBZone small business concern eligible for the program pursuant to § 126.200(c)(2)(ii) must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation.
- (d) A certified HUBZone small business concern that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement. Such failure will result in proposed decertification pursuant to § 126.503.

[84 FR 65247, Nov. 26, 2019, as amended at 85 FR 66197, Oct. 16, 2020]

### **§ 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?**

HUBZone certification does not guarantee that a certified HUBZone small business concern will receive HUBZone contracts. Certified HUBZone small business concerns should market their capabilities to appropriate contracting activities in order to increase the prospect that the contracting activity will adopt an acquisition strategy that includes HUBZone contract opportunities.

[69 FR 29425, May 24, 2004, as amended at 84 FR 65247, Nov. 26, 2019]

### **§ 126.604 Who decides if a contract opportunity for HUBZone set-aside competition exists?**

The contracting officer for the contracting activity makes this decision.

### **§ 126.605 What requirements are not available for HUBZone contracts?**

A contracting activity may not make a requirement available for a HUBZone contract if:

- (a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 *et seq.*, as amended; or
- (b) An 8(a) participant currently is performing the requirement through the 8(a)BD program or SBA has accepted the requirement for award through the 8(a)BD program, unless SBA has consented to release the requirement from the 8(a)BD program.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004]

### **§ 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).

[85 FR 66197, Oct. 16, 2020]

### **§ 126.607 When must a contracting officer set aside a requirement for certified HUBZone small business concerns?**

- (a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting pursuant to § 126.605.
- (b) *Contracting Among Small Business Programs* –
  - (1) **Acquisitions Valued at or below the Simplified Acquisition Threshold.** The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.
  - (2) **Acquisitions Valued Above the Simplified Acquisition Threshold.**
    - (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.

- (ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.
- (c) If the contracting officer decides to set aside the requirement for competition restricted to certified HUBZone small business concerns, the contracting officer must:
  - (1) Have a reasonable expectation after reviewing the list of certified HUBZone small business concerns contained in DSBS (or successor system) that at least two responsible qualified HUBZone SBCs will submit offers; and
  - (2) Determine that award can be made at fair market price.

[63 FR 31908, June 11, 1998, as amended at 70 FR 51250, Aug. 30, 2005; 75 FR 62281, Oct. 7, 2010; 77 FR 1860, Jan. 12, 2012; 78 FR 61146, Oct. 2, 2013; 84 FR 65247, Nov. 26, 2019]

### **§ 126.608 Are there HUBZone contract opportunities at or below the simplified acquisition threshold or micropurchase threshold?**

A CO may make a requirement available as a HUBZone set-aside or sole source award if it is at or below the simplified acquisition threshold. In addition, a CO may award a requirement as a HUBZone contract to a certified HUBZone small business concern at or below the micropurchase threshold.

[69 FR 29425, May 24, 2004, as amended at 84 FR 65248, Nov. 26, 2019]

### **§ 126.609 Can a HUBZone competition be limited or authorize preferences to small business concerns having additional socioeconomic certifications?**

A procuring activity cannot restrict a HUBZone competition (for either a contract or order) to require SBA socioeconomic certifications other than HUBZone certification (*i.e.*, a competition cannot be limited only to business concerns that are both HUBZone and 8(a), HUBZone and WOSB, or HUBZone and SDVO) or give evaluation preferences to firms having one or more other certifications.

[88 FR 26212, Apr. 27, 2023]

### **§ 126.610 May SBA appeal a contracting officer's decision not to make a procurement available for award as a HUBZone contract?**

- (a) The Administrator may appeal a CO's decision not to make a particular requirement available for award as a HUBZone contract to the Secretary of the department or head of the agency.
- (b) An appeal is initiated by SBA's Procurement Center Representative to the CO, and may be in response to information supplied by the D/HUB, his or her designee, or other interested parties.

[69 FR 29425, May 24, 2004]

### § 126.611 What is the process for an appeal of a contracting officer's decision not to issue a procurement as a HUBZone contract?

- (a) **Notice of appeal.** When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as a HUBZone contract, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.
- (b) **Suspension of action.** Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the head of the contracting activity issues a written decision on the appeal, unless the head of the contracting activity makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.
- (c) **Deadline for appeal.** Within 15 business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.
- (d) **Decision.** The contracting activity must specify in writing the reasons for a denial of an appeal brought under this section.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004; 84 FR 65248, Nov. 26, 2019]

### § 126.612 When may a CO award sole source contracts to HUBZone small business concerns?

A contracting officer may award a sole source contract to a HUBZone small business concern only when the contracting officer determines that:

- (a) None of the provisions of §§ 126.605 or 126.607 apply;
- (b) The anticipated award price of the contract, including options, will not exceed:
  - (1) \$7,000,000 for a contract assigned a manufacturing NAICS code, or
  - (2) \$4,500,000 for all other contracts.
- (c) Two or more HUBZone small business concerns are not likely to submit offers;
- (d) A HUBZone small business concern is a responsible contractor able to perform the contract; and
- (e) In the estimation of the CO, contract award can be made at a fair and reasonable price.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004; 74 FR 46887, Sept. 14, 2009; 83 FR 12852, Mar. 26, 2018; 84 FR 65248, Nov. 26, 2019; 86 FR 61673, Nov. 8, 2021]

### § 126.613 How does a price evaluation preference affect the bid of a certified HUBZone small business concern in full and open competition?

- (a)



- (1) Where a CO will award a contract on the basis of full and open competition, the CO must deem the price offered by a certified HUBZone small business concern to be lower than the price offered by another offeror (other than another small business concern) if the price offered by the certified HUBZone small business concern is not more than 10% higher than the price offered by the otherwise lowest, responsive, and responsible offeror. For a best value procurement, the CO must apply the 10% preference to the otherwise successful offer of a large business and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation. This does not apply if the certified HUBZone small business concern will receive the contract as part of a reserve for certified HUBZone small business concerns.
- (2) Where, after considering the price evaluation adjustment, the price offered by a certified HUBZone small business concern is equal to the price offered by a large business (or, in a best value procurement, the total evaluation points received by a certified HUBZone small business concern is equal to the total evaluation points received by a large business), award shall be made to the certified HUBZone small business concern.

(i) **Example 1 :**

In a full and open competition, a certified HUBZone small business concern submits an offer of \$98, a non-HUBZone small business concern submits an offer of \$95, and a large business submits an offer of \$93. The lowest, responsive, responsible offeror would be the large business. However, the CO must apply the HUBZone price evaluation preference. In this example, the certified HUBZone small business concern's offer is not more than 10% higher than the large business' offer and, consequently, the certified HUBZone small business concern displaces the large business as the lowest, responsive, and responsible offeror.

(ii) **Example 2 :**

In a full and open competition, a certified HUBZone small business concern submits an offer of \$103, a non-HUBZone small business concern submits an offer of \$100, and a large business submits an offer of \$93. The lowest, responsive, responsible offeror would be from the large business. The CO must then apply the HUBZone price evaluation preference. In this example, the certified HUBZone small business concern's offer is more than 10% higher than the large business' offer and, consequently, the certified HUBZone small business concern does not displace the large business as the lowest, responsive, and responsible offeror. In addition, the non-HUBZone small business concern's offer at \$100 does not displace the large business' offer because a price evaluation preference is not applied to change an offer and benefit a non-HUBZone small business concern.

(iii) **Example 3 :**

In a full and open competition, a certified HUBZone small business concern submits an offer of \$98 and a non-HUBZone small business concern submits an offer of \$93. The CO would not apply the price evaluation preference in this procurement because the lowest, responsive, responsible offeror is a SBC.

(iv) **Example 4 :**

In a full and open competition, a certified HUBZone small business concern submits an offer of \$98 and a large business submits an offer of \$93. The contracting officer has stated in the solicitation that one contract will be reserved for a certified HUBZone small business concern. The contracting officer would not apply the price evaluation preference when determining which

HUBZone small business concern would receive the contract reserved for HUBZone small business concerns, but would apply the price evaluation preference when determining the awardees for the non-reserved portion.

(b)

- (1) For purchases by the Secretary of Agriculture of agricultural commodities, the price evaluation preferences shall be:
  - (i) 10%, for the portion of a contract to be awarded that is not greater than 25% of the total volume being procured for each commodity in a single invitation for bids (IFB);
  - (ii) 5%, for the portion of a contract to be awarded that is greater than 25%, but not greater than 40%, of the total volume being procured for each commodity in a single IFB; and
  - (iii) Zero, for the portion of a contract to be awarded that is greater than 40% of the total volume being procured for each commodity in a single IFB.
- (2) The 10% and 5% price evaluation preferences for agricultural commodities apply to all offers from certified HUBZone small business concerns up to the 25% and 40% volume limits specified in paragraph (b)(1) of this section. As such, more than one certified HUBZone small business concern may receive a price evaluation preference for any given commodity in a single IFB.

(i) **Example :**

There is an IFB for 100,000 pounds of wheat. Bid 1 (from a large business) is \$1/pound for 100,000 pounds of wheat. Bid 2 (from a HUBZone small business concern) is \$1.05/pound for 20,000 pounds of wheat. Bid 3 (from a HUBZone small business concern) is \$1.04/pound for 20,000 pounds. Bid 3 receives a 10% price evaluation adjustment for 20,000 pounds, since 20,000 is less than 25% of 100,000 pounds. With the 10% price evaluation adjustment, Bid 1 changes from \$20,000 for the first 20,000 pounds to \$22,000. Bid 3's price of \$20,800 ( $\$1.04 \times 20,000$ ) is now lower than any other bid for 20,000 pounds. Thus, Bid 3 will be accepted for the full 20,000 pounds. Bid 2 receives a 10% price evaluation adjustment for that amount of its bid when added to the volume in Bid 3 that does not exceed 25% of the total volume being procured. Since 25,000 pounds is 25% of the total volume of wheat under the IFB, and Bid 3 totaled 20,000 pounds, a 10% price evaluation adjustment will be applied to the first 5,000 pounds of Bid 2. With the price evaluation adjustment, the price for Bid 1, as measured against Bid 2, for 5,000 pounds changes from \$5,000 to \$5,500. Bid 2's price of \$5,250 ( $\$1.05 \times 5,000$ ) is lower than Bid 1 for 5,000 pounds. Bid 2 will then receive a 5% price evaluation adjustment for the remaining 15,000 pounds, since the total volume of Bids 3 and 2 receiving an adjustment does not exceed 40% of the total volume of wheat under the IFB (i.e., 40,000 pounds). With the 5% price evaluation adjustment, Bid 1's price for the next 15,000 pounds changes from \$15,000 to \$15,750. Bid 2's price for that 15,000 pounds is also \$15,750 ( $\$1.05 \times 15,000$ ). Because the evaluation price for Bid 2 is *not more than* 10% higher than the price offered by Bid 1, Bid 2's price is deemed to be lower than the price offered by Bid 1. Since the evaluation price for both the first 5,000 pounds (receiving a 10% price evaluation adjustment) and the remaining 15,000 pounds (receiving a 5% price evaluation adjustment) is less than Bid 1, Bid 2 will be accepted for the full 20,000 pounds.

(ii) [Reserved]

- (c) For purchases by the Secretary of Agriculture of agricultural commodities for export operations through international food aid programs administered by the Farm Service Agency, the price evaluation preference shall be 5% on the first portion of a contract to be awarded that is not greater than 20% of the total volume being procured for each commodity in a single IFB.
- (d) A contract awarded to a certified HUBZone small business concern under a preference described in paragraph (b) of this section shall not be counted toward the fulfillment of any requirement partially set aside for competition restricted to small business concerns.

[69 FR 29425, May 24, 2004, as amended at 70 FR 51250, Aug. 30, 2005; 78 FR 61146, Oct. 2, 2013; 84 FR 65248, Nov. 26, 2019]

## § 126.614 [Reserved]

### § 126.615 May a large business participate on a HUBZone contract?

Except as provided in § 126.618, a large business may not participate as a prime contractor on a HUBZone award, but may participate as a subcontractor to an otherwise qualified HUBZone SBC, subject to the contract performance requirements set forth in § 126.700.

[81 FR 48591, July 25, 2016, as amended at 81 FR 71983, Oct. 19, 2016]

### § 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

- (a) **General.** A certified HUBZone small business concern may enter into a joint venture agreement with one or more other small business concerns, or with an SBA-approved mentor authorized by § 125.9 of this chapter, for the purpose of submitting an offer for a HUBZone contract.
  - (1) The joint venture itself need not be a certified HUBZone small business concern, but the joint venture should be designated as a HUBZone joint venture in SAM (or successor system) with the HUBZone-certified joint venture partner identified.
  - (2) A certified HUBZone small business concern cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for certified HUBZone small business concerns.
- (b) **Size.**
  - (1) A joint venture of at least one certified HUBZone small business concern and one or more other business concerns may submit an offer as a small business for a HUBZone procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.
  - (2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the HUBZone procurement or sale.
- (c) **Contents of joint venture agreement.** Every joint venture agreement to perform a HUBZone contract, including those between a protégé firm that is a certified HUBZone small business concern and its SBA-approved mentor authorized by § 124.520 or § 125.9 of this chapter, must contain a provision:
  - (1) Setting forth the purpose of the joint venture;

- (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.
- (3) Stating that with respect to a separate legal entity joint venture, the certified HUBZone small business concern must own at least 51% of the joint venture entity;
- (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) Providing for the establishment and administration of a special bank account in the name of the joint venture. 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. All payments due the joint venture for performance on a HUBZone contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;
- (6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;
- (7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of

the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

- (8) Obligating all parties to the joint venture to ensure performance of the HUBZone contract and to complete performance despite the withdrawal of any member;
- (9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified HUBZone small business concern managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;
- (10) Requiring that the final original records be retained by the certified HUBZone small business concern managing venturer upon completion of the HUBZone contract performed by the joint venture;
- (11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
- (12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) ***Limitations on subcontracting.***

- (1) For any HUBZone contract to be performed by a joint venture between a certified HUBZone small business concern and another certified HUBZone small business concern, the aggregate of the certified HUBZone small business concerns to the joint venture, not each concern separately, must perform the applicable percentage of work required by § 125.6 of this chapter.
- (2) For any HUBZone contract to be performed by a joint venture between a certified HUBZone small business concern and a small business concern or its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter, and the certified HUBZone small business concern partner to the joint venture must perform at least 40% of the work performed by the joint venture.
  - (i) The work performed by the certified HUBZone small business concern partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.
  - (ii) The amount of work done by the partners will be aggregated and the work done by the certified HUBZone small business concern partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a HUBZone qualified protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(e) ***Certification of compliance —***

