

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 124, 125, 126, and 127**

[Docket No.: SBA-2011-011]

RIN 3245-AG20

Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation**AGENCY:** Small Business Administration.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This proposed rule would amend SBA's regulations to implement the following sections of the Small Business Jobs Act of 2010: section 1311 (definition of multiple award contract); section 1313 (consolidation of contracts definitions, policy, limitations on use, determination on necessary and justified); and section 1331 (reservation and set-aside of multiple award contracts and orders against multiple award contracts for small businesses). In addition, the proposed rule revises 13 CFR part 125 by reorganizing the part for clarity and creating a definition section.

DATES: You must submit your comments on or before July 16, 2012.

ADDRESSES: You may submit comments, identified by RIN: 3245-AG20, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

All comments will be posted on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the comments to Dean Koppel and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, (202) 205-7322.

SUPPLEMENTARY INFORMATION:**I. Executive Summary**

This proposed rule seeks to ensure the increased consideration of small businesses in connection with the establishment and use of multiple award contracts and acquisitions that consolidate contracts, consistent with sections 1311, 1313, and 1331 of the Jobs Act. Over the past 15 years, Federal agencies have increasingly used multiple award contracts—including the Multiple Award Schedules (MAS) contracts managed by the General Services Administration (GSA), governmentwide acquisition contracts, multi-agency contracts, and agency-specific indefinite-delivery indefinite-quantity (IDIQ) contracts—to acquire a wide range of products and services. They have also consolidated acquisitions, often through the use of multiple award contracts, to eliminate duplicative efforts, save money by pooling their buying power, and reduce administrative costs. While these actions provide an important foundation for achieving greater fiscal responsibility, they have also created challenges for agencies seeking to take full advantage of the many benefits that small business provide to our taxpayers: creativity, innovation, cost-effective technical expertise, and job growth and economic expansion, as well as maximizing awards to small businesses as both prime and subcontractors in fulfilling the Government's statutory small business goals.

In September 2010, the President's Interagency Task Force on Small Business Contracting made a series of recommendations to increase procurement opportunities for small businesses in the federal marketplace. These recommendations included a strengthened policy on set-asides that "rationalizes and appropriately balances the need for efficiency with the need to maximize opportunities for small businesses." The Task Force further recommended guidance to clarify practices and strategies to prevent unjustified contract bundling and mitigate any negative effects of justified contract bundling on small businesses. The same month these recommendations were issued, the President signed the Jobs Act which included provisions that address both of these issues. Both actions recognize the significant opportunities that exist to increase small business participation on multiple award contracts and the ability of set asides—the most powerful small business contracting tool—to unlock these opportunities. These actions also recognize the continued attention that is

required to ensure agencies avoid unjustified bundling and mitigate the negative effects of justified bundling. This proposed rule is designed to address these important issues and implement the provisions of the Jobs Act that deal with them.

A. Multiple Award Contracts and the Use of Set-Asides, Partial Set-Asides and Reserves

Section 1331 of the Jobs Act requires the Administrator for the Office of Federal Procurement Policy (OFPP) and the Administrator for the Small Business Administration (SBA), in consultation with the Administrator of GSA, to establish regulations under which Federal agencies may: (1) Set-aside part or parts of a multiple award contract for small business, (2) reserve one or more awards on multiple award contracts that are established through full and open competition, and (3) set aside orders under multiple award contracts awarded pursuant to full and open competition that have not been set aside, partially set aside, or include a reserve for small businesses. Section 1331 of the Jobs Act does not revise or repeal the requirement for a contracting officer to set aside a *contract* for exclusive small business participation if the contracting officer determines that capable small businesses can meet the *contract's requirements*.

Last November, SBA and OFPP, in consultation with GSA, requested that the Department of Defense (DOD), GSA, and the National Aeronautics and Space Administration (NASA) publish an interim rule in order to provide agencies with initial guidance that they can use to take advantage of the authorities addressed in section 1331. Among other things, the interim rule makes clear that set-asides may be used in connection with the placement of orders under multiple award contracts, notwithstanding the requirement to provide each contract holder a fair opportunity to be considered, and further makes clear that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under Multiple Award Schedule contracts. While the interim rule amends existing solicitation provisions and contract clauses to provide notice of set-asides, it does not define terms, such as "reserve"; nor does it provide guidance for how to apply the various section 1331 authorities.

This proposed rule provides more specific guidance to ensure both that meaningful consideration of set-asides and reserves is given in connection with the award of multiple award contracts

and task and delivery orders placed against them, and that these tools are used in a consistent manner across agencies. To achieve these results, including the requirement in section 1331 that use of the tools be left to the discretion of agencies, SBA's proposed rule takes the following four steps:

1. *Definition of terms and processes.* As stated above, section 1331 covers three authorities: (i) Partial set-asides, (ii) contract reserves, and (iii) order set-asides for small businesses. The proposed rule provides guidance on each of these authorities, defining key terms and laying out processes for each tool.

(i) *Partial set-asides.* The proposed rule explains at § 125.1(n) that the term "partial set-aside" for a multiple award contract means a contracting vehicle that can be used when market research indicates that a total set-aside is not appropriate but the procurement can be broken up into smaller discrete portions or categories (such as contract line items) and two or more small business concerns, including 8(a) Business Development (BD) Participants, Historically Underutilized Business Zone (HUBZone) small business concerns, Service Disabled Veteran-Owned small business concerns (SDVO SBCs) and Women-Owned Small businesses concerns (WOSBs) or Economically Disadvantaged WOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. The rule would allow for small businesses to submit an offer on the set-aside portion, non-set aside portion, or both. See proposed § 125.2(e)(3). This approach would replace the more cumbersome process currently found at Federal Acquisition Regulation (FAR) § 19.502-3 that requires small businesses to first submit responsive offers on the non-set-aside portion in order to be considered for the set-aside portion. The FAR's partial set-aside process has proven to be unnecessarily complicated, which has resulted in its underutilization over time.

