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Title 13 – Business Credit and Assistance

Chapter I – Small Business Administration

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PART 128—VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

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

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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 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. 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 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.