- (1) ***At time of offer.*** If submitting an offer as a joint venture for a HUBZone contract, at the time of initial offer (and if applicable, final offer), each certified HUBZone small business concern joint venture partner must make the following certifications to the contracting officer separately under its own name:

- (i) It is a certified HUBZone small business concern that appears in DSBS (or successor system) as a certified HUBZone small business concern and it met the eligibility requirements in § 126.200 at the time of its initial certification or, if applicable, at the time of its most recent recertification;
  - (ii) It, together with its affiliates, is small under the size standard corresponding to the NAICS code assigned to the procurement;
  - (iii) It will “attempt to maintain” having at least 35% of its employees residing in a HUBZone during performance of the contract; and
  - (iv) It will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in § 125.6 of this chapter and §§ 126.200(f) and 126.700.
- (2) **Prior to performance.** Prior to the performance of any HUBZone contract as a joint venture, the HUBZone small business concern partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating the following:
- (i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section; and
  - (ii) The parties will perform the contract in compliance with the joint venture agreement.
- (f) **Capabilities, past performance, and experience.** When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a HUBZone contract 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 HUBZone small business concern 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.
- (g) **Contract execution.** The procuring activity will execute a HUBZone contract in the name of the joint venture entity or the certified HUBZone small business concern, but in either case will identify the award as one to a HUBZone joint venture or a HUBZone mentor-protégé joint venture, as appropriate.
- (h) **Inspection of records.** The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.
- (i) **Limitations on subcontracting reports.** The certified HUBZone small business concern partner to a joint venture must describe how it is meeting or has met the applicable limitations on subcontracting requirements for each HUBZone contract it performs as a joint venture.
- (1) The certified HUBZone small business concern partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the limitations on subcontracting requirements are being met for each HUBZone contract performed during the year.
  - (2) At the completion of every HUBZone contract awarded to a joint venture, the certified HUBZone small business concern partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how

and certifying that the limitations on subcontracting 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 (c) of this section.

- (j) **Basis for suspension or debarment.** The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:
- (1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;
  - (2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or
  - (3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.
- (k) Any person with information concerning a joint venture's compliance with the limitations on subcontracting requirements may report that information to SBA and/or the SBA Office of Inspector General.

[81 FR 48591, July 25, 2016, as amended at 81 FR 94942, Dec. 27, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65248, Nov. 29, 2019; 85 FR 66197, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26212, Apr. 27, 2023]

### **§ 126.617 Who decides contract disputes arising between a certified HUBZone small business concern and a contracting activity after the award of a HUBZone contract?**

For purposes of the Disputes Clause of a specific HUBZone contract, the contracting activity will decide disputes arising between a certified HUBZone small business concern and the contracting activity.

[69 FR 29426, May 24, 2004, as amended at 84 FR 65249, Nov. 26, 2019]

### **§ 126.618 How does a certified HUBZone small business concern's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?**

- (a) A certified HUBZone small business concern may enter into a mentor-protégé relationship under § 125.9 of this chapter or in connection with a mentor-protégé program of another agency, provided that such relationships do not conflict with the HUBZone requirements described in § 126.200.
- (b) For purposes of determining whether an applicant to the HUBZone Program or a certified HUBZone small business concern qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or certified HUBZone small business concern and the firm that is its mentor in an SBA-approved mentor-protégé relationship (including a mentor that is other than small) on the basis of the mentor-protégé agreement or the assistance provided to the protégé firm under the agreement. SBA will not consider the employees of the mentor in determining whether the applicant or certified HUBZone small business concern meets (or continues to meet) the 35% HUBZone residency requirement or the principal office requirement, or in determining the size of the applicant or certified HUBZone small business concern for any employee-based size standard.
- (c) A certified HUBZone small business concern that is a prime contractor on a HUBZone contract may subcontract work to its mentor.

- (1) The certified HUBZone small business concern must meet the applicable limitations on subcontracting requirements set forth in § 125.6(c) of this chapter.
- (2) SBA may find affiliation between a prime HUBZone contractor and its mentor subcontractor where the mentor will perform primary and vital requirements of the contract. See § 121.103(h)(3) of this chapter.

[81 FR 48593, July 25, 2016, as amended at 84 FR 65249, Nov. 26, 2019; 85 FR 66197, Oct. 16, 2020; 88 FR 26213, Apr. 27, 2023]

### **§ 126.619 When must a certified HUBZone small business concern recertify its status for a HUBZone contract?**

- (a) A concern that is a certified HUBZone small business concern at the time of initial offer (including a Multiple Award Contract) is generally considered a HUBZone small business concern throughout the life of that contract.
  - (1) If a concern is a certified HUBZone small business concern at the time of initial offer for a HUBZone Multiple Award Contract, then it will be considered a certified HUBZone small business concern for each order issued against the contract, unless a contracting officer requests a new HUBZone certification in connection with a specific order (see paragraph (b)(4) of this section).
  - (2) Except for orders under Federal Supply Schedule contracts, where the underlying Multiple Award Contract is not a HUBZone contract and a procuring agency is setting aside an order for the HUBZone program, a concern must be a certified HUBZone small business concern and appear in DSBS (or successor system) as a certified HUBZone small business concern at the time it submits its offer for the order.
  - (3) Where a contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as a certified HUBZone small business concern to the procuring agency, or inform the procuring agency that it is not a certified HUBZone small business concern, within 30 days of the novation approval. If the concern is not a certified HUBZone small business concern, the agency can no longer count any work performed under the contract, including any options or orders issued pursuant to the contract, from that point forward towards its HUBZone goals.
  - (4) Where a 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 a certified HUBZone small business concern to the procuring agency, or inform the procuring agency that it no longer qualifies as a HUBZone small business concern. If the contractor is unable to recertify its status as a HUBZone small business concern, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. The agency must immediately revise all applicable Federal contract databases to reflect the new status.
  - (5) Where a concern is decertified after the award of a HUBZone contract, the procuring agency may exercise options and still count the award as an award to a HUBZone small business concern, except where recertification is required or requested under this section, or where the concern has been found to be ineligible for award pursuant to a HUBZone status protest pursuant to § 126.803.



- (b) For the 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 a HUBZone small business concern 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 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.
  - (1) If the concern cannot recertify that it qualifies as a HUBZone small business concern, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. This means that if the concern either no longer meets the HUBZone eligibility requirements or no longer qualifies as small for the size standard corresponding to NAICS code assigned to the contract, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.
  - (2) A concern that did not certify itself as a HUBZone small business concern, either initially or prior to an option being exercised, may recertify itself as a HUBZone small business concern for a subsequent option period if it meets the eligibility requirements at that time.
  - (3) 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.
  - (4) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date of the concern's initial certification or, if applicable, its most recent recertification.
- (c) Except for Blanket Purchase Agreements under Federal Supply Schedule contracts, a concern's status will be determined at the time of submission of its initial response to a solicitation for an Agreement (including Blanket Purchase Agreements (BPAs), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards for certified HUBZone small business concerns) and each order issued pursuant to the Agreement.

[84 FR 65249, Nov. 26, 2019, as amended at 85 FR 5304, Jan. 30, 2020; 85 FR 27660, May 11, 2020]

## Subpart G—Contract Performance Requirements

### § 126.700 What are the limitations on subcontracting requirements for HUBZone contracts?

- (a) **Other than Multiple Award Contracts.** For other than a Multiple Award Contract, a prime contractor receiving an award as a certified HUBZone small business concern must meet the limitations on subcontracting requirements set forth in § 125.6 of this chapter.
- (b) **Multiple Award Contracts —**
  - (1) **Total Set-Aside Contracts.** For a Multiple Award Contract that is totally set aside for certified HUBZone small business concerns, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (see § 125.6), or if applicable, the nonmanufacturer rule (see § 121.406 of this chapter), during the base term and during each subsequent option period. However, the contracting officer, at his or her discretion, may also require the concern to comply with the limitations on subcontracting or the nonmanufacturer rule for each individual order awarded under the Multiple Award Contract.

- (2) **Partial Set-Aside Contracts.** For Multiple Award Contracts that are partially set aside for certified HUBZone small business concerns, paragraph (b)(1) of this section applies to the set-aside portion of the contract. For orders awarded under the non-set-aside portion of a Multiple Award Contract, a certified HUBZone small business concern need not comply with any limitations on subcontracting or nonmanufacturer rule requirements.
- (3) **Orders Set Aside for certified HUBZone small business concerns.** For each individual order that is set aside for certified HUBZone small business concerns under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (see § 125.6 of this chapter), or if applicable, the nonmanufacturer rule (see § 121.406 of this chapter), in the performance of such order.
- (4) **Reserves.** For an order that is set aside for certified HUBZone small business concerns against a Multiple Award Contract with a HUBZone reserve, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (see § 125.6 of this chapter), or if applicable, the nonmanufacturer rule (see § 121.406 of this chapter), in the performance of such order. However, the certified HUBZone small business concern does not have to comply with the limitations on subcontracting or the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst certified HUBZone small business concerns and one or more other-than-small business concerns.

[84 FR 65249, Nov. 26, 2019, as amended at 86 FR 61673, Nov. 8, 2021]

### **§ 126.701 Can these subcontracting percentages requirements change?**

Yes. The Administrator may change the subcontracting percentage requirements if the Administrator determines that such action is necessary to reflect conventional industry practices.

### **§ 126.702 How can the subcontracting percentage requirements be changed?**

SBA may change the required subcontracting percentage for a specific industry if the Administrator determines that such action is necessary to reflect conventional industry practices among SBCs that are below the numerical size standard for businesses in that industry group. The procedures for requesting changes in subcontracting percentages are set forth in § 125.6 of this chapter.

[69 FR 29427, May 24, 2004]

## **Subpart H—Protests**

### **§ 126.800 Who may protest the status of a certified HUBZone small business concern?**

- (a) **For sole source procurements.** SBA or the contracting officer may protest the proposed awardee's status as a certified HUBZone small business concern.
- (b) **For all other procurements, including Multiple Award Contracts (see § 125.1 of this chapter).** SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's status as a certified HUBZone small business concern.

[84 FR 65250, Nov. 26, 2019]

## § 126.801 How does an interested party file a HUBZone status protest?

### (a) *General.*

- (1) A HUBZone status protest is the process by which an interested party may challenge the HUBZone status of an apparent successful offeror on a HUBZone contract, including a HUBZone joint venture submitting an offer under § 126.616. SBA will also consider a protest challenging whether a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract.
- (2) The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a certified HUBZone small business concern is other than small for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the HUBZone small business concern and whether the concern meets the HUBZone eligibility requirements set forth in § 126.200, SBA will process the protests concurrently, under the procedures set forth in part 121 of this chapter and this part.
- (3) SBA does not review issues concerning the administration of a HUBZone contract.

### (b) *Format and specificity.*

- (1) Protests must be in writing and must state all specific grounds as to why the protestor believes the protested concern should not qualify as a certified HUBZone small business concern. Specifically, a protestor must explain why:
  - (i) The protested concern did not meet the HUBZone eligibility requirements set forth in § 126.200;
  - (ii) The protested joint venture does not meet the requirements set forth in § 126.616;
  - (iii) The protested concern, as a HUBZone prime contractor, is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract; and/or
  - (iv) The protested concern, on the anniversary date of its initial HUBZone certification, failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract.
- (2) Specificity requires more than conclusions of ineligibility. A protest merely asserting that the protested concern did not qualify as a HUBZone small business concern, or that it did not meet the principal office and/or 35% residency requirements, without setting forth specific facts or allegations, is insufficient and will be dismissed.
- (3) For a protest filed against a HUBZone joint venture, the protest must state all specific grounds as to why:
  - (i) The HUBZone small business partner to the joint venture did not meet the HUBZone eligibility requirements set forth in § 126.200 at the time the concern applied for certification or on the anniversary of such certification; and/or
  - (ii) The protested HUBZone joint venture does not meet the requirements set forth in § 126.616.
- (4) For a protest alleging that the prime contractor has an ostensible subcontractor, the protest must state all specific grounds as to why:

- (i) The protested concern is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or
  - (ii) One or more subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract.
- (5) For a protest alleging that the protested concern failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract, the protest must state all specific grounds explaining why the protester believes that at least 20% of the protested firm's employees do not reside in a HUBZone.

(c) **Filing.**

- (1) An interested party other than a contracting officer or SBA must submit its written protest to the contracting officer.
- (2) A contracting officer and SBA must submit their protest to the D/HUB.
- (3) Protestors may submit their protests by email to [hzprotests@sba.gov](mailto:hzprotests@sba.gov).

(d) **Timeliness.** A protest challenging the HUBZone status of an apparent successful offeror on a HUBZone contract must be timely, or it will be dismissed.

- (1) For negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.
  - (i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for certified HUBZone small business concerns under a multiple award contract that was not itself set aside or reserved for certified HUBZone small business concerns, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.
  - (ii) Where a contracting officer has required offerors for a specific order under a multiple award HUBZone contract to recertify their HUBZone status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.
- (2) For sealed bid acquisitions:
  - (i) An interested party must submit its protest by close of business on the fifth business day after bid opening, or where the identified low bidder is determined to be ineligible for award, by close of business on the fifth business day after the contracting officer has notified interested parties of the identity of that low bidder, or
  - (ii) If the price evaluation preference was not applied at the time of bid opening, an interested party must submit its protest by close of business on the fifth business day after the date of identification of the apparent successful low bidder.
- (3) Any protest submitted after the time limits is untimely, unless it is from SBA or the CO.
- (4) Any protest received prior to bid opening or notification of intended award, whichever applies, is premature.