(ii) *Contract reserves.* The proposed rule establishes a process, at § 125.2(e)(4), for agencies to reserve awards for small businesses (including Small Business Teaming Arrangements) under a multiple award contract awarded pursuant to full and open competition if the requirement cannot be broken into discrete components to support a partial set-aside and market research shows that either at least two small businesses could perform on a part of the contract or at least one small business could perform all of the contract. Reserves have been used by a

number of agencies, but there has not been a common understanding of what the term means or a uniform approach to its application. Many agencies have reserved awards for small businesses only to make them compete on an unrestricted basis with other-than-small business contract holders because of the statutory requirement to provide a fair opportunity for all multiple award contract holders to be considered. Small businesses were especially vocal in providing feedback to SBA during its 2011 Jobs Tour about their frustration at having to expend resources to become contract holders only to find themselves repeatedly competing against large businesses for work when two or more small businesses were available under the contract and could have competed effectively under a set-aside to perform work at a fair and reasonable price. To address this concern, the rule provides that orders must be set-aside for small businesses if the rule-of-two or any alternative set-aside requirements provided in SBA's small business program have been met.

(iii) *Order set-asides.* The proposed rule also lays out processes, at § 125.2(e)(6), that permit agencies, when awarding multiple award contracts pursuant to full and open competition without either partial set-asides or reserves, to make commitments to set aside orders, or preserve the right to consider set-asides, when the rule of two is met. The contracting officer would state in the solicitation and resulting contract what process would be used—*e.g.*, automatic application of set-asides or preservation of right to consider set-asides. These alternatives maximize agencies' flexibility in exercising their discretion to determine when and how best to use set-asides under multiple award contracts.

Finally, the proposed rule states at § 125.1(k) that the term "multiple award contract" includes MAS contracts issued by GSA—or agencies to which GSA has delegated authority. This clarification is consistent with the interim FAR rule which, as explained above, states (at FAR 8.405-5(a)) that order set-asides may be used in connection with the placement of orders and BPAs under MAS contracts. The MAS Program provides an important contracting gateway to help agencies reach small businesses. It is the largest acquisition program in the Federal Government built on MACs; nearly \$40 billion in sales went through the MAS contracts managed by GSA in FY 2011. As a general matter, SBA anticipates that Schedule orders would be conducted using a modified version of the process set forth at 125.2(e)(6). A

contracting officer, at his or her discretion, may set aside a Schedule order by including language in its request for quote that the order is a set aside for small business and only quotes submitted by a small business concern (or a specific category of small businesses) will be accepted. GSA's Federal Acquisition Service is modifying its schedules to include all appropriate set-aside clauses and has developed both written and webinar training for agency customers. For additional information on using set-asides on orders, agencies should go to www.gsa.gov.

2. *Documentation of consideration given to section 1331 authorities.* SBA seeks to ensure that agencies give meaningful consideration to the tools provided by section 1331 without either prescribing use of any specific tool in any given circumstance or imposing significant new burdens. The proposed rule recognizes that consideration of these tools, which can open up new and previously untapped opportunities for small businesses, is especially important for agencies that have not met their small business goals. For this reason, the proposed rule would require at § 125.2(e)(1)(iii) that the contracting officer document the contract file to provide an explanation if the contracting officer decided not to use any of the 1331 tools in connection with the award of a multiple-award contract when at least one of these authorities could have been used—*i.e.*, partial contract set-aside, contract reserve, or contract clause that commits the agency to setting aside orders, or preserving the right to set aside orders, when the rule of two is met. In addition, where an agency commits to using or preserving the right to use set-asides for orders under multiple award contracts that have not been set-aside, partially set-aside or reserved, the agency must document the file whenever a task order or delivery order is not set-aside for a small business.

Although these documentation requirements are spelled out in the proposed rule, SBA does not view them as creating new burdens for agency contracting officers. To the contrary, SBA believes these requirements reinforce responsibilities which serve the purpose of increasing opportunities for small businesses that already are in the FAR, such as FAR 19.501(c), which states, as a general matter, that "the contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business."

3. *Preservation of agency discretion.*

The proposed rule preserves the discretion that section 1331 vests in agencies to decide whether or not to use any of the enumerated set-aside and reserve tools. See proposed § 125.2(e)(1)(ii). There is nothing in the rule that compels an agency to award a multiple award contract with a partial set-aside, contract reserve, or contract clause that commits (or preserves the right) to set aside orders when the rule of two is met. The rule only requires that agencies consider these tools before awarding the multiple award contract and, if they choose not to use any of them, document the rationale. This discretion would not apply to total set-asides, which, as explained above, are not addressed by section 1331. Consistent with current policies in SBA's regulations and the FAR, agencies are required to set aside a multiple award contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs, or EDWOSBs.

Agencies have the discretion to forego using the section 1331 tools even if the rule of two could be met; they simply need to explain how their planned action is consistent with the best interests of the agency (e.g., agency met its small business goal in the last year; agency has a history of successfully awarding significant amounts of work to small businesses for the stated requirements under multiple award contracts without set-asides, and has received substantial value from being able to select from among small and other than small businesses as needs arise; agency can get better overall value by using the fair opportunity process without restriction for the stated requirements and has developed a strategy with the help of its Office of Small Disadvantaged Business Utilization (OSDBU) or Office of Small Business Programs (OSBP) that involves use of order set asides whenever the rule of two is met on a number of multiple award contracts for other requirements). Once an agency has exercised its discretion to use one of the § 1331 tools, it must honor the commitment when placing orders. For example, if an agency inserts a clause in a multiple award contract awarded pursuant to full and open competition stating that it will set-aside orders when the rule of two is met, it must do so. Alternatively, if the agency preserves the right to set aside orders, they would not be required to set aside an order every time the rule of two can be met,

but should document the file with an explanation when they do not do so.