- (e) **Referral to SBA.** The contracting officer must forward to SBA any non-premature HUBZone status protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send the protest, along with a referral letter, to the D/HUB by email to [hzprotests@sba.gov](mailto:hzprotests@sba.gov).
- (1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including the following:
- (i) The solicitation number;
  - (ii) The name, address, telephone number, email address, and facsimile number of the contracting officer;
  - (iii) The type of HUBZone contract at issue (*i.e.*, HUBZone set-aside; HUBZone sole source; full and open competition with a HUBZone price evaluation preference applied; reserve for HUBZone small business concerns under a Multiple Award Contract; or order set-aside for HUBZone small business concerns against a Multiple Award Contract);
  - (iv) If the procurement was conducted using full and open competition with a HUBZone price evaluation preference, whether the protester's opportunity for award was affected by the preference;
  - (v) If the procurement was a HUBZone set-aside, whether the protester submitted an offer;
  - (vi) Whether the protested concern was the apparent successful offeror;
  - (vii) Whether the procurement was conducted using sealed bid or negotiated procedures;
  - (viii) If the procurement was conducted using sealed bid procedures, the bid opening date;
  - (ix) The date the protester was notified of the apparent successful offeror;
  - (x) The date the protest was submitted to the contracting officer;
  - (xi) The date the protested concern submitted its initial offer or bid to the contracting activity; and
  - (xii) Whether a contract has been awarded, and if applicable, the date of contract award and contract number.
- (2) Where a protestor alleges that a certified HUBZone small business concern is unduly reliant on one or more subcontractors that are not certified HUBZone small business concerns or a subcontractor that is not a certified HUBZone small business concern will perform primary and vital requirements of the contract, the D/HUB will refer the matter to the Government Contracting Area Office serving the geographic area in which the principal office of the certified HUBZone small business concern is located for a determination as to whether the ostensible subcontractor rule has been met.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29427, May 24, 2004, 84 FR 65250, Nov. 26, 2019; 84 FR 65665, Nov. 29, 2019; 85 FR 66197, Oct. 16, 2020; 88 FR 26213, Apr. 27, 2023]

## § 126.802 Who decides a HUBZone status protest?

The D/HUB or designee will determine whether the concern qualifies as a certified HUBZone small business concern.

[63 FR 31908, June 11, 1998, as amended at 84 FR 65250, Nov. 26, 2019]

## § 126.803 How will SBA process a HUBZone status protest and what are the possible outcomes?

- (a) **Date at which eligibility determined.** SBA will determine the eligibility of a concern subject to a HUBZone status protest as of the date of its initial certification or, if applicable, its most recent recertification.
- (b) **Notice of receipt of protest.**
  - (1) SBA immediately will notify the contracting officer and the protestor of the date SBA receives a protest and whether SBA will process the protest or dismiss it in accordance with § 126.804.
  - (2) If SBA determines the protest is timely and sufficiently specific, SBA will notify the protested concern of the protest and the identity of the protestor. The protested concern must submit information responsive to the protest within 5 business days of the date of receipt of the protest.
- (c) **Time period for determination.**
  - (1) SBA will determine the HUBZone status of the protested concern within 15 business days after receipt of a complete protest referral.
  - (2) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (e) of this section apply to the procurement in question.
- (d) **Notice of determination.** SBA will notify the contracting officer, the protestor, and the protested concern of its determination.
- (e) **Effect of determination.** The determination is effective immediately and is final, unless overturned on appeal by SBA's Office of Hearings and Appeals (OHA) pursuant to part 134 of this chapter.
  - (1) **Protest sustained.** If the D/HUB finds the protested concern ineligible and sustains the protest, SBA will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS (or successor system). A contracting officer shall not award a contract to a protested concern that the D/HUB has determined is not an eligible HUBZone small business concern for the procurement in question.
    - (i) **No appeal filed.** If a contracting officer receives a determination sustaining a protest after contract award, and no appeal has been filed, the contracting officer shall terminate the award.
    - (ii) **Appeal filed.**
      - (A) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.
      - (B) If OHA affirms the initial determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.
    - (iii) **Update FPDS-NG.** Where the contract was awarded to a concern that is found not to qualify as a HUBZone small business concern, the contracting officer must update the Federal Procurement Data System-Next Generation (FPDS-NG) and other procurement reporting databases to reflect the final agency HUBZone decision (*i.e.*, the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed).

- (2) **Protest dismissed or denied.** If the D/HUB denies or dismisses the protest, the contracting officer may award the contract to the protested concern.
  - (i) **No appeal filed.** If a contracting officer receives a determination dismissing or denying a protest and no appeal has been filed, the contracting officer may:
    - (A) Award the contract to the protested concern if it has not yet been awarded; or
    - (B) Authorize contract performance to proceed if the contract has been awarded.
  - (ii) **Appeal filed.** If OHA overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.
- (3) A concern found to be ineligible is precluded from applying for HUBZone certification for ninety (90) calendar days from the date of the final agency decision (*i.e.*, the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed).

[63 FR 31908, June 11, 1998, as amended at 69 FR 29427, May 24, 2004; 74 FR 45754, Sept. 4, 2009; 76 FR 5685, Feb. 2, 2011; 76 FR 43574, July 21, 2011; 84 FR 65250, Nov. 26, 2019; 88 FR 21088, Apr. 10, 2023]

### § 126.804 Will SBA decide all HUBZone status protests?

SBA will decide all protests not dismissed on the basis that they are premature, untimely, non-specific, moot, or not filed by an interested party.

[84 FR 65251, Nov. 26, 2019]

### § 126.805 What are the procedures for appeals of HUBZone status protest determinations?

The protested concern, the protester, or the contracting officer may file an appeal of a HUBZone status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

[88 FR 21089, Apr. 10, 2023]

## Subpart I—Penalties

### § 126.900 What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?

- (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 HUBZone SBCs, 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 HUBZone SBC willfully sought and received the award by misrepresentation.
- (b) **Deemed Certifications.** The following actions shall be deemed affirmative, willful and intentional certifications of HUBZone SBC 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 HUBZone SBCs.

- (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 HUBZone SBC.
  - (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 HUBZone SBC.
- (c) **Signature Requirement.** Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the HUBZone SBC 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 HUBZone status claimed by the concern.
- (d) **Limitation of Liability.** Paragraphs (a)-(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 HUBZone status 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' HUBZone status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing HUBZone status representations or certifications, 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 a HUBZone SBC 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 status as a HUBZone SBC 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 HUBZone 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.

[78 FR 38820, June 28, 2013, as amended at 81 FR 31492, May 19, 2016]



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This content is from the eCFR and is authoritative but unofficial.

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## Title 13 – Business Credit and Assistance

### Chapter I – Small Business Administration

#### Part 127 Women-Owned Small Business Federal Contract Program

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- § 127.101 What type of assistance is available under this part?
- § 127.102 What are the definitions of the terms used in this part?

##### Subpart B Eligibility Requirements To Qualify as an EDWOSB or WOSB

- § 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?
- § 127.201 What are the requirements for ownership of an EDWOSB and WOSB?
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###### Certification

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- § 127.301 When may a concern apply for certification?
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§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

§ 127.505 [Reserved]

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

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§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

§ 127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?

§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

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§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

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#### **Subpart G** Penalties

§ 127.700 What are the requirements for representing EDWOSB or WOSB status, and what are the penalties for misrepresentation?

§ 127.701 What must a concern do in order to be identified as an EDWOSB or WOSB in any Federal procurement databases?

## **PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL**

# CONTRACT PROGRAM

**Authority:** 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

**Source:** 75 FR 62282, Oct. 7, 2010, unless otherwise noted.

## Subpart A—General Provisions

### § 127.100 What is the purpose of this part?

Section 8(m) of the Small Business Act authorizes certain procurement mechanisms to ensure that Women-Owned Small Businesses (WOSBs) have an equal opportunity to participate in Federal contracting. This part implements these mechanisms and ensures that the program created, referred to as the WOSB Program, is substantially related to this important Congressional goal in accordance with applicable law.

### § 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible WOSBs for certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

[80 FR 55021, Sept. 14, 2015]

### § 127.102 What are the definitions of the terms used in this part?

For purposes of this part:

**8(a) Business Development (8(a) BD) concern** means a concern that SBA has certified as an 8(a) BD program participant and whose term has not expired or otherwise left the 8(a) BD program early.

**AA/GC&BD** means SBA's Associate Administrator for Government Contracting and Business Development.

**Citizen** means a person born or naturalized in the United States. Resident aliens and holders of permanent visas are not considered to be citizens.

**Concern** means a firm that satisfies the requirements in § 121.105 of this chapter.

**Contracting officer** has the meaning given to that term in Section 27(f)(5) of the Office of Federal Procurement Policy Act (codified at 41 U.S.C. 423(f)(5)).

**D/GC** means SBA's Director for Government Contracting.

**Economically Disadvantaged WOSB (EDWOSB)** means a concern that is small pursuant to part 121 of this chapter and that is at least 51 percent owned and controlled by one or more women who are citizens and who are economically disadvantaged in accordance with §§ 127.200, 127.201, 127.202 and 127.203. An EDWOSB automatically qualifies as a WOSB.

**EDWOSB requirement** means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible EDWOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set aside for EDWOSBs issued against a Multiple Award Contract.

**Immediate family member** means father, mother, husband, wife, son, daughter, stepchild, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.

**Interested party** means any concern that submits an offer for a specific EDWOSB or WOSB requirement (including Multiple Award Contracts), any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given a WOSB or EDWOSB, the contracting activity's contracting officer, or SBA.

**Primary industry classification** means the six-digit North American Industry Classification System (NAICS) code designation that best describes the primary business activity of the concern. The NAICS code designations are described in the NAICS manual available via the Internet at <http://www.census.gov/NAICS>. In determining the primary industry in which a concern is engaged, SBA will consider the factors set forth in § 121.107 of this chapter.

**Same or similar line of business** means business activities within the same four-digit “Industry Group” of the NAICS Manual as the primary industry classification of the WOSB or EDWOSB.

**Substantial underrepresentation** is determined by a study using a reliable and relevant methodology.

**System for Award Management (SAM) (or any successor system)** means a federal system that consolidates various federal procurement systems (e.g., Central Contractor Registration (CCR), Federal Agency Registration (Fedreg), Online Representations and Certifications Application (ORCA), Excluded Parties List System (EPLS)) and the Catalog of Federal Domestic Assistance into one system.

**Underrepresentation** is determined by a study using a reliable and relevant methodology.

**Women-Owned Small Business (WOSB)** means a concern that qualifies as small pursuant to part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile, and that is at least 51 percent owned and controlled by one or more women who are citizens in accordance with §§ 127.200, 127.201 and 127.202. This definition applies to any certification as to a concern's status as a WOSB, not solely to those certifications relating to a WOSB contract.

**WOSB Program Repository** means a secure, Web-based application that collects, stores and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under a WOSB or EDWOSB requirement.

**WOSB requirement** means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible WOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set aside for WOSBs issued against a Multiple Award Contract.

[75 FR 62282, Oct. 7, 2010, as amended at 78 FR 61146, Oct. 2, 2013; 80 FR 55022, Sept. 14, 2015; 88 FR 26214, Apr. 27, 2023]

## Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

## § 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

- (a) **Qualification as an EDWOSB.** To qualify as an EDWOSB, a concern must be:
  - (1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile; and
  - (2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens and are economically disadvantaged.
- (b) **Qualification as a WOSB.** To qualify as a WOSB, a concern must be:
  - (1) A small business as defined in part 121 of this chapter for the size standard corresponding to any NAICS code listed in its SAM profile; and
  - (2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.
- (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.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27660, May 11, 2020; 88 FR 26214, Apr. 27, 2023]

## § 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

- (a) **General.** To qualify as an EDWOSB one or more economically disadvantaged women must unconditionally and directly own at least 51 percent of the concern. To qualify as a WOSB, one or more women must unconditionally and directly own at least 51 percent of the concern. Ownership will be determined without regard to community property laws.
- (b) **Requirement for unconditional ownership.** To be considered unconditional, the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.
- (c) **Requirement for direct ownership.** To be considered direct, the qualifying women must own 51 percent of the concern directly. The 51 percent ownership may not be through another business entity or a trust (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women or economically disadvantaged women. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a woman or economically disadvantaged woman where the trust is revocable, and the woman is the grantor, the trustee, and the sole current beneficiary of the trust.

- (d) **Ownership of a partnership.** In the case of a concern that is a partnership, at least 51 percent of each class of partnership interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women. The ownership must be reflected in the concern's partnership agreement. For purposes of this requirement, general and limited partnership interests are considered different classes of partnership interest.
- (e) **Ownership of a limited liability company.** In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women.
- (f) **Ownership of a corporation.** In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more women, or in the case of an EDWOSB, economically disadvantaged women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

[75 FR 62282, Oct. 7, 2010, as amended at 88 FR 26214, Apr. 27, 2023]

## § 127.202 What are the requirements for control of an EDWOSB or WOSB?

- (a) **General.** To qualify as a WOSB, the management and daily business operations of the concern must be controlled by one or more women. To qualify as an EDWOSB, the management and daily business operations of the concern must be controlled by one or more women who are economically disadvantaged. Control by one or more women or economically disadvantaged women 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 women or economically disadvantaged women.
- (b) **Managerial position and experience.** A woman, or in the case of an EDWOSB an economically disadvantaged woman, must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern. The woman or economically disadvantaged woman manager need not have the technical expertise or possess the required license to be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, if a man possesses the required license and has an equity interest in the concern, he may be found to control the concern.
- (c) **Limitation on outside employment.** The woman or economically-disadvantaged woman who holds the highest officer position of the business concern may not engage in outside employment that prevent her from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a woman or economically disadvantaged woman claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, there is a rebuttable presumption that she does not control the business concern. In such a case, the woman must provide evidence that she has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management and administration of the business.
- (d) **Control over a partnership.** In the case of a partnership, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as general partners, with control over all partnership decisions.

- (e) **Control over a limited liability company.** In the case of a limited liability company, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as management members, with control over all decisions of the limited liability company.
- (f) **Control over a corporation.** One or more women, or in the case of an EDWOSB, economically disadvantaged women, must control the Board of Directors of the concern. Women or economically disadvantaged women are considered to control the Board of Directors when either:
  - (1) One or more women or economically disadvantaged women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or
  - (2) Women or economically disadvantaged women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.
- (g) **Involvement in the concern by other individuals or entities.** Men or other entities may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no males or other entity may exercise actual control or have the power to control the concern.

[75 FR 62282, Oct. 7, 2010, as amended at 88 FR 26214, Apr. 27, 2023]

### **§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?**

- (a) **General.** To qualify as an EDWOSB, the concern must be at least 51 percent owned by one or more women who are economically disadvantaged. A woman is economically disadvantaged if she can demonstrate that her 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. SBA does not take into consideration community property laws when determining economic disadvantage when the woman has no direct, individual or separate ownership interest in the property.
- (b) **Limitation on personal net worth.**
  - (1) In order to be considered economically disadvantaged, the woman's personal net worth must be less than \$850,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.
  - (2) Income received from an EDWOSB that is an S corporation, LLC or partnership will be excluded from net worth where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the business concern or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the EDWOSB only, not losses to the individual, and cannot be used to reduce an individual's net worth.
  - (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. In order to properly assess whether funds invested in a retirement account may be excluded from a woman's net worth, she must provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.
- (c) **Factors to be considered.**

- (1) **General.** The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past three years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, will be considered in determining whether she is economically disadvantaged.
  - (2) **Spouse's financial situation.** SBA may consider a spouse's financial situation in determining a woman's access to credit and capital. When married, an individual claiming economic disadvantage must submit separate financial information for her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (e.g., an officer, employee or director) or has lent money to, provided credit or financial support to, or guaranteed a loan of the business. SBA may also consider the spouse's financial condition if the spouse's business is in the same or similar line of business as the EDWOSB or WOSB and the spouse's business and WOSB share similar names, Web sites, equipment or employees. In addition, all transfers to a spouse within two years of a certification will be attributed to a woman claiming economic disadvantage as set forth in paragraph (d) of this section.
  - (3) **Income.**
    - (i) When considering a woman's personal income, if the adjusted gross yearly income averaged over the three years preceding the certification exceeds \$400,000, SBA will presume that she is not economically disadvantaged. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.
    - (ii) Income received by an EDWOSB that is an S corporation, LLC, or partnership will be excluded from an individual's income where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the EDWOSB or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the EDWOSB only, not losses to the individual, and cannot be used to reduce a woman's personal income.
  - (4) **Fair market value of all assets.** A woman will generally not be considered economically disadvantaged if the fair market value of all her assets (including her primary residence and the value of the business concern) exceeds \$6.5 million. The only assets excluded from this determination are funds excluded under paragraph (b)(3) of this section as being invested in a qualified IRA account or other official retirement account.
- (d) **Transfers within two years.** Assets that a woman claiming economic disadvantage transferred within two years of the date of the concern's certification will be attributed to the woman claiming economic disadvantage if the assets were transferred to an immediate family member, or to a trust that has as a beneficiary an immediate family member. The transferred assets within the two-year period will not be attributed to the woman if the transfer was:
- (1) To or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or
  - (2) To an immediate family member in recognition of a special occasion, such as a birthday, graduation, anniversary, or retirement.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27660, May 11, 2020; 87 FR 69154, Nov. 17, 2022]



## Subpart C—Certification of EDWOSB or WOSB Status

### CERTIFICATION

#### § 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.

[85 FR 27660, May 11, 2020]

### § 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.

[85 FR 27661, May 11, 2020]

### § 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.

[85 FR 27661, May 11, 2020]

### § 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.

[85 FR 27661, May 11, 2020]

### § 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.
- (1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the WOSB or EDWOSB eligibility requirements, SBA will decline the concern's application.
- (2) If, during the processing of an application, SBA determines that an applicant or its representative has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

- (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.
  - (1) If SBA denies a business concern's application for WOSB certification based on lack of ownership or lack of control by women, within two days of SBA's denial, the applicant concern must update its WOSB self-certification status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible WOSB.
  - (2) If a business concern fails to update its WOSB self-certification status in the System for Award Management (or any successor system), SBA will make such update within two days of the business's failure to do so.
- (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.

[85 FR 27661, May 11, 2020, as amended at 88 FR 26214, Apr. 27, 2023]

### § 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).

[85 FR 27661, May 11, 2020]

#### 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](http://sba.gov).

[85 FR 27662, May 11, 2020]

### § 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.

[85 FR 27662, May 11, 2020]

### § 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.

[85 FR 27662, May 11, 2020]

### § 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.

[85 FR 27662, May 11, 2020]

### § 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.

[85 FR 27662, May 11, 2020]

### **§ 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.

[85 FR 27662, May 11, 2020]

### **§ 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.

[85 FR 27662, May 11, 2020]

## Subpart D—Eligibility Examinations

### § 127.400 How does a concern maintain its WOSB or EDWOSB certification?

Any concern seeking to remain a certified WOSB or EDWOSB must undergo a program examination every three years.

- (a) 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.

*Example to paragraph (a).* Concern A is certified by SBA to be eligible for the WOSB Program on March 31, 2023. Concern A is considered 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 March 30, 2026. On April 22, 2025, after Concern A is identified as the apparent successful offeror on a WOSB set-aside contract, its status as an eligible WOSB is protested. On May 15, 2025, Concern A receives a positive determination from SBA confirming that it is an eligible WOSB. Concern A's new certification date is May 15, 2025. Concern A is now considered 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 May 14, 2028.

- (b) The concern must either request a program examination from SBA or notify SBA that it has requested a program examination from 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.

*Example to paragraph (b).* Concern B is certified by a third-party certifier to be eligible for the WOSB Program on July 20, 2023. Concern B is considered 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, 2026. Concern B must request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier, by June 20, 2026, to continue participating in the WOSB Program after July 19, 2026.

- (c) The SBA Administrator or designee may postpone the program examination and recertification process in appropriate, extraordinary circumstances.

[88 FR 26214, Apr. 27, 2023, as amended at 89 FR 16446, Mar. 7, 2024]

### § 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.

[85 FR 27663, May 11, 2020]

### **§ 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.

[85 FR 27664, May 11, 2020]

### **§ 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.

[85 FR 27664, May 11, 2020]

### **§ 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.

[85 FR 27664, May 11, 2020]

### **§ 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) **Decertification in response to adverse protest decision.** SBA will decertify a concern found to be ineligible during a WOSB/EDWOSB status protest.
- (d) **Decertification due to submission of false information.** If SBA discovers that a WOSB or EDWOSB or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.
- (e) **Effect of decertification.** Once SBA has decertified a concern, the concern cannot self-certify as a WOSB or EDWOSB, as applicable, for any WOSB or EDWOSB contract. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of its decertification.
  - (1) Not later than two days after the date on which SBA decertifies a business concern, such concern must update its WOSB/EDWOSB status in the System for Award Management (or any successor system).
  - (2) If a business concern fails to update its WOSB/EDWOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.
- (f) **Reapplication.** A concern decertified pursuant to this section may reapply to the program pursuant to § 127.305.

[85 FR 27664, May 11, 2020, as amended at 88 FR 26215, Apr. 27, 2023]

## Subpart E—Federal Contract Assistance

### § 127.500 In what industries is a contracting officer authorized to restrict competition or make a sole source award under this part?

A contracting officer may restrict competition or make a sole source award under this part only in those industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement, as specified in § 127.501, regardless of the place of performance.

[80 FR 55022, Sept. 14, 2015, as amended at 81 FR 48593, July 25, 2016]

## § 127.501 How will SBA determine the industries that are eligible for EDWOSB or WOSB requirements?

- (a) Based upon its analysis, SBA will designate by NAICS Industry Subsector Code those industries in which WOSBs are underrepresented and substantially underrepresented.
- (b) In determining the extent of underrepresentation of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or information necessary to analyze the extent of underrepresentation of WOSBs.

[75 FR 62282, Oct. 7, 2010, as amended at 80 FR 55022, Sept. 14, 2015]

## § 127.502 How will SBA identify and provide notice of the designated industries?

SBA will post on its Internet Web site at <http://www.sba.gov> a list of NAICS Industry Subsector industries it designates under § 127.501. The list of designated industries also may be obtained from the local SBA district office and may be posted on the General Services Administration Internet Web site.

## § 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

- (a) **Competition restricted to EDWOSBs.** For requirements in industries designated by SBA as underrepresented pursuant to § 127.501, a contracting officer may restrict competition to EDWOSBs if the contracting officer has a reasonable expectation based on market research that:
  - (1) Two or more EDWOSBs will submit offers for the contract; and
  - (2) Contract award may be made at a fair and reasonable price.
- (b) **Competition restricted to WOSBs.** For requirements in industries designated by SBA as substantially underrepresented pursuant to § 127.501, a contracting officer may restrict competition to WOSBs if the contracting officer has a reasonable expectation based on market research that:
  - (1) Two or more WOSBs will submit offers (this includes EDWOSBs, which are also WOSBs); and
  - (2) Contract award may be made at a fair and reasonable price.
- (c) **Sole source awards to EDWOSBs.** For requirements in industries designated by SBA as underrepresented pursuant to § 127.501, a contracting officer may issue a sole source award to an EDWOSB when the contacting officer determines that:
  - (1) The EDWOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more EDWOSBs will submit offers;
  - (2) The anticipated award price of the contract (including options) will not exceed \$7,000,000 in the case of a contract assigned a North American Industry Classification System (NAICS) code for manufacturing, or \$4,500,000 in the case of any other contract opportunity; and
  - (3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.
- (d) **Sole source awards to WOSBs.** For requirements in industries designated by SBA as substantially underrepresented pursuant to § 127.501, a contracting officer may issue a sole source award to a WOSB when the contacting officer determines that:

- (1) The WOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more WOSBs will submit offers;
  - (2) The anticipated award price of the contract (including options) will not exceed \$7,000,000 in the case of a contract assigned a NAICS code for manufacturing, or \$4,500,000 in the case of any other contract opportunity; and
  - (3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.
- (e) **Competitions requiring or favoring additional socioeconomic certifications.** A procuring activity cannot restrict a WOSB or EDWOSB competition (for either a contract or order) to require SBA socioeconomic certifications other than WOSB/EDWOSB certification (*i.e.*, a competition cannot be limited only to business concerns that are both WOSB/EDWOSB and 8(a), WOSB/EDWOSB and HUBZone, or WOSB/EDWOSB and SDVO) or give evaluation preferences to firms having one or more other certifications.
- (f) **8(a) BD requirements.** A contracting officer may not restrict competition to eligible EDWOSBs or WOSBs if an 8(a) BD Participant is currently performing the requirement under the 8(a) BD Program or SBA has accepted the requirement for performance under the authority of the 8(a) BD program, unless SBA consented to release the requirement from the 8(a) BD program.
- (g) **Contracting Among Small Business Programs.**
- (1) **Acquisitions Valued At or Below the Simplified Acquisition Threshold.** The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.
  - (2) **Acquisitions Valued Above the Simplified Acquisition Threshold.**
    - (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in SAM (or any successor system) and associated representations were reviewed.
    - (ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

- (h) **Contract file.** When restricting competition to WOSBs or EDWOSBs in accordance with § 127.503, the contracting officer must document the contract file accordingly, including the type and extent of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as an underrepresented or, with respect to WOSBs, substantially underrepresented, industry. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's documents and certifications in SAM (or any successor system) and associated representations were reviewed.

[75 FR 62282, Oct. 7, 2010, as amended at 77 FR 1861, Jan. 12, 2012; 78 FR 26506, May 7, 2013; 78 FR 61147, Oct. 2, 2013; 79 FR 31849, June 3, 2014; 80 FR 55022, Sept. 14, 2015; 83 FR 12852, Mar. 26, 2018; 84 FR 65665, Nov. 29, 2019; 85 FR 27664, May 11, 2020; 85 FR 66197, Oct. 16, 2020; 86 FR 61673, Nov. 8, 2021; 88 FR 26215, Apr. 27, 2023]

### § 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 grounds for a size protest, as described at § 121.103(h)(3) of this chapter.

- (2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified WOSBs or EDWOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified WOSBs or EDWOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.
- (3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(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.

[85 FR 66197, Oct. 16, 2020, as amended at 86 FR 10732, Feb. 23, 2021; 88 FR 26215, Apr. 27, 2023]

## § 127.505 [Reserved]

### § 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture, including those between a protégé and a mentor under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter), may submit an offer on a WOSB Program contract if the joint venture meets all of the following requirements:

- (a)
  - (1) A joint venture of at least one WOSB or EDWOSB and one or more other business concerns may submit an offer as a small business for a WOSB Program procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.
  - (2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 and § 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the WOSB Program procurement or sale.
  - (3) A WOSB or EDWOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for WOSBs or EDWOSBs.
- (b) The EDWOSB or WOSB participant of the joint venture must be designated in SAM (or any successor system) as an EDWOSB or WOSB;
- (c) **Contents of joint venture agreement.** The parties to the joint venture must enter into a written joint venture agreement. The joint venture agreement must contain a provision:
  - (1) Setting forth the purpose of the joint venture.
  - (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.
- (3) Stating that with respect to a separate legal entity joint venture, the WOSB must own at least 51% of the joint venture entity;
- (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) Providing for the establishment and administration of a special bank account in the name of the joint venture. 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. All payments due the joint venture for performance on a WOSB Program contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;
- (6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;
- (7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;
- (8) Obligating all parties to the joint venture to ensure performance of the WOSB contract and to complete performance despite the withdrawal of any member;
- (9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the WOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;



- (10) Requiring that the final original records be retained by the WOSB managing venturer upon completion of the WOSB Program contract performed by the joint venture;
- (11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
- (12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) **Performance of work.**

- (1) For any WOSB Program contract, the joint venture (including one between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter) must perform the applicable percentage of work required by § 125.6 of this chapter.
- (2) The WOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.
  - (i) The work performed by the WOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.
  - (ii) The amount of work done by the partners will be aggregated and the work done by the WOSB partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by the non-WOSB partner, all work done by the non-WOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) **Certification of compliance.** Prior to the performance of any WOSB Program contract as a joint venture, the WOSB Program participant in the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

- (i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;
- (ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) **Capabilities, past performance, and experience.** When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an EDWOSB or WOSB contract 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 EDWOSB or WOSB small business concern 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.

(g) **Contract execution.** The procuring activity will execute a WOSB Program contract in the name of the joint venture entity or the WOSB, but in either case will identify the award as one to a WOSB Program joint venture or a WOSB Program mentor-protégé joint venture, as appropriate.

(h) **Submission of joint venture agreement.** The WOSB Program participant must provide a copy of the joint venture agreement to the contracting officer.