SBA's procurement center representatives (PCRs) may review acquisitions involving the award of multiple award contracts or orders issued against such contracts that are not set-aside for small businesses or where no awards have been reserved for small businesses. See proposed § 125.2(b). This review process is consistent with PCRs' longstanding responsibility to assist small business concerns in obtaining a fair share of Federal Government contracting opportunities. As these authorities are implemented, PCRs may look to work more closely with agencies that have not met their small business goals in the prior year. However, the ultimate decision of whether to apply a § 1331 tool to any given procurement action is a decision of the contracting officer, as expressly stated in proposed § 125.2(e)(1)(ii).

In issuing their interim rule, the FAR signatories (i.e., DoD, GSA, and NASA) made clear that agencies are expected to consider using the 1331 tools. SBA joins in this expectation for careful and meaningful consideration. While use of the 1331 tools is discretionary, the responsibility to give small businesses maximum practicable opportunity is mandatory and agencies will be held accountable for taking all reasonable steps to meet their small business goals. This means that each agency must figure out how best to use these tools with others already available to increase awards to small businesses and help the Federal Government meet and exceed its government-wide small business contracting goals year over year.

SBA seeks to strike the best balance to maximize small business participation on multiple award contracts without compromising the greater flexibility and leverage agencies gain in conducting procurements through multiple award contracts. Throughout the preamble, SBA poses a number of questions to draw attention to particular aspects of the rule on which it is particularly interested in receiving comment to evaluate if the proposed rule has achieved this balance, such as:

- Whether the proposed definitions and processes make sense, including the proposal to require set-asides of orders under reserves if the rule of two can be met; and
- Whether the proposed documentation requirements are adequate, too stringent, or too weak. For respondents who believe the documentation requirements are too weak, they are encouraged to comment

on how they should be strengthened (e.g., by requiring higher level approval and/or posting online concurrent with the issuance of the solicitation, similar to steps that agencies will need to take in the context of explaining decisions to consolidate contracts). For respondents who believe the documentation requirements are too stringent, they are encouraged to offer views on what changes might be considered.

4. *Application of size standards to multiple award contracts.* Under SBA's current rules, a North American Industry Classification System (NAICS) code and size standard is required for all contracts, and for all orders under long-term contracts greater than five years. In some instances, SBA has seen that an agency will assign multiple NAICS codes to a multiple award contract where a business may be small for one or more of the NAICS codes, but not all, and the agency receives credit for an award to a small business even though the business is not small for the NAICS code assigned or that should have been assigned to that particular order. The proposed rule provides several alternatives at § 121.402(c)(i)(A) and (B) to ensure every contract and every order issued against a contract contains a NAICS code with a corresponding size standard and that coding for orders more accurately reflects the size of the business for the work being performed. For example, a contracting officer may divide a multiple award contract for divergent goods and services into discrete categories (which could be by contract line item numbers, special item numbers, functional areas, sectors, or any other means for identifying various parts of a requirement identified by the contracting officer), each of which is assigned a NAICS code with a corresponding size standard. The NAICS code assigned to the order would be the same as the NAICS code assigned to the category in the contract. It is SBA's intention in proposing these changes that only small businesses receive the benefits afforded to small business concerns and that agencies receive credit only for awards to small businesses.

B. Consolidation of Contract Requirements

Section 1313 of the Jobs Act amends the Small Business Act to require that agencies address contract consolidation, which is defined as use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of the Federal agency with a total value over \$2 million for goods or services that have

been provided to or performed for the Federal agency under two or more separate contracts each lower in cost than the total cost of the contract for which the offers are solicited. For a number of years, DoD has had responsibilities, set forth in 10 U.S.C. 2383, to address contract consolidation. The proposed rule builds on much of DoD's existing guidance and explains that an agency may not conduct an acquisition that is a consolidation of contract requirements unless the senior procurement executive (SPE) or chief acquisition officer (CAO): (1) Justifies the consolidation by showing that the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation and (2) identifies the negative impact on small businesses. The proposed rule also requires SBA's PCR to work with the agency's small business specialist and OSDBU or OSBP to identify bundled or consolidated requirements and promote set-asides and reserves.

Additional detail about the proposed rule and the various considerations that have shaped it is set forth below.

II. Background

On September 27, 2010, the President signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, which was designed to protect the interests of small businesses and boost their opportunities in the Federal marketplace. The law not only makes significant improvements to the Small Business Act's procurement programs, it creates new programs and new initiatives. This proposed rule addresses two important parts of the Jobs Act: (1) Application of the SBA's small business programs to multiple award contracts, and (2) limitations on contract consolidation and bundling.

A. Multiple Award Contracts

The FAR permit agencies to issue several awards to different offerors that submitted an acceptable response to the same solicitation for an IDIQ contract. See FAR subpart 16.5 (publicly available at www.acquisition.gov/far/index.html). In fact, the FAR states that the contracting officer must give preference to making "multiple awards" of IDIQ contracts under a single solicitation for the same or similar supplies or services to two or more offerors. FAR § 16.504(c). Hence, these types of contracts are referred to as multiple award contracts. Agencies issue either task orders (order for services) or delivery orders (order for supplies) for competition against the

multiple award contract. Multiple award contracts are often used to support interagency contracting through: (1) Multi-agency contracts (MACs), which are established by one agency for use by it or other Government agencies to obtain supplies and services, and (2) governmentwide acquisition contracts for information technology requirements, which are established for governmentwide use and operated by an executive agent designated by the Office of Management and Budget (OMB). FAR § 2.101.

Multiple award contracts are used by Federal agencies because they provide greater flexibility and leverage for the agency in conducting their procurements and obtaining competition. However, until recently, there had been no clear guidance in regulations on the application of the SBA's small business programs to multiple award contracts, including the GSA's MAS Program (which includes Federal Supply Schedules and other Multiple Award Schedules), although there has been much discussion on this issue. For example, in *Delex Systems, Inc.*, B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 (publicly available at www.gao.gov/decisions/bidpro/40043.htm), the GAO held that the small business set-aside provisions of FAR § 19.502-2(b) applied to competitions for task and delivery orders issued under certain multiple award contracts. Despite this opinion, many agencies had been reluctant to set-aside such task and delivery orders for small businesses without specific procurement guidance or regulations.