- (i) **Inspection of records.** The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.
- (j) **Performance of work reports.** The WOSB Program participant in the joint venture must describe how it is meeting or has met the applicable performance of work requirements for each WOSB Program contract it performs as a joint venture.
  - (1) The WOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each WOSB Program contract performed during the year.
  - (2) At the completion of every WOSB Program contract awarded to a joint venture, the WOSB partner to the joint venture must submit a report to the relevant contracting officer and to the 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 (c) of this section.
- (k) **Basis for suspension or debarment.** The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:
  - (1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;
  - (2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or
  - (3) Failure to submit the certification required by paragraph (e) or comply with paragraph (i) of this section.
- (l) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

[75 FR 62282, Oct. 7, 2010, as amended at 78 FR 61147, Oct. 2, 2013; 81 FR 34265, May 31, 2016; 81 FR 48593, July 25, 2016; 81 FR 94942, Dec. 27, 2016; 85 FR 66199, Oct. 16, 2020; 86 FR 2960, Jan. 14, 2021; 88 FR 26215, Apr. 27, 2023]

### **§ 127.507 Are there EDWOSB and WOSB contracting opportunities at or below the simplified acquisition threshold?**

If the requirement is valued at or below the simplified acquisition threshold, the contracting officer may set aside the requirement or award the requirement on a sole source basis as set forth in § 127.503.

[80 FR 55022, Sept. 14, 2015]

### **§ 127.508 May SBA appeal a contracting officer's decision not to make a requirement available for award as a WOSB Program contract?**

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award under the WOSB Program.

## § 127.509 What is the process for such an appeal?

- (a) **Notice of appeal.** When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for the WOSB Program, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five (5) business days after receiving notice of the contracting officer's decision.
- (b) **Suspension of action.** Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.
- (c) **Deadline for appeal.** Within fifteen (15) business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.
- (d) **Decision.** The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

## Subpart F—Protests

### § 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

- (a) **For sole source procurements.** SBA or the contracting officer may protest the proposed awardee's EDWOSB or WOSB status.
- (b) **For all other EDWOSB or WOSB requirements.** An interested party may protest the apparent successful offeror's EDWOSB or WOSB status.

[80 FR 55022, Sept. 14, 2015]

### § 127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?

An interested party seeking to protest both the size and the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement must file two separate protests, one size protest pursuant to part 121 of this chapter and one EDWOSB or WOSB status protest pursuant to this subpart. An interested party seeking to protest only the size of an apparent successful EDWOSB or WOSB offeror must file a size protest to the contracting officer pursuant to part 121 of this chapter.

### § 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

- (a) SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the protest presents sufficient credible evidence to show that the concern may not be owned and controlled by one or more women who are United States citizens and, if the protest is in connection with an EDWOSB contract, that the concern is not at least 51 percent owned and controlled by one or more women who are economically disadvantaged. SBA will also consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in § 127.300. In

addition, when sufficient credible evidence is presented, SBA will consider a protest challenging whether the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in § 125.1 of this chapter, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract.

- (b) For a protest filed against an EDWOSB or WOSB joint venture, the protest must state all specific grounds for why—
  - (1) The EDOWSB or WOSB partner to the joint venture did not meet the EDWOSB or WOSB eligibility requirements set forth in § 127.200; and/or
  - (2) The protested EDWOSB or WOSB joint venture did not meet the requirements set forth in § 127.506.

[75 FR 62282, Oct. 7, 2010, as amended at 84 FR 65251, Nov. 26, 2019; 84 FR 65665, Nov. 29, 2019]

### § 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

- (a) **Format.** Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible EDWOSB or WOSB, without setting forth specific facts or allegations, is insufficient.
- (b) **Filing.** Protestors may deliver their written protests in person, by facsimile, by express delivery service, e-mail, or by U.S. mail (received by the applicable date) to the following:
  - (1) To the contracting officer, if the protestor is an offeror for the specific contract; or
  - (2) To the D/GC, if the protest is initiated by the contracting officer or SBA. IF SBA initiates a protest, the D/GC will notify the contracting officer of such protest.
- (c) **Timeliness.**
  - (1) For negotiated acquisitions, a protest from an interested party must be received by the contracting officer prior to the close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror or notification of award. 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.
  - (2) For sealed bid acquisitions, a protest from an interested party must be received by close of business on the fifth business day after bid opening. Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.
  - (3) Any protest received after the time limit is untimely, unless it is from SBA or the contracting officer. A contracting officer or SBA may file an EDWOSB or WOSB protest at any time after bid opening or notification of intended awardee, whichever applies.

- (4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.
- (5) A timely filed protest applies to the procurement in question even if filed after award.
- (d) **Referral to SBA.** The contracting officer must forward to SBA any WOSB or EDWOSB status protest received, notwithstanding whether he or she believes it is premature, sufficiently specific, or timely. The contracting officer must send all WOSB and EDWOSB status protests, along with a referral letter and documents, directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, or by fax to (202) 205-6390, Attn: Women-Owned Small Business Status Protest.
  - (1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the contracting officer; when the protestor received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded.
  - (2) Where a protestor alleges that a WOSB/EDWOSB is unduly reliant on one or more subcontractors that are not WOSBs/EDWOSBs or a subcontractor that is not a WOSB/EDWOSB will perform primary and vital requirements of the contract, the D/GC or designee will refer the matter to the Government Contracting Area Office serving the geographic area in which the principal office of the SDVO SBC is located for a determination as to whether the ostensible subcontractor rule has been met.
  - (3) The D/GC or designee will decide the merits of EDWOSB or WOSB status protests.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27665, May 11, 2020; 85 FR 66199, Oct. 16, 2020; 88 FR 26215, Apr. 27, 2023]

## § 127.604 How will SBA process an EDWOSB or WOSB status protest?

- (a) **Notice of receipt of protest.** Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (f) of this section apply to the procurement in question.
- (b) **Dismissal of protest.** If SBA determines that the protest is premature, untimely, nonspecific, or is based on nonprotestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. Notwithstanding SBA's dismissal of the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part or submit a protest itself.
- (c) **Notice to protested concern.** If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

- (1) Notify the protested concern of the protest and request information and documents responding to the protest within five (5) business days from the date of the notice. These documents will include those that verify the eligibility of the concern, respond to the protest allegations, and copies of proposals or bids submitted in response to an EDWOSB or WOSB requirement. In addition, EDWOSBs will be required to submit signed copies of SBA Form 413, Personal Financial Statement, the three most recent personal income tax returns (including all schedules and W-2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506-T, Request for Tax Transcript Form. SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information and documents; and
  - (2) Forward a copy of the protest to the protested concern.
- (d) **Time period for determination.** SBA will determine the EDWOSB or WOSB status of the protested concern within fifteen (15) business days after receipt of the protest, or within any extension of that time that the contracting officer may grant SBA. If SBA does not issue its determination within the fifteen (15) business day period (or within any extension of that time the contracting officer has granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (f) of this section apply to the procurement in question. The determination must be included in the contract file and a written copy sent to the D/GC.
- (e) **Notification of determination.** SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination. If SBA sustains the protest, SBA will issue a decision explaining the basis of its determination and requiring that the concern remove its designation in SAM (or any successor system) as an EDWOSB or WOSB, as appropriate. Regardless of a decision not to sustain the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part.
- (f) **Effect of determination.** SBA's determination is effective immediately and is final unless overturned by SBA's Office of Hearings and Appeals (OHA) on appeal pursuant to § 127.605.
- (1) A contracting officer may award the contract to a protested concern after the D/GC either has determined that the protested concern is an eligible WOSB or EDWOSB or has dismissed all protests against it. If OHA subsequently overturns the D/GC's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.
  - (2) A contracting officer shall not award the contract to a protested concern that the D/GC has determined is not an EDWOSB or WOSB for the procurement in question.
    - (i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.
    - (ii) If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.
    - (iii) If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders.

- (3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency decision (the D/GC's decision if no appeal is filed or OHA's decision).
- (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.

[75 FR 62282, Oct. 7, 2010, as amended at 77 FR 1861, Jan. 12, 2012; 78 FR 61148, Oct. 2, 2013; 85 FR 27665, May 11, 2020]

### § 127.605 What are the procedures for appealing an EDWOSB or WOSB status protest decision?

The protested concern, the protestor, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

## Subpart G—Penalties

### § 127.700 What are the requirements for representing EDWOSB or WOSB status, and what are the penalties for misrepresentation?

- (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 EDWOSBs or WOSBs, 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 EDWOSB or WOSB willfully sought and received the award by misrepresentation.
- (b) **Deemed Certifications.** The following actions shall be deemed affirmative, willful and intentional certifications of EDWOSB or WOSB 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 EDWOSBs or WOSBs.
  - (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 EDWOSB or WOSB.
  - (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 an EDWOSB or WOSB.
- (c) **Signature Requirement.** Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the EDWOSB or WOSB 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 EDWOSB or WOSB status claimed by the concern.
- (d) **Limitation of Liability.** Paragraphs (a)-(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 EDWOSB or WOSB status 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' EDWOSB or WOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing EDWOSB or WOSB status representations or certifications, 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 an EDWOSB or WOSB 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 status as an EDWOSB or WOSB 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 EDWOSB or WOSB 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.

[78 FR 38820, June 28, 2013, as amended at 81 FR 31492, May 19, 2016]

**§ 127.701 What must a concern do in order to be identified as an EDWOSB or WOSB in any Federal procurement databases?**

- (a) In order to be identified as an EDWOSB or WOSB in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its EDWOSB or WOSB status in connection with specific eligibility requirements at least annually.
- (b) If a firm identified as an EDWOSB or WOSB in SAM fails to certify its status within one year of a status certification, the firm will not be listed as an EDWOSB or WOSB in SAM, unless and until the firm recertifies its EDWOSB or WOSB status.

[78 FR 38821, June 28, 2013]



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This content is from the eCFR and is authoritative but unofficial.

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## **Title 13 – Business Credit and Assistance**

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**Subpart F** Penalties and Retention of Records

**§ 128.600** What are the requirements for representing VOSB or SDVOSB status, and what are the penalties for misrepresentation?

**Subpart G** Surplus Personal Property for Veteran-Owned Small Business Programs

**§ 128.700** How does a VOSB obtain Federal surplus personal property?

## **PART 128—VETERAN SMALL BUSINESS CERTIFICATION PROGRAM**

**Authority:** 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f-1.

**Source:** 87 FR 73412, Nov. 29, 2022, unless otherwise noted.

### **Subpart A—Provisions of General Applicability**

#### **§ 128.100 What is the purpose of this part?**

Section 8127 of Title 38 within the U.S. Code (38 U.S.C. 8127) authorizes certain procurement mechanisms to provide Veteran-Owned Small Business Concerns (VOSB) and Service-Disabled Veteran-Owned Small Business Concerns (SDVOSB) with contracting assistance opportunities at the Department of Veterans Affairs (VA). Section 36 of the Small Business Act (15 U.S.C. 657f) authorizes certain procurement mechanisms to provide SDVOSBs with contracting assistance opportunities across the Federal Government. In addition, sections 36 and 36A of the Small Business Act (15 U.S.C. 657f, 657f-1) authorize the Small Business Administration (SBA) to certify the status of VOSB and SDVOSBs. This part implements these mechanisms and ensures that the program created, referred to as the Veteran Small Business Certification Program, is substantially related to this important congressional goal in accordance with applicable law.

#### **§ 128.101 What type of assistance is available under this part?**

Contracting officers are authorized to restrict competition or award sole source contracts or orders to eligible SDVOSBs. In addition, 48 CFR chapter 8 authorizes VA contracting officers to restrict competition or award sole source contracts or orders to eligible VOSBs and SDVOSBs.

#### **§ 128.102 What definitions are important in the Veteran Small Business Certification Program?**

**Applicant** means a firm applying for certification in the Veteran Small Business Certification Program.

**Certification database** means the database of certified VOSBs and SDVOSBs eligible to participate in the Veteran Small Business Certification Program.

**Contracting officer** has the meaning given such term in section 2101(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 2101(1)).

**Day-to-day operations** means the marketing, production, sales, and administrative functions of the firm.

**Employee Stock Ownership Plan (ESOP)** has the meaning given such term in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

**Negative control** includes, but is not limited to, instances where a non-qualifying-veteran has the ability, under the concern's governing documents (e.g., charter, by-laws, operating agreement, or shareholder's agreement), to prevent a quorum or otherwise block action by the board of directors or qualifying veteran owner(s).

**Non-veteran** means any individual who does not claim veteran status, or upon whose status an Applicant or Participant does not rely in qualifying for certification.

**Participant** means a small business that has been certified by SBA as eligible to participate in the Veteran Small Business Certification Program or verified by VA's Center for Verification and Evaluation prior to January 1, 2023, and appearing in the certification database.

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

(1) A permanent caregiver may be appointed, in a number of ways, including:

(i) By a court of competent jurisdiction;

(ii) By the Department of Veterans Affairs, National Caregiver Support Program, as the Primary Family Caregiver of a Veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by law and the Secretary and may be revoked if the eligibility criteria do not continue to be met); or

(iii) By a legal designation.

(2) Any appointment of a permanent caregiver must in all cases be accompanied by a written determination from the Department of Veterans Affairs that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension. The appointment must also delineate why the permanent caregiver is given the appointment, must include the consent of the veteran to the appointment and how the appointment would contribute to managing the veteran's well-being.

**Qualifying veteran** means a veteran upon which a VOSB's eligibility is based, or in the case of an SDVOSB, a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) (as those terms are defined in this part) upon which a SDVOSB's eligibility is based.

*Service-connected* has the meaning given that term in 38 U.S.C. 101(16).

*Service-disabled veteran* means a veteran who is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran.

*Service-Disabled Veteran-Owned Small Business Concern (SDVOSB)* means a small business concern that meets the requirements described in § 128.200(b).

*Service-disabled veteran with a permanent and severe disability* means a veteran with a service-connected disability that has been determined by the Department of Veterans Affairs, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

*Small business concern (SBC)* means, a concern that, with its affiliates, meets the size standard corresponding to any North American Industry Classification System (NAICS) code listed in its SAM profile, pursuant to part 121 of this chapter. At the time of contract offer, a VOSB or SDVOSB must be small within the size standard corresponding to the NAICS code assigned to the contract.

*Surviving spouse* has the meaning given the term in 38 U.S.C. 101(3).

*System for Award Management (SAM)* (or any successor system) means a federal system available at [www.sam.gov](http://www.sam.gov) that consolidates various federal procurement systems (e.g., Central Contractor Registration, Federal Agency Registration, Online Representations and Certifications Application, Excluded Parties List System) and the Catalog of Federal Domestic Assistance into one system.

*VA* means the U.S. Department of Veterans Affairs.

*Veteran* has the meaning given such term in 38 U.S.C. 101(2). A Reservist or member of the National Guard called to Federal active duty or disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualifies as a veteran.

*Veterans Affairs Acquisition Regulation (VAAR)* is the set of rules, located at 48 CFR chapter 8, that specifically govern requirements exclusive to VA prime and subcontracting actions.

*Veteran-Owned Small Business Concern (VOSB)* means a small business concern that meets the requirements described in § 128.200(a).

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 42592, July 3, 2023]

## Subpart B—Eligibility Requirements for the Veteran Small Business Certification Program

### § 128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB?

Link to an amendment published at 89 FR 48269, June 6, 2024.

(a) **Qualification as a VOSB.** To qualify as a VOSB, a business entity must be:

- (1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;
- (2) Not less than 51 percent owned and controlled by one or more veterans.

(b) **Qualification as an SDVOSB.** To qualify as an SDVOSB, a business entity must be:

- (1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;
  - (2) Not less than 51 percent owned and controlled by one or more service-disabled veterans or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran.
- (c) **VOSB and SDVOSB certification requirement.**
- (1) A concern must be certified as a VOSB or SDVOSB pursuant to § 128.300 in order to be awarded a VOSB or SDVOSB set-aside or sole source contract. Any small business concern that submits a complete certification application to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.
  - (2) Other small business concerns that meet the eligibility requirements of this part but do not seek SDVOSB set-aside or sole source contracts may continue to self-certify their SDVOSB status, receive prime contract or subcontract awards that are not SDVOSB set-aside or sole source contracts, and count toward an agency's goal for SDVOSB awards.

## § 128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB?

- (a) **Suspension and debarment.**
- (1) In order to be eligible for VOSB or SDVOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in SAM.
  - (2) An Applicant or Participant must immediately notify SBA of any active exclusion.
  - (3) If, after certifying a Participant, SBA discovers that a firm has been suspended from Federal Government contracting, SBA will propose the firm for decertification pursuant to § 128.310.
  - (4) If, after certifying a Participant, SBA discovers that a firm has been debarred from federal government contracting, SBA will remove the Participant from the certification database immediately, notwithstanding the provisions of § 128.310.
- (b) **Financial obligations.** An Applicant is not eligible for certification as a VOSB or SDVOSB if the concern, or any of the principals, fail to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans, or other government-assisted financing. An Applicant may become eligible for certification as a VOSB or SDVOSB if the firm or the affected principals can demonstrate that the financial obligations owed have been settled, discharged, or forgiven by the Federal Government. If, after certifying a Participant, SBA discovers that the Participant or any principals have failed to pay significant financial obligations owed to the Federal Government, SBA will initiate proceedings to decertify the Participant and remove it from the certification database pursuant to § 128.310.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

## § 128.202 Who does SBA consider to own a VOSB or SDVOSB?

To qualify as a VOSB, one or more veterans must unconditionally and directly own at least 51 percent of the concern. To qualify as a SDVOSB, one or more service-disabled veterans must unconditionally and directly own at least 51 percent of the concern.

- (a) **Direct ownership.** To be considered direct ownership, the qualifying veteran must own 51 percent of the concern directly, and not through another business entity or trust (including an ESOP). However, ownership by a trust, such as a living trust, may be considered direct ownership where the trust is revocable, and qualifying veterans are the grantors, trustees, and the current beneficiaries of the trust.
- (b) **Unconditional ownership.** To be considered unconditional, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).
  - (1) The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.
  - (2) In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by qualifying veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any ownership interests which are held by investment companies licensed under 15 U.S.C. 681 et. seq.
  - (3) A right of first refusal granting the non-qualifying-veteran the contractual right to purchase the ownership interests of the qualifying veteran, does not affect the unconditional nature of ownership, if the terms follow normal commercial practices. If those rights are exercised by the non-qualifying-veteran, a Participant must notify SBA in accordance with § 128.307. If the exercise of those rights results in the qualifying veteran(s) owning less than 51% of the concern, SBA will initiate decertification pursuant to § 128.310.
- (c) **Ownership of a partnership.** In the case of a concern that is a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more qualifying veterans. The ownership must be reflected in the concern's partnership agreement.
- (d) **Ownership of a limited liability company.** In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more qualifying veterans.
- (e) **Ownership of a corporation.** In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more qualifying veterans. In the case of a publicly-owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more qualifying veterans.
- (f) **Change of ownership.** A Participant may change its ownership or business structure so long as one or more qualifying veterans own and control it after the change. A Participant must notify SBA of a change of ownership in accordance with § 128.307 and attest to its continued eligibility.
- (g) **Dividends and distributions.** One or more qualifying veterans must be entitled to receive:

- (1) At least 51 percent of the annual distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern, and a qualifying veteran's ability to share in the profits of the concern must be commensurate with the extent of his/her ownership interest in that concern.
  - (2) 100 percent of the value of each share of stock owned by them in the event that the stock or member interest is sold;
  - (3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock or member interest owned in the event of dissolution of the corporation, partnership, or limited liability company; and
- (h) **Community property.** Ownership will be determined without regard to community property laws.
- (i) **Surviving spouse.**
- (1) A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period specified in paragraph (i)(2) of this section if:
    - (i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;
    - (ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)); and
    - (iii) For a Participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the certification database.
  - (2) The time period described in paragraph (i)(1)(iii) of this section is the time period beginning on the date of the veteran's death and ending on the earlier of—
    - (i) The date on which the surviving spouse remarries;
    - (ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;
    - (iii) In the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, 10 years after the date of the death of the veteran; or
    - (iv) In the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability, 3 years after the date of the death of the veteran.

### § 128.203 Who does SBA consider to control a VOSB or SDVOSB?

- (a) **General.** To be an eligible VOSB, the management and daily business operations of the concern must be controlled by one or more veterans. To be an eligible SDVOSB, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more qualifying veterans means that one or more qualifying veterans controls both the long-term decision-making and the day-to-day operations of the Applicant or Participant.

- (b) **Managerial position and experience.** A qualifying veteran must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to control the concern. The qualifying veteran need not have the technical expertise or possess the required license to be found to control of the concern if the qualifying veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.
- (c) **Control over a partnership.** In the case of a partnership, one or more qualifying veterans must serve as general partners, with control over all partnership decisions.
- (d) **Control over a limited liability company.** In the case of a limited liability company, one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.
- (e) **Control over a corporation.** One or more qualifying veterans must control the Board of Directors of the concern.
  - (1) SBA will deem qualifying veterans to control the Board of Directors where:
    - (i) One qualifying veteran owns 100% of all voting stock and is on the Board of Directors;
    - (ii) One qualifying veteran owns at least 51% of all voting stock, the qualifying veteran is on the Board of Directors, and no supermajority voting requirements exist for shareholders to approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the qualifying veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements; or
    - (iii) Two or more qualifying veterans together own at least 51% of all voting stock, each such qualifying veteran is on the Board of Directors, no supermajority voting requirements exist, and the qualifying veteran shareholders can demonstrate that they have made enforceable arrangements to permit one qualifying veteran to vote the stock of all qualifying veterans as a block without a shareholder meeting. Where the concern has supermajority voting requirements, the qualifying veteran shareholders must own at least that percentage of voting stock needed to overcome any such supermajority ownership requirements.
  - (2) Where a concern does not meet the requirements set forth in paragraph (e)(1) of this section, the qualifying veteran(s) must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is a qualifying veteran and one is not, the qualifying veteran vote must be weighted—worth more than one vote—in order for the concern to be eligible). Where a concern seeks to comply with this paragraph (e)(2):
    - (i) Provisions for the establishment of a quorum cannot permit non-qualifying-veteran Directors to control the Board of Directors, directly or indirectly; and
    - (ii) Any Executive Committee of Directors must be controlled by qualifying veteran Directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.



- (iii) Non-qualifying-veterans may be found to control or have the power to control in circumstances where non-qualifying-veterans control the Board of Directors of the Applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-qualifying-veterans to prevent a quorum or block actions proposed by the qualifying veterans.
- (3) Non-voting, advisory, or honorary Directors may be appointed without affecting qualifying veterans' control of the Board of Directors.
- (4) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.
- (f) **Supermajority requirements.** One or more qualifying veteran(s) must meet all supermajority voting requirements regarding the management and daily business operations of the concern, regardless of the legal structure of the firm. An Applicant must inform the SBA, when applicable, of any supermajority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being certified, a Participant must inform the SBA of changes regarding supermajority voting requirements.
- (g) **Unexercised rights.** A qualifying veteran's unexercised right to cause a change in the control or management of the concern does not in itself constitute control, regardless of how quickly or easily the right could be exercised.
- (h) **Limitations on control by non-qualifying-veterans.**
  - (1) A non-qualifying-veteran must not:
    - (i) Exercise actual control or have the power to control the concern;
    - (ii) Have business relationships that cause such dependence that the qualifying veteran cannot exercise independent business judgment without great economic risk;
    - (iii) Control the Applicant or Participant through loan arrangements (which does not include providing a loan guaranty on commercially reasonable terms);
    - (iv) Provide critical financial or bonding support or a critical license to the Applicant or Participant, which directly or indirectly allows the non-qualifying-veteran significantly to influence business decisions of the qualifying veteran.
  - (2) A non-qualifying-veteran may be involved in the management of the concern, and may be a stockholder, partner, limited liability member, officer, and/or director of the concern. However, a non-qualifying-veteran generally may not:
    - (i) Be a former employer, or a principal of a former employer, of any qualifying veteran, unless the concern demonstrates that the relationship between the former employer or principal and the qualifying veteran does not give the former employer actual control or the potential to control the Applicant or Participant and such relationship is in the best interests of the concern; or
    - (ii) Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying veteran who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern.

- (i) **Limitation on outside employment.** The qualifying veteran who holds the highest officer position of the business concern may not engage in outside employment that prevent the qualifying veteran from devoting the time and attention to the concern necessary to control its management and daily business operations. A qualifying veteran generally must devote full-time during the business's normal hours of operations, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the concern. Where a qualifying veteran claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, SBA will assume that the qualifying veteran does not control the concern, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business.
- (j) **Exception for extraordinary circumstances.** SBA will not find that a lack of control exists where a qualifying veteran does not have the unilateral power and authority to make decisions regarding the following extraordinary circumstances:
  - (1) Adding a new equity stakeholder;
  - (2) Dissolution of the company;
  - (3) Sale of the company or all assets of the company;
  - (4) The merger of the company; and
  - (5) Company declaring bankruptcy.
- (k) **Exception for active duty.** Notwithstanding the requirements of this section, where a qualifying veteran is a reserve component member in the United States military who has been called to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the qualifying veteran during the period of active duty. The concern must keep records evidencing the qualifying veteran's active duty status and the written designation of control and provide those documents to SBA.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

## § 128.204 What size standards apply to VOSBs and SDVOSBs?

- (a) **Time of certification.** At the time of certification, a VOSB or SDVOSB must be a small business under the size standard corresponding to any NAICS code listed in its SAM profile. If SBA is unable to verify that an Applicant is small, SBA may deny the concern's application as a certified VOSB or SDVOSB, or SBA may request a formal size determination pursuant to part 121 of this chapter.
- (b) **Time of contract offer.** In connection with a VOSB or SDVOSB contract, a VOSB or SDVOSB must be small under the size standard corresponding to the NAICS code assigned to the contract at the time it submits its initial offer or response which includes price. To be eligible for a VOSB or SDVOSB multiple award contract, a VOSB or SDVOSB must be small pursuant to the requirements of § 121.404(a)(1) of this chapter. If the contracting officer is unable to verify that the VOSB or SDVOSB is small, the contracting officer should submit a size protest to SBA in accordance with part 121 of this chapter.

## Subpart C—Certification of VOSB or SDVOSB Status

### § 128.300 How is a concern certified as a VOSB or SDVOSB?

A concern must apply to SBA for certification as a VOSB or SDVOSB. The concern must submit evidence that it is a small business owned and controlled by one or more qualifying veterans. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. If SBA determines that a concern meets the eligibility requirements of a VOSB or SDVOSB, it will notify the concern and designate the concern as a certified VOSB or SDVOSB in the certification database.

### § 128.301 Where must an application be filed?

An application for certification as a VOSB or SDVOSB must be electronically filed according to the instructions on SBA's website at [www.sba.gov](http://www.sba.gov). Upon receipt of the Applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information.

### § 128.302 How does SBA process applications for certification?

- (a) SBA's Director of Government Contracting (D/GC) (or designee) is authorized to approve or deny applications for certification as a VOSB or SDVOSB.
- (b) SBA, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. SBA will take into account any clarifications made by an Applicant in response to such a request.
- (c) SBA, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial. If an Applicant does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the Applicant failed to provide would demonstrate ineligibility and deny certification on this basis.
- (d) An Applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances. The Applicant bears the burden of proof to demonstrate its eligibility as a VOSB or SDVOSB.
  - (1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.
  - (2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.
- (e) The Applicant must inform SBA of any changed circumstances that occur during its application review and that could affect its eligibility for the program (e.g., change in size status, ownership, or control, filing of bankruptcy, or calling to active duty) and may withdraw its application at that time. Changed circumstances will be considered by SBA in determining an Applicant's eligibility and may constitute grounds for denial of the application. The D/GC may propose decertification for any VOSB or SDVOSB that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

- (f) The decision of the D/GC to approve or deny an application will be in writing. A decision to deny certification status will state the specific reason(s) for denial and will inform the Applicant of any appeal rights.
  - (1) If SBA denies a business concern's application for VOSB or SDVOSB certification, within two days of SBA's denial becoming a final agency decision, the applicant concern must update its VOSB or SDVOSB self-certification status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible VOSB or SDVOSB.
    - (i) If an applicant appeals the D/GC's denial decision to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter and OHA affirms the ineligibility determination, the two-day requirement applies immediately upon OHA's final decision.
    - (ii) If an applicant does not appeal the D/GC's denial decision to OHA, the two-day requirement begins 10 business days after receipt of the D/GC's denial.
  - (2) If a business concern fails to update its VOSB or SDVOSB self-certification status in the System for Award Management (or any successor system) after a final SBA decision, SBA will make such update within two days of the business's failure to do so.
- (g) If the D/GC approves the application, the period of program eligibility will be specified in the concern's certification letter.
- (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. It is the responsibility of the Applicant to ensure all contact information is current in the certification database.