On April 26, 2010, the President issued Presidential Memorandum on the Interagency Task Force on Federal Contracting Opportunities for Small Businesses, which established an Interagency Task Force on Federal Contracting Opportunities for Small Business (Interagency Task Force), co-chaired by the Director of OMB, the SBA Administrator, and the Secretary of Commerce. The report issued by the task force outlined several recommendations to further increase opportunities for small businesses in Federal contracting. In particular, the task force recommended the following as it relates to multiple award contracts:

- That OFPP lead an effort, in close collaboration with SBA and GSA, as well as the DoD and other contracting agencies, to determine which steps are (or should be) permitted and encouraged, and which are required with respect to reserving individual orders for small businesses under task-and-delivery-order and GSA Multiple

Award Schedule (GSA Schedules) contracts.

- In conducting the analysis, OFPP should reach out to interested stakeholders, including agency CAOs, SPEs, and Small Business Directors; OSDBU, including the Department of Defense Directors, OSBP; Procurement Technical Assistance Centers; Congress; small and large businesses; and professional and trade associations.

- When appropriate (taking into account possible statutory and regulatory changes), OFPP should issue guidance addressing the use of set-asides and related authorities for limiting consideration for task and delivery orders to small businesses. Guidance should also address existing set-aside and related policies, as necessary. General guidance should be drafted jointly with SBA, and with GSA as to guidance affecting the Schedules.

Report on Small Business Federal Contracting Opportunities, at pages 9–10 (publicly available at http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf).

Prior to this, the Acquisition Advisory Panel (Advisory Panel), which was authorized by section 1423 of the Services Acquisition Reform Act of 2003 (Section 843 of Title VIII of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109-163)) also addressed this issue in its Final Report. By law, the Panel was tasked with reviewing laws, regulations, and Governmentwide acquisition policies regarding the use of commercial practices, performance-based contracting, performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts. In its final report, which devoted an entire chapter to small business contracting, the Panel noted that "[t]he passage of FASA [Federal Acquisition Streamlining Act of 1994], the enactment of the Clinger-Cohen Act two years later, and the expansion of the GSA Schedules [MAS] Program has led to a marked increase in the use of multiple award indefinite delivery, indefinite quantity (IDIQ) contracting vehicles." Final Report, Chapter 4 at 297 (publicly available at <https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf>).

The report explained that agencies have used innovative means to ensure small businesses receive some of these multiple award contracts, such as by "reserving" one or more awards for small businesses in an otherwise full and open competition. The report further explained that there was no specific statutory authority for such reserves.

Both reports demonstrated that agency officials needed clear guidance and they wanted specific statutory authority to apply the authorities of the SBA's small business programs to multiple award contracts. The Jobs Act provides the needed guidance and specific statutory authority on this issue. With respect to multiple award contracts, the Jobs Act does two things—it defines the term and it establishes a framework to address the application of SBA's small business programs when awarding such a contract, or orders issued against a multiple award contract. In fact, the Jobs Act broadly defines the term multiple award contract to include all task and delivery contracts, which necessarily includes the GSA Multiple Award Schedules Program and other MACs. The Schedules is the largest governmentwide program in the Federal government relying on the use of multiple award contracts. Thus, the Jobs Act provides a needed tool to further assist agencies in contracting with small businesses.

In addition, the Jobs Act amended the Small Business Act (Act) to permit Federal agencies to:

- Set-aside part or parts of multiple award contracts for small business concerns, including small business concerns owned and controlled by socially and economically disadvantaged individuals that are 8(a) Business Development (BD) Participants, HUBZone small business concerns, SDVO SBCs, WOSBs, and EDWOSBs;
- Set-aside orders placed against multiple award contracts (notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j) for small business concerns, including 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, and WOSBs or EDWOSBs; and
- Reserve one or more contract awards for small business concerns under full and open competition, when the agency intends to make multiple contract awards, including reserves for 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, and WOSBs or EDWOSBs.

The legislative history for a precursor bill to the Jobs Act explains that the purpose of such provisions is to "correct" the mixed level of participation of small businesses in multiple award contracts since small businesses have had trouble securing contract awards through the multiple award contract system. See S. Rep. 111–343 at 7 (publicly available at <http://thomas.loc.gov/cgi-bin/cpquery/>

R?cp111:FLD010:@1(sr343)). As an example, the Senate Report explains that in FY 2007, although small businesses represented about 80.8% of the contractors under the GSA Multiple Award Schedules Program, they received only about 37.33% of the sales dollars (*i.e.*, task or delivery orders). *Id.* It further explains that although the Small Business Act and the FAR require Federal agencies to set contracts aside for small businesses if there is a reasonable expectation that two or more small businesses would submit offers at reasonable prices, as noted above, many agencies have not applied these small business set-aside requirements to multiple award contracts and even fewer have considered application of these requirements to orders issued against such contracts

In addition to providing statutory authority to further assist small businesses in obtaining awards of multiple award contracts and orders against such contracts, the Jobs Act mandates that SBA and OFPP, in consultation with the Administrator of GSA, issue regulations implementing § 1331. The regulatory guidance issued in response to § 1331 will help agencies leverage opportunities for small businesses under multiple award contracts that can be secured through the use of partial contract set-asides, order set-asides, and contract reserves. The SBA met with OFPP and representatives of GSA and other major contracting agencies several times over the course of the last year in an attempt to produce a draft proposed regulation that took into account the concerns of the various affected parties. In late 2011, SBA and OFPP held the required statutory consultations with senior GSA officials to further refine the proposed rule.