*[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42592, July 3, 2023]*

### **§ 128.303 What must a concern submit to apply for VOSB or SDVOSB certification?**

- (a) To be certified by SBA as a VOSB or SDVOSB, a concern must provide documents and information demonstrating that it is owned and controlled by one or more qualifying veterans and qualifies as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile. A list of the minimum required documents that must be submitted can be found on SBA's website at [www.sba.gov](http://www.sba.gov) on or before January 1, 2023.
- (b) Where an Applicant small business concern is a participant in the 8(a) Business Development (BD) Program and the individual upon whom 8(a) BD Program eligibility is based is a qualifying veteran, the Applicant may use documentation of its most recent annual review, or documentation of its 8(a) BD Program acceptance if it has not yet had an annual review, in support of its application for certification as a VOSB or SDVOSB. An Applicant must certify that there have been no material changes in its ownership or control since its 8(a) BD Program certification or annual review and demonstrate that the individual(s) who own and control it are qualifying veterans.
- (c) A small business concern that is certified by the WOSB/EDWOSB Program and the individual(s) upon whom WOSB/EDWOSB Program eligibility is based is one or more qualifying veterans may use documentation of its most recent annual recertification, or documentation of its acceptance in support of its application for certification. An Applicant must certify that there are no material changes in its ownership or control since its WOSB certification or recertification and demonstrate that the individuals who own and control it are qualifying veterans.

- (d) If a concern was decertified or previously denied certification from the Veteran Small Business Certification Program within the past 3 years, 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 deny the concern.
- (e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 128.307, 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 deny the concern.
- (f) Participants must retain documentation demonstrating satisfaction of all qualifying requirements during the entire period of participation.

### **§ 128.304 Can an Applicant appeal SBA's initial decision to deny an application?**

An Applicant may appeal SBA's decision to deny an application for certification as a VOSB or SDVOSB by filing an appeal with the SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran is not subject to appeal to OHA.

### **§ 128.305 Can an Applicant or Participant reapply for certification after a denied certification or decertification?**

An Applicant that SBA denied certification or a Participant that SBA has decertified may submit an application for certification no sooner than ninety (90) calendar days from the date of final agency decision (*i.e.*, the SBA decision if no appeal is filed or the decision of SBA's OHA where an appeal is filed pursuant to § 128.304) if it believes that it has overcome all of the reasons for denial or decertification and is currently eligible.

### **§ 128.306 How does a concern maintain its VOSB or SDVOSB certification?**

- (a) Any Participant seeking to remain certified must recertify its eligibility every 3 years. There is no limitation on the number of times a business may recertify. Participants may recertify within 120 calendar days prior to the termination of their eligibility period. If the concern fails to recertify, SBA may decertify the firm at the end of their eligibility period.
- (b) The Participant must maintain its eligibility during its participation in the program and must inform SBA of any changes that may affect its eligibility within 30 calendar days in accordance with § 128.307.
- (c) The Participant must respond to any program examination initiated by SBA to remain a certified VOSB or SDVOSB.
- (d) At the discretion of the Administrator (or designee), a Participant's eligibility period may be extended by a period of up to one year.

### **§ 128.307 What are a Participant's ongoing obligations to SBA?**

Once certified, a VOSB or SDVOSB must notify SBA of any material changes that could affect its eligibility, within 30 calendar days of any such change, and attest to its continued eligibility. Material changes include, but are not limited to, a change in the firm's ownership, business structure, or control, filing of bankruptcy, or change in active duty status. The method for notifying SBA can be found on SBA's web page. A concern's failure to notify SBA of a material change may result in decertification, pursuant to § 128.310. In addition, SBA may seek the imposition of penalties under § 128.600.

## § 128.308 What is a program examination and what will SBA examine?

- (a) **General.** A program examination is an investigation by SBA officials, which verifies the accuracy of any statement or information provided by a certified Participant. SBA may verify that the Participant currently meets the eligibility requirements of this part and that it met such requirements at the time of its application. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a Participant did not meet the eligibility requirements in this part when it was certified or no longer meets all of those requirements.
- (b) **Scope of examination.** SBA may review any information related to the concern's eligibility including, but not limited to, documentation related to the firm's legal structure, ownership, and control. Examiners may review any information previously provided to SBA and any additional information requested by SBA at the time of program examination. SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the concern failed to provide would demonstrate ineligibility, and decertify on this basis pursuant to § 128.310.
- (c) **Outcome of examination.** Upon its completion of the examination, SBA will issue a written decision.
  - (1) If SBA finds that the Participant does not qualify as a VOSB or SDVOSB, the procedures at § 128.310 will apply, except as provided in § 128.201.
  - (2) If SBA finds that the Participant continues to qualify as a VOSB or SDVOSB, the original eligibility period remains in effect.

## § 128.309 What are the ways a Participant may exit the Veteran Small Business Certification Program?

- (a) **Voluntary withdrawal.** A Participant may voluntarily withdraw from the Veteran Small Business Certification Program at any time. Once a concern notifies SBA that it seeks to voluntarily withdraw from the program, SBA will decertify the concern and remove its designation as a certified VOSB or SDVOSB in the certification database. The concern may reapply for SDVOSB or VOSB certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.
- (b) **Decertification by SBA.** SBA may decertify a Participant and remove its designation as a VOSB or SDVOSB in the certification database in accordance with § 128.310. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.
- (c) **Decertification pursuant to a protest.** Any certified VOSB or SDVOSB that is found to be ineligible through a VOSB or SDVOSB status protest decision will be immediately removed from the certification database. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.
- (d) **Decertification due to suspension or debarment.** SBA may decertify a Participant immediately upon notice that the Participant or any of its owners has an active exclusion in SAM, pursuant to § 128.201.

## § 128.310 What are the procedures for decertification?

- (a) **Proposed decertification.** If SBA has information indicating that a Participant may not meet the eligibility requirements of this part, SBA may propose decertification of the concern. The notice of proposed decertification will notify the concern that it has 30 calendar days from the date it receives the letter to

submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at an email address in the Participant's certification database profile.

- (b) **Response to proposed decertification.** The Participant must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the Participant must rebut each of the reasons set forth by SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include documents showing that the concern is eligible as of the date specified in the notice. If a Participant fails to cooperate with SBA or fails to provide the information requested, SBA may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.
- (c) **Decision.** SBA will review the response and determine whether the Participant remains eligible. If SBA determines that the Participant is not eligible, the D/GC will issue a notice of decertification. The notice will set forth the specific facts and reasons for the decision, notify the concern of the right to appeal, and will advise the concern that it may re-apply after it has met all eligibility criteria in this part and completed the waiting period as set forth in § 128.305(a). If SBA finds that the concern is eligible, the Participant will continue to be designated as a VOSB or SDVOSB in the certification database.
- (d) **Decertification due to submission of false information.** If SBA discovers that a VOSB/SDVOSB or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.
- (e) **Effect of decertification.** On the effective date of a concern's decertification, SBA will remove its designation as a certified VOSB or SDVOSB in the certification database. However, such concern is obligated to perform previously awarded contracts to the completion of their existing term of performance.
- (f) **Appeals.** A concern that has been decertified pursuant to this section may file an appeal with OHA in accordance with part 134 of this chapter. The decision on the appeal shall be final. If no appeal is filed, the D/GC's decision is the final agency decision.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

## Subpart D—Federal Contract Assistance

### § 128.400 What are VOSB and SDVOSB contracts?

- (a) VOSB contracts are exclusively VA procurements, including prime contracts and subcontracts for which the VA is the procuring agency. For VA procurements, the VAAR (48 CFR chapter 8) specifically governs requirements exclusive to VA prime and subcontracting actions. The VAAR supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.
- (b) SDVOSB contracts, including Multiple Award Contracts (see § 125.1 of this chapter), are contracts available to an SDVOSB through any of the following procurement methods:
  - (1) Sole source awards to an SDVOSB;
  - (2) Set-aside awards, including partial set-asides, based on competition restricted to SDVOSBs;
  - (3) Awards based on a reserve for SDVOSBs in a solicitation for a Multiple Award Contract (see § 125.1 of this chapter); or

- (4) Orders set aside for SDVOSBs against a Multiple Award Contract, which had been awarded in full and open competition or as a small business set-aside.

### § 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

- (a) **Certification requirement.** Only certified VOSBs and SDVOSBs are eligible to submit an offer on a specific VOSB or SDVOSB requirement. The concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB at the time of initial offer or response which includes price. Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit to SBA a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.
- (b) **Joint ventures.** A joint venture may submit an offer for a VOSB or SDVOSB contract if the joint venture meets the requirements set forth in § 128.402.
- (c) **Non-manufacturers.** A certified VOSB or SDVOSB that is a non-manufacturer may submit an offer on a VOSB or SDVOSB contract for supplies if it meets the requirements of the non-manufacturer rule set forth at § 121.406(b)(1) of this chapter.
- (d) **Multiple Award Contracts –**
  - (1) **VOSB or SDVOSB 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 a VOSB or SDVOSB's eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as a certified VOSB or SDVOSB as part of its initial offer or response 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 VOSB or SDVOSB.** For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement or a contracting officer sets aside an order exclusively for VOSBs or SDVOSBs. 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 VOSBs or SDVOSBs, a concern must be a certified VOSB or SDVOSB at the time it submits its initial offer or response 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 certified VOSB or SDVOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the certified VOSB or SDVOSB pool, concerns need not recertify their status as VOSBs or SDVOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).



- (B) **VOSB or SDVOSB set-aside Multiple Award Contracts.** For a Multiple Award Contract that is specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement.
- (ii) SBA will determine VOSB or SDVOSB status at the time of initial offer or response which includes price, for an order or an Agreement issued against a Multiple Award Contract, if the contracting officer requests a new VOSB or SDVOSB certification for the order or Agreement.
- (iii) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.
- (2) **Total set-aside contracts.** The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (see § 125.6 of this chapter) and the nonmanufacturer rule (see § 121.406(b) of this chapter), if applicable, in the performance of a contract totally set aside for VOSBs or SDVOSBs. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.
- (3) **Partial set-aside contracts.** For orders awarded under a partial set-aside contract, the certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (see § 125.6 of this chapter) and the nonmanufacturer rule (see § 121.406(b) of this chapter), if applicable, during each performance period of the contract (e.g., during the base term and then during each option period thereafter). For orders awarded under the non-set-aside portion, the VOSB or SDVOSB need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.
- (4) **Orders.** The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (see § 125.6 of this chapter) and the nonmanufacturer rule (see § 121.406(b) of this chapter), if applicable, in the performance of each individual order that has been set aside for VOSBs or SDVOSBs.
- (5) **Reserves.** The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (see § 125.6 of this chapter) and the nonmanufacturer rule (see § 121.406(b) of this chapter), if applicable, in the performance of an order that is set aside for VOSBs or SDVOSBs. However, the VOSB or SDVOSB will not have to comply with the limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed among VOSBs or SDVOSBs, and other-than-small business concerns.
- (e) **Recertification.**
- (1) A Participant that qualifies as a VOSB or SDVOSB at the time of initial offer response which includes price, including a Multiple Award Contract, is generally considered to be a VOSB or SDVOSB throughout the life of that contract. This means that if a VOSB or SDVOSB is certified at the time of initial offer for a Multiple Award Contract, then it will be considered a VOSB or SDVOSB for each order issued against the contract, unless a contracting officer requests a new VOSB or SDVOSB eligibility review in connection with a specific order. Where a concern is later decertified from the

Veteran-Owned Small Business Contracting Program, the procuring agency may exercise options and still count the award as an award to a VOSB or SDVOSB. For a Multiple Award Contract, a concern that has been decertified from the Veteran-Owned Small Business Contracting Program may still be issued orders as a VOSB or SDVOSB unless the contracting officer requests recertification of VOSB or SDVOSB status in connection with the order. However, the following exceptions apply to this paragraph (e)(1):

- (i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must recertify its status as a VOSB or SDVOSB to the procuring agency or inform the procuring agency that it does not qualify as a VOSB or SDVOSB within 30 calendar days of the novation approval. If the concern is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals.
  - (ii) Where a 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 VOSB or SDVOSB status to the procuring agency or inform the procuring agency that it no longer qualifies as a VOSB or SDVOSB. If the contractor is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.
  - (iii) Where there has been a VOSB or SDVOSB status protest on the solicitation or contract, part 134 of this chapter describes the effect of the status determination on the contract award.
- (2) For the purposes of VOSB or SDVOSB 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 VOSB or SDVOSB status no more than 120 calendar days prior to the end of the fifth year of the contract, and no more than 120 calendar days prior to exercising any option. If the business is unable to recertify its status as a certified VOSB or SDVOSB, 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 VOSB or SDVOSB goals.
- (i) A business concern that did not certify itself as a VOSB or SDVOSB, either initially or prior to an option being exercised, may recertify itself as a VOSB or SDVOSB for a subsequent option period if it meets the eligibility requirements in this part at that time.
  - (ii) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting (see § 125.6 of this chapter), nonmanufacturer (see § 121.406(b) of this chapter), and subcontracting plan requirements (see § 125.3(a) of this chapter) in effect at the time of contract award remain in effect throughout the life of the contract. However, a concern that initially self-certified as an SDVOSB for the award of an SDVOSB contract may recertify as an SDVOSB only if it is currently a certified SDVOSB.
  - (iii) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its response to the solicitation for the order.
  - (iv) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

- (f) **Limitations on subcontracting.** A business concern seeking a VOSB or SDVOSB contract must meet the applicable limitations on subcontracting requirements set forth in § 125.6 of this chapter.
- (g) **Ostensible subcontractor.** Where a subcontractor that is not a certified VOSB or SDVOSB will perform the primary and vital requirements of a VOSB or SDVOSB contract, or where a VOSB or SDVOSB prime contractor is unduly reliant on one or more small businesses that are not certified VOSBs or SDVOSBs to perform the VOSB or SDVOSB contract, the prime contractor is not eligible for award of that VOSB or SDVOSB contract.
  - (1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a VOSB or SDVOSB status protest, as described in § 134.1003(c) of this chapter. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(2) of this chapter.
  - (2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.
  - (3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.
- (h) **Two-step procurements.** For purposes of architect-engineering, design-build or two-step sealed bidding procurements, a concern must be certified as a VOSB or SDVOSB as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42593, July 3, 2023]

## § 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

- (a) **General.** A certified VOSB or SDVOSB may enter into a joint venture agreement with one or more other small business concerns, or with an approved mentor authorized by § 125.9 of this chapter, for the purpose of submitting an offer for a VOSB or SDVOSB contract. The joint venture itself need not be a certified VOSB or SDVOSB. Where this section references the requirements of a VOSB or SDVOSB joint venture partner, the VOSB or SDVOSB status of that joint venture partner must correspond with the type of award (e.g., to be eligible for a SDVOSB contract, a SDVOSB joint venture partner must be the managing venturer of the joint venture).
  - (1) The VOSB or SDVOSB joint venture partner must be certified in accordance with this part;
  - (2) The joint venture agreement must comply with the requirements set forth in this part; and
  - (3) A VOSB or SDVOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for VOSBs or SDVOSBs.
- (b) **Size.**

- (1) A joint venture of at least one certified VOSB or SDVOSB and one or more other business concerns may submit an offer as a small business for a competitive VOSB or SDVOSB procurement or sale, or be awarded a sole source VOSB or SDVOSB contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.
  - (2) A joint venture between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor (see § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the VOSB or SDVOSB procurement or sale.
- (c) **Contents of joint venture agreement.** Every joint venture agreement to perform a VOSB or SDVOSB contract, including those between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor authorized by § 125.9 of this chapter, must contain a provision:
- (1) Setting forth the purpose of the joint venture;
  - (2) Designating a certified VOSB or SDVOSB as the managing venturer of the joint venture and designating a named employee of the certified VOSB or SDVOSB 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 VOSB or SDVOSB 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 VOSB or SDVOSB 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 VOSB or SDVOSB for purposes of performance under the joint venture; and
    - (iii) Although the joint venture managers responsible for orders issued under an indefinite delivery/ indefinite quantity contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;
  - (3) Stating that with respect to a separate legal entity joint venture, the certified VOSB or SDVOSB must own at least 51% of the joint venture entity;
  - (4) Stating that the certified VOSB or SDVOSB must receive profits from the joint venture commensurate with the work performed by the certified VOSB or SDVOSB, or a percentage agreed to by the parties to the joint venture whereby the certified VOSB or SDVOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified VOSB or SDVOSB;
  - (5) Providing for the establishment and administration of a special bank account in the name of the joint venture. 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. All payments due the joint venture for performance on a VOSB or SDVOSB contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

- (6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;
- (7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;
- (8) Obligating all parties to the joint venture to ensure performance of the VOSB or SDVOSB contract and to complete performance despite the withdrawal of any member;
- (9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified VOSB or SDVOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director (or designee) upon written request;
- (10) Requiring that the final original records be retained by the certified VOSB or SDVOSB managing venturer upon completion of the VOSB or SDVOSB contract performed by the joint venture;
- (11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
- (12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 calendar days after completion of the contract.

(d) ***Limitations on subcontracting.***

- (1) For any VOSB or SDVOSB contract, including those between a protégé and a mentor authorized by § 125.9 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter.
- (2) The certified VOSB or SDVOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture, except that in the context of a joint venture between a protégé VOSB or SDVOSB and its SBA-approved mentor the VOSB or SDVOSB protégé must individually perform at least 40% of the work performed by the joint venture.
  - (i) The work performed by the certified VOSB or SDVOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

- (ii) The amount of work done by the partners will be aggregated and the work done by the certified VOSB or SDVOSB partners must be at least 40% of the total done by all partners. In determining the amount of work done by a non-VOSB or SDVOSB partner, all work done by the non-VOSB or SDVOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) **Certification of compliance** –

- (1) **At time of offer.** If submitting an offer as a joint venture for a VOSB or SDVOSB contract, at the time of initial offer (and if applicable, final offer), each certified VOSB or SDVOSB joint venture partner must make the following certifications to the contracting officer separately under its own name:

- (i) It is a certified VOSB or SDVOSB;
- (ii) It, together with its affiliates, is small under the size standard corresponding to the NAICS code assigned to the procurement;
- (iii) It will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in § 125.6 of this chapter.

- (2) **Prior to identification as apparent successful offeror.**

- (i) Prior to being identified as an apparent successful offeror for a VOSB or SDVOSB contract, the certified VOSB or SDVOSB partner to the joint venture must submit a certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:
  - (A) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;
  - (B) The parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements set forth in paragraph (d) of this section.
- (ii) Although the managing venturer must be a certified VOSB or SDVOSB as of the date of the joint venture's initial offer which includes price in order for the joint venture to qualify as an eligible VOSB or SDVOSB, the joint venture must meet the joint venture agreement requirements set forth in paragraph (c) of this section at the time the joint venture is identified as an apparent successful offeror.

- (f) **Capabilities, past performance, and experience.** When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a VOSB or SDVOSB contract 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 certified VOSB or SDVOSB 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.

- (g) **Contract execution.** The procuring activity will execute a VOSB or SDVOSB contract in the name of the joint venture entity or the certified VOSB or SDVOSB, but in either case will identify the award as one to a VOSB or SDVOSB joint venture or a VOSB or SDVOSB mentor-protégé joint venture, as appropriate.

- (h) **Inspection of records.** The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.
- (i) **Performance of work reports.** A certified VOSB or SDVOSB partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each VOSB or SDVOSB contract it performs as a joint venture.
  - (1) The certified VOSB or SDVOSB partner to the joint venture must annually 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 are being met.
  - (2) At the completion of every VOSB or SDVOSB contract awarded to a joint venture, the certified VOSB or SDVOSB 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 (c) of this section.
  - (3) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.
- (j) **Basis for suspension or debarment.** The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:
  - (1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;
  - (2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or
  - (3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42593, July 3, 2023]

### § 128.403 What requirements are not available for VOSB or SDVOSB contracts?

For VA procurements, a contracting officer may award a VOSB or SDVOSB contract as set forth in the VAAR. For non-VA SDVOSB contracts, a contracting activity may not make a requirement available for a SDVOSB contract if:

- (a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 8501 et seq., as amended; or
- (b) An 8(a) BD program participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) BD program, unless SBA has consented to release of the requirement from the section 8(a) BD program.

## § 128.404 When may a contracting officer set aside a procurement for VOSBs or SDVOSBs?

- (a) **VA procurements.** For VA procurements, a contracting officer may set aside a contract for a VOSB or SDVOSB as set forth in the VAAR. For non-VA procurements, the contracting officer first must review a requirement to determine whether it is excluded from SDVOSB contracting pursuant to § 128.403.
- (b) **Contracting among small business programs –**
  - (1) **Acquisitions valued at or below the simplified acquisition threshold.** For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. The requirement in this paragraph (b)(1) does not preclude a contracting officer from making an award to a small business under the 8(a) BD, Historically Underutilized Business Zone (HUBZone), SDVOSB, or WOSB Programs.
  - (2) **Acquisitions valued above the simplified acquisition threshold.**
    - (i) For VA procurements, a contracting officer may award above the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVOSB, or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVOSB, or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.
    - (ii) SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.
- (c) **SDVOSB set-asides.** If the contracting officer decides to set aside the requirement for competition restricted to SDVOSBs, the contracting officer must:
  - (1) Have a reasonable expectation that at least two responsible SDVOSBs will submit offers; and
  - (2) Determine that the award can be made at fair market price.



- (d) **Prohibition on competitions requiring or favoring additional socioeconomic certifications.** A procuring activity cannot restrict an SDVOSB competition (for either a contract or order) to require certifications other than SDVOSB certification (*i.e.*, a competition cannot be limited only to business concerns that are both SDVOSB and 8(a), SDVOSB and HUBZone, or SDVOSB and WOSB) or give evaluation preferences to firms having one or more other certifications.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

### **§ 128.405 When may a contracting officer award a sole source contract to a VOSBs or SDVOSB?**

For VA procurements, a contracting officer may award a sole source contract to a VOSB or SDVOSB as set forth in the VAAR. A contracting officer may award a sole source contract to an SDVOSB for non-VA procurements only when the contracting officer determines that:

- (a) None of the provisions of § 128.403 or § 128.404 apply;
- (b) The anticipated award price of the contract, including options, will not exceed:
  - (1) \$7,000,000 for a contract assigned a manufacturing NAICS code; or
  - (2) \$4,000,000 for all other contracts;
- (c) A SDVOSB is a responsible contractor able to perform the contract; and
- (d) Contract award can be made at a fair and reasonable price.

### **§ 128.406 Are there VOSB or SDVOSB contracting opportunities at or below the simplified acquisition threshold?**

- (a) For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR.
- (b) For non-VA procurements, if a SDVOSB requirement is at or below the simplified acquisition threshold, the contracting officer may set aside the requirement for consideration among SDVOSBs using simplified acquisition procedures or may award a sole source contract to an SDVOSB.

### **§ 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as a SDVOSB contract?**

The SBA Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVOSB sole source or a SDVOSB set-aside contract at or above the simplified acquisition threshold.

### **§ 128.408 What is the process for such an appeal?**

- (a) **Notice of appeal.** When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVOSB contract, the contracting officer must notify the Procurement Center Representative as soon as practicable. If the SBA Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

- (b) **Suspension of action.** Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.
- (c) **Deadline for appeal.** Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.
- (d) **Decision.** The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

## Subpart E—Protests Concerning VOSBs and SDVOSBs

### § 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

- (a) All challenges to the inclusion in the certification database of a VOSB or SDVOSB based on the status of the concern as a small business concern or the ownership or control of the concern, shall be heard by the Office of Hearings and Appeals of the Small Business Administration in accordance with part 134 of this chapter. The decision of the Office of Hearings and Appeals shall be considered final agency action.
- (b) The protest procedures described in part 134 of this chapter are separate from those governing size protests and appeals. All protests relating to whether an eligible VOSB or SDVOSB is a small business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the VOSB or SDVOSB and whether the concern meets the VOSB or SDVOSB requirements set forth in § 128.200, SBA will process each protest concurrently under the procedures set forth in parts 121 and 134 of this chapter. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.
- (c) When challenging the SDVOSB status of a joint venture, the managing SDVOSB party to the joint venture must be a certified SDVOSB as of the date of the joint venture's initial offer, including price, for the SDVOSB contract and compliance with the joint venture agreement requirements set forth in § 128.402(c) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.
- (d) A concern found not to qualify as a VOSB or SDVOSB in a status protest may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database. If a concern found to be ineligible submits an offer, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as a VOSB or SDVOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse determination.
  - (1) Not later than two days after SBA's final determination finding a concern ineligible as a VOSB or SDVOSB, such concern must update its VOSB or SDVOSB status in the System for Award Management (or any successor system).
  - (2) If a business concern fails to update its VOSB or SDVOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

## Subpart F—Penalties and Retention of Records

### § 128.600 What are the requirements for representing VOSB or SDVOSB status, and what are the penalties for misrepresentation?

- (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 VOSBs or SDVOSBs, 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 VOSB or SDVOSB willfully sought and received the award by misrepresentation.
- (b) **Deemed certifications.** The following actions shall be deemed affirmative, willful, and intentional certifications of VOSB or SDVOSB 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 VOSBs or SDVOSBs.
  - (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 VOSB or SDVOSB.
  - (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 VOSB or SDVOSB.
- (c) **Signature requirement.** Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the VOSB or, in the case of an SDVOSB, SDVOSB 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 SDVOSB 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 VOSB or SDVOSB status 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' VOSB or SDVOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing VOSB or SDVOSB status representations or certifications, 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 a VOSB or SDVOSB 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 status as a VOSB or SDVOSB pursuant to the procedures set forth in 48 CFR part 9, 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 part 142 of this chapter.
- (3) **Criminal penalties.** Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the VOSB or SDVOSB 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.

## Subpart G—Surplus Personal Property for Veteran-Owned Small Business Programs

### § 128.700 How does a VOSB obtain Federal surplus personal property?

(a) **General.**

- (1) Pursuant to 15 U.S.C. 657b(g), eligible small business concerns owned and controlled by veterans may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102-37 and this section will be used to transfer surplus personal property to such concerns.
- (2) The surplus personal property which may be transferred to SASPs for further transfer to eligible small business concerns owned and controlled by veterans includes all surplus personal property which has become available for donation pursuant to 41 CFR 102-37.30.

(b) **Eligibility to receive Federal surplus personal property.** To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

- (1) Be a small business concern owned and controlled by veterans, that has been certified by SBA under this part;
- (2) Not be debarred, suspended, or declared ineligible under title 2 or title 48 of the CFR; and
- (3) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) **Use of acquired surplus personal property.**

- (1) Eligible concerns may acquire Federal surplus personal property from the SASP in the state(s) where the concern is located and operates, provided the concern represents and agrees in writing:
  - (i) As to what the intended use of the surplus personal property is to be;
  - (ii) That it will use the surplus personal property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;
  - (iii) That it will not sell or transfer the surplus personal property to be acquired to any party other than the Federal Government as required by General Services Administration (GSA) and SASP requirements and guidelines;

- (iv) That, at its own expense, it will return the surplus personal property to a SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;
  - (v) That, should it breach its agreement not to sell or transfer the surplus personal property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and
  - (vi) That it will give GSA and the SASP access to inspect the surplus personal property and all records pertaining to it.
- (2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property, and all costs associated with the use and maintenance of the property.
- (d) **Costs.** Concerns acquiring surplus personal property from a SASP may be required to pay a service fee to the SASP in accordance with 41 CFR 102-37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.
  - (e) **Title.** Upon execution of the SASP distribution document, the firm receiving the property has only conditional title to the property during the applicable period of restriction. Full title to the property will vest in the recipient concern only after the recipient concern has met all of the requirements of this part and the requirements of GSA and the SASP that it received the property from.