As a first step to implement § 1331, both SBA and OFPP requested DoD, GSA, and NASA publish an interim FAR rule so that agencies could begin taking advantage of this important tool. On November 2, 2011, the FAR issued an interim final rule that amended the following FAR subparts:

- FAR subpart 8.4 to clarify that agencies may set-asides orders and blanket purchase agreements for small business concerns under the Schedule;
- FAR subpart 16.5 to clarify that agencies may set-aside orders for small business concerns in connection with multiple award contracts, notwithstanding the statutory requirement to provide each contract holder a fair opportunity to be considered.
- FAR subpart 19.5 to add a new section, based on Section 1331, authorizing agencies to: (1) Set aside

part or parts of a multiple-award contract for small business concerns, including set-asides for small business concerns under the 8(a) Program, the HUBZone Program, the SDVOSB Program, and the WOSB Program; (2) set-aside orders placed against multiple-award contracts for small business concerns, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs; and (3) reserve one or more contract awards for small business concerns, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs, under full and open multiple-award procurements.

See 76 FR 68032.

Although the FAR interim final rule permits agencies to begin using the Jobs Act authority, there are several issues that still remain to be addressed. This proposed rule attempts to address those issues as they relate to the application of SBA's programs to multiple award contracts. In drafting the rule, the SBA has taken into consideration all of the above, as well as information obtained from meetings with various stakeholders concerning these issues.

In sum, this rule seeks to provide adequate tools and assurances that agencies will maximize small business participation on multiple award contracts without compromising the greater flexibility and leverage agencies have in conducting procurements through multiple award contracts. For example, although the MAS Program already affords opportunities for small businesses competing for orders, SBA, OFPP, and GSA hope this rule, which specifically authorizes the use of small business order set-asides in connection with the MAS Program, will provide agencies further means to reach more small businesses and increase awards to small businesses. SBA and OFPP, after consultation with GSA, have attempted to strike the right balance and seek comments regarding the proposed rule. The discussion that follows explains in detail the specific changes the SBA proposes to its regulations to address this issue.

B. Contract Consolidation/Bundling

The Jobs Act amended the Small Business Act to include provisions relating to contract consolidation and bundling. Contract bundling and consolidation have been used in the Federal government for many years now. Agencies generally consolidate or bundle two or more requirements into one solicitation in order to streamline the procurement process, reduce administrative functions (fewer number of contracts for a contracting officer to administer) and leverage buying power.

See U.S. Government Accountability Office, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 4 (May 2004) (publicly available at <http://www.gao.gov/new.items/d04454.pdf>). Although such contract consolidation and bundling may provide efficiency for the Federal government, the end result often precludes small business participation at the prime contractor level and generally provides for awards to a fewer number of contractors. See 15 U.S.C. 631(j); see also S. Rep. No. 105-62, at 21 (1997) (“Often bundling results in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain. As a result, the government can experience a dramatic reduction in the number of offerors. This practice, intended to reduce short term administrative costs, can result in a monopolistic environment with a few large businesses controlling the market supply.”)

The Small Business Act contains provisions defining bundling and limiting the use of bundling and its effect on small businesses. 15 U.S.C. 632(o). Bundling as defined by the Small Business Act is not *per se* prohibited; rather, bundling is permissible where an agency can adequately justify the projected bundled contract.

Despite the provisions in the Small Business Act and implementing regulations, bundling contracts and orders is still having harmful effects on the ability of small business concerns to compete for and receive contracting opportunities and, therefore, mitigation is necessary. Thus, the Jobs Act has amended the Small Business Act to provide for certain policies to further reduce contract bundling, including requiring that agencies publish on Web sites a list of bundled contracts and rationale for each such bundled contract. It also requires agencies that bundle requirements to include in their solicitation for any multiple award contract above the substantial bundling threshold a provision soliciting offers from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.

The Small Business Act, however, had never addressed contract consolidation (although contract consolidation is addressed in 10 U.S.C. 2383 for DoD). Consequently, the Jobs Act has now amended the Small Business Act to address and define contract consolidation in a broader manner than bundling. As it is now defined, contract consolidation occurs

when an agency uses a single solicitation to obtain offers to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited in the single solicitation. Thus, a consolidated contract combines contracts performed by small or large businesses into one solicitation while a bundled procurement combines work previously performed only by small businesses or work that could have been performed only by small businesses. As with bundling, the statute permits an agency to justify the consolidation.

We note that the Interagency Task Force also addressed this issue and outlined several recommendations to increase opportunities for small businesses in Federal contracting. In particular, the Interagency Task Force recommended that SBA strengthen the regulations addressing the reviews of contract bundling to prevent unjustified bundling and ensure the use of appropriate mitigation strategies. *Report on Small Business Federal Contracting Opportunities*, at 10 (publicly available at http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf).

Likewise, the Advisory Panel addressed contract bundling and consolidation and noted that reports by OFPP and the SBA’s Office of Advocacy indicated that the use of bundled and consolidated contracts had resulted in a decline of awards to small businesses. The Panel determined that the contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions because there is a general misunderstanding of contract bundling. Final Report, Chapter 4 at 289–90 (publicly available at <https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf>).

The proposed rule addresses the statutory amendments to the Small Business Act as they relate to mitigation of bundling and contract consolidation. SBA has taken into consideration all of the above when drafting these rules. The supplementary information below explains in detail the specific changes the SBA proposes to each of its regulations to address this issue.

C. Public and Federal Outreach

Last spring, the SBA conducted a Small Business Jobs Act Tour that covered 13 cities, including: Albuquerque, Miami, Atlanta, Boston,

Chicago, San Antonio, Seattle, Columbus, New York, Huntsville, Denver, San Diego and Washington, DC. See 76 FR 12395 (March 7, 2011); 76 FR 16703 (March 25, 2011); 76 FR 26948 (May 10, 2011). The objective of the tour was to provide information and receive input on significant Jobs Act provisions. In its **Federal Register** notice announcing the tour, the SBA set forth some key questions concerning multiple award contracts, bundling and consolidation, on which it specifically sought public input. During the tour, the SBA gained valuable information and insight on small businesses in Federal contracting that it utilized when drafting the following proposed regulations. The SBA also requested and received written comments from the public on these provisions.

Further, the SBA met with various agencies that are members of the Federal Acquisition Regulatory Council (FAR Council) to discuss the provisions of the Jobs Act. The input provided during these meetings was also utilized in drafting these proposed regulations, especially as they relate to set-asides of multiple award contracts.

Finally, as discussed above, the Jobs Act requires that SBA and OFPP, after consultation with GSA, issue regulations relating to partial set-asides, reserves and set-asides of orders against multiple award contracts. The SBA has met with GSA several times over the course of the last year, including recently in the latter half of 2011. Many of GSA’s comments have been incorporated into this proposed rule.

III. Proposed Amendments

The SBA is proposing to amend its regulations to address small business contracting as it relates to multiple award contracts and to address and clarify the regulations on bundling and contract consolidation. Because these issues affect the various SBA programs, the SBA must propose amendments to several sections of its regulations. In addition, because these two issues require changes to the same sections of SBA’s regulations and some of the issues are interconnected, the SBA determined it would be best to propose amendments relating to the two issues in one rule. The proposed amendments are set forth in a part-by-part analysis below.

A. Part 121—Size

The SBA is proposing to amend its size regulations to address both bundling and contract consolidation as well as multiple award contracts. The Small Business Act, 15 U.S.C. 644(e)(4), specifically states that for bundled

contracts, a small business concern may submit an offer that provides for use of a particular team of subcontractors for the performance of the contract and the agency must evaluate the offer in the same manner as other offers. Further, the Act states that if a small business concern forms a team for this purpose (*i.e.*, enters into a formal written Small Business Teaming Arrangement), it must not affect its status as a small business concern for any other purpose. The purpose of this section is to encourage small businesses to form teams to compete on larger contracts for which, by definition, a small business is not on its own able to compete. Therefore, the SBA proposes to amend § 121.103 by creating an exception to affiliation for teams of small businesses for bundled contracts.

The SBA proposes to amend § 121.402 to explain how small business size standards are assigned to multiple award contracts and orders issued against such contracts. Under SBA's current regulations, a NAICS code and size standard is required for contracts, and all orders under long-term contracts (*i.e.*, contract greater than five years). SBA has seen instances where an agency assigns a NAICS code to a multiple award contract and then issues orders using a different NAICS code with a different, lower size standard or issues an order with no NAICS code or size standard assigned. The agency then counts each of the orders as an award to a small business even if the business represented it was small for the higher size standard corresponding to the NAICS code assigned to the contract and not for the lower size standard assigned to the order. In other instances, SBA has seen that an agency will assign multiple NAICS codes to a multiple award contract where a business concern may be small for one or more of the NAICS codes, but not all, and the agency receives credit on an order for an award to a "small business" even though the business is not small for the NAICS code assigned or that should have been assigned to that particular order.

To address this situation, the proposed rule provides a contracting officer with two different alternatives in assigning NAICS codes on multiple award contracts. First, a contracting officer may assign one NAICS code and corresponding size standard to the multiple award contract if all of the orders issued against that contract can also be classified under that same NAICS code and corresponding size standard.

Second, the contracting officer may divide a multiple award contract for

divergent goods and services into discrete categories, each of which is assigned a NAICS code with a corresponding size standard. The contracting officer is vested with the discretion to decide how to assign the requirements to the various categories—whether it is by contract line item numbers (CLINs), special item numbers (SINs), functional area (FA), sectors, or other method of identifying various parts of a requirement. Thus, an agency would assign multiple NAICS codes to a multiple award contract only if the agency can divide the contract into different categories and can then compete or award orders in that category, notwithstanding the nomenclature the procuring agency utilizes to describe the category (*e.g.*, CLIN, SIN, FA). The NAICS code assigned to the order would be the same as the NAICS code assigned to the category (*e.g.* CLIN) in the contract.

Regardless of which method the contracting officer uses to assign a NAICS code, the proposed rule requires that every contract and every order issued against a contract must contain a NAICS code with a corresponding size standard. With respect to assigning a NAICS code to an order in cases like the GSA Schedule where an agency can issue an order against multiple categories on a multiple award contract, the contracting officer would be required to select the single NAICS code that best represents the principal nature of the acquisition (*i.e.*, usually the component that accounts for the greatest percentage of contract value) for that order. That would mean if the agency is buying services and supplies with the order, but the greatest percentage of the order value is for services, the agency would assign a services NAICS code for the order. The purpose of this proposal is twofold: to ensure that agencies receive credit only for awards to small businesses and to ensure that only small businesses receive the benefits afforded to such business concerns.

The SBA notes that it considered one alternative to this proposed rule where an order contains items/services from multiple NAICS codes and size standards assigned to a multiple award contract. Specifically, the SBA considered requiring that a business meet only the smallest size standard corresponding to any NAICS code of any of the items/services (line items) to be procured under the contract. Any order issued against the contract, regardless of the NAICS code assigned to the order, would then be considered an order placed with a small business. If the contract contained size standards that were receipts-based and employee-

based, the business would have to meet the smallest receipts-based size standard to be considered small for the contract and each order.

The SBA welcomes comments on its proposed amendments to § 121.402 explaining how small business size standards are assigned to multiple award contracts and orders issued against such contracts. SBA requests comments on the alternatives afforded to contracting officers under the proposed rule, including whether they offer a workable alternative and give sufficient discretion to contracting officers. Specifically, the SBA would like comments addressing any burden that may be imposed by requiring the contracting officer to divide the requirement into multiple categories with associated NAICS codes and size standards on a multiple award contract and placing a NAICS code on each order that flows down from the underlying contract. The SBA would also like the comments to address whether this burden is outweighed by the purpose of the proposed rule—to more effectively capture true small business participation. Finally, SBA would welcome comments on the alternative described in the prior paragraph, which was not adopted in the proposed rule.

Next, the SBA proposes to amend § 121.404, which addresses when the size status of a small business concern is determined. In order to provide certainty in the procurement process, SBA's regulations require that size generally be determined at one specific point in time—size is determined as of the date a business concern self-certifies its size status as part of its initial offer including price. When a business represents that it is small, it is then considered small for the life of that specific contract, and the concern is not required to again certify that it qualifies as small for that contract unless the contract is a long term contract (*i.e.*, the contract exceeds five years) or there is a merger, acquisition, or novation. If the contract is greater than five years, then the contractor must recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract or prior to exercising any option thereafter. Similarly, a contractor must also recertify its size status whenever there has been a contract novation, or merger or acquisition and no novation has been required.

SBA is proposing to clarify two issues that have been raised under this recertification rule that SBA issued in 2006. First, while the regulations clearly required a business that was bought by another entity to recertify its size status after the acquisition, such a requirement

was not as clear where a business that had previously certified itself to be small acquired another business. SBA believes that re-certification should be required in either case since the acquisition may render the concern other than small for the particular contract. As such, the proposed rule clarifies that recertification is required from both the acquired concern and the acquiring concern. Second, SBA proposes to clarify that recertification is required when a participant in a joint venture is involved in a merger or acquisition, regardless of whether the participant is the acquired concern or the acquiring concern.

In addition, the SBA is proposing that, in general, all of these same rules concerning when size is determined apply to multiple award contracts. For multiple award contracts, SBA will determine size at the time of initial offer of the contract based upon the size standard set forth in the solicitation for that contract. If the contract is divided into categories (CLINs, SINs, FAs, sectors or the equivalent), then each such category will have a NAICS code and corresponding size standard. A business will have to represent its status for each of those NAICS codes at the time of initial offer of the multiple award contract. When the agency places an order against the contract, it must assign a NAICS code with the corresponding size standard to the order using one of the NAICS codes assigned to the contract which best describes the principal purpose of the good or service being acquired. If the business concern represented that it was small for that NAICS code at the time of contract award, then it will be considered small for that order with the same NAICS code. Of course, a contracting officer may always, on his or her own initiative, require a business concern to recertify its size status with respect to each order, but the regulations do not require that in every instance.

The following examples demonstrate how this would work:

- An agency issues a multiple award contract and assigns a single NAICS code to the contract. A business concern has represented it is small for that NAICS code. The business concern is small for the life of the contract and for each order issued against that contract with the same NAICS code. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its size status.
- An agency issues a multiple award contract that has been separated into two categories by CLINs—graphic

design services and computer systems design services. The agency assigns two NAICS codes to the contract, one for the CLIN for graphic design services (with a \$7 million size standard) and one for the CLIN for computer systems design services (with a \$25 million size standard). A business concern has represented that it is small for the NAICS code assigned to the CLIN for computer systems design services and other-than-small for the NAICS code assigned to the CLIN for graphic design services. If the agency issues an order that is predominately for computer systems design services, it must assign to the order the same NAICS code used in the contract for computer systems design services. Because the business represented that it was small for that NAICS code at the time of initial offer for the contract CLIN for computer systems design services, it would be considered small for the order. Similarly, if the agency issues an order that is predominantly for graphic design services, it must assign to the order the same NAICS code used in the contract for graphic design services. Because the business represented that it was other-than-small at the time of initial offer for the contract CLIN for graphic design services, it would be considered other-than-small for the order. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its status for both NAICS codes.

- An agency issues an order against the GSA Schedule Contract. The ordering agency has assigned a single NAICS code to the order, which corresponds to a NAICS code assigned to the Schedule category (*e.g.*, SIN). A business concern has represented that it is small for that NAICS code assigned to the SIN on the GSA Schedule Contract. The business concern is then considered small for the order. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its status for the NAICS code.

The SBA notes that in drafting this proposed rule it considered requiring businesses to recertify their size for long term orders (*i.e.*—orders greater than five years). The SBA is concerned that if an agency issues a long term order just prior to a business recertifying its status as other-than-small on a multiple award contract, then the long term order will be counted as an award to a small business for an indefinite amount of time. However, the SBA is unsure of

how often this situation occurs and is requesting comments specifically on whether small businesses should be required to recertify their size and status for long term orders. The SBA also welcomes comments on all of these proposed amendments as they relate to size and multiple award contracts.

In addition to the above, the SBA has proposed amending its regulations at § 121.404 to address “Agreements,” such as Blanket Purchase Agreements (BPAs), Basic Agreements (BAs) or Basic Ordering Agreements (BOAs). These Agreements are not considered contracts under the FAR. *See* FAR § 16.702(a)(2) (a basic agreement is not a contract). However, the SBA has seen examples where agencies are setting aside such Agreements for small businesses. Consequently, the SBA is proposing an amendment to its regulations to address this practice.

Specifically, SBA proposes that if such an Agreement is set-aside, SBA will determine size at the time of the response to the solicitation for the Agreement, to ensure only small businesses receive the Agreement. In addition, because such an Agreement is not considered a contract, the business concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order under the Agreement in order for the procuring agency to count the award of the order as an award to small business for purposes of goaling. If agencies were permitted to set aside BPAs, BOAs and other Agreements to small businesses without having to verify size, then it is not clear that small businesses would actually be receiving the awards and it is not clear that the small business would have to meet the Act’s provisions, for example, subcontracting limitations requirements, which we believe creates a loophole.

The only exception to this proposed rule on Agreements is for BPAs issued against the GSA Schedule. Because the business will have represented its status at the time of award of the GSA Schedule contract, the SBA does not believe there is a need to represent its size again for the BPA.

The SBA has also proposed amending its size regulations to include multiple award contracts in the sections addressing who may initiate a size protest (13 CFR 121.1001) and what time limits apply to size protests (13 CFR 121.1004).

In addition, SBA proposes to amend § 121.1103 to specify that NAICS appeals may be filed at SBA’s Office of Hearings and Appeals (OHA) by any concern seeking to be considered a small business for a challenged

procurement and regardless of whether the procurement is set aside for small businesses or unrestricted. This would change OHA's current policy of declining jurisdiction on NAICS code appeals related to unrestricted procurements or finding that appellants lack standing in such appeals. See *NAICS Appeal of McKissack & McKissack*, SBA No. NAICS-5154 (2010). Neither the FAR nor SBA's existing regulations place restrictions on the types of solicitations that may be challenged in a NAICS appeal. Thus, OHA's current policy prevents an avenue of relief that SBA intended to be available to a business that is denied the benefits of its small status by an incorrect NAICS designation. The proposed rule makes it clear that SBA will adjudicate NAICS appeals on unrestricted procurements, so long as the appellant is seeking to be considered a small business for the procurement.

The SBA welcomes comments on all of these proposed amendments to part 121.

B. Part 125—Small Business Programs

Part 125 of SBA's regulations covers SBA's small business prime contracting program, subcontracting, the Certificate of Competency (COC) program and the limitations on subcontracting requirements. Encompassed in these regulations are issues such as bundling and Procurement Center Representative (PCR) reviews. Thus, the greatest number of proposed amendments that address the issues relating to multiple award contracts and bundling/consolidation have been to part 125.

SBA first reviewed part 125 and determined that it needed better organization. In § 125.1, SBA has proposed a definitions section and has moved all of the definitions in part 125 (except for the definitions relating to the SDVO SBC Program) into that one section. SBA also added all of the definitions and terms set forth in the Jobs Act to this one section in order to provide ease of use for the readers.

One important definition proposed relates to contract consolidation. The SBA has implemented the statute and defined that term to mean a solicitation for a single contract or a multiple award contract to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options). The SBA notes that the \$2 million price is a statutory

threshold (see 15 U.S.C. 657q), not subject to amendment by the SBA. Based upon this definition, an example of a consolidated contract would include the following:

- An agency had two separate contracts for janitorial services. One was performed by a small business and had a contract value of \$1 million and the other by a large business that had a contract value of \$2 million. The agency places both those requirements into one solicitation for \$3 million. This is a consolidated contract because it combines two separate contracts into one and the costs of each of the two contracts is less than the total cost of the consolidated contract. In addition, the consolidated contract's value exceeds \$2 million.

Another important term SBA defined is "multiple award contract." Section 1311 of the Jobs Act defines the term multiple award contract to mean: (1) A multiple award contract (either task or delivery order contract) entered into under the authority of 41 U.S.C. 253h (the authority for task and delivery order contracts), 41 U.S.C. 253(i) (the authority for task and delivery order contracts for advisory and assistance services), 41 U.S.C. 253(j) (issuance of orders off of task and delivery order contracts) and 41 U.S.C. 253k (definition of task order contract and delivery order contract); and (2) any other multiple award, indefinite delivery, indefinite quantity contract that is entered into by an agency.

The SBA believes that it is important to have a clearly understood definition of what a multiple award contract is because the Jobs Act permits those contracts to be conducted as a partial set-aside, or reserve and further permits the set-aside of orders against such contracts. In this regard, SBA's proposed rule expressly includes the GSA Multiple Award Schedules Program within the scope of the definition of the term "multiple award contract." As noted above the Multiple Award Schedules Program is the largest contract program in the Federal Government relying on multiple award contracts. It is fully consistent with the Jobs Act to defining this term to be inclusive of the Schedules. Even though the Act does not specifically reference the GSA Multiple Award Schedules Program in its definition of multiple award contract, the definition set forth in statute clearly states that a multiple award contract is "*any other multiple award, indefinite delivery, indefinite quantity contract that is entered into by an agency.*" 15 U.S.C. 632(v)(2) (emphasis added). Further, the Jobs Act states that the Administrator of OFPP

and SBA, "*in consultation with the Administrator of General Services,*" must establish guidance by regulation that addresses application of the SBA's programs to multiple award contracts. *Id.* § 644(r) (emphasis added). Congress' inclusion of GSA within the consultation process clearly signals its intent to allow small business set-asides within the context of the GSA Multiple Award Schedules Program. In addition, the legislative history for a prior version of a bill similar to the Jobs Act specifically included GSA Multiple Award Schedules Contracts as multiple award contracts as follows:

The bill improves small business participation in the acquisition process. The bill also authorizes small business set-asides in multiple award multi-agency contracting vehicles in order to correct the very mixed record of small business participation in such contracts. These contract types were intended to reduce the administrative costs of contracting by reducing both the number of businesses and the types of terms and conditions which had to be completed for each task or delivery order. Under such contracts, the government negotiates an up-front agreement on future price discounts and delivery terms, but no actual work is performed or paid for until task and delivery orders are issued. In many instances, small businesses have had trouble securing business through the multiple-award contract system. For example, within the GSA Federal Supply Schedules (FSS or Schedules), small businesses represented about 80.8 percent of Schedule holders, but only 37.33 percent of Schedule sales dollars in FY 2007.

See S. Rep. 111-343 at 7 (publicly available at [http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1\(sr343\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr343))) (emphasis added). Further, we note that the Defense Federal Acquisition Regulation Supplement (DFARS) already includes GSA Schedule Contracts in its definition of multiple award contracts. See DFARS § 207.170-2.

We also note that the interim FAR rule, which is co-signed by GSA, the manager of the MAS Program, amends FAR subpart 8.4 to make clear that the Jobs Act provisions apply and states that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under the MAS Program.

Moreover, the Interagency Task Force sought to determine which steps are (or should be) permitted and which are required with respect to reserving individual orders for small businesses under task-and-delivery-order and GSA Schedule Contracts. *Report on Small Business Federal Contracting Opportunities*, at 9 (publicly available at http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf).

Likewise, the Advisory Panel's Final Report noted how inconsistently agencies were applying the small business regulations to the GSA Schedule Contracts and recommended that specific guidance be provided and that the FAR be amended to permit set-asides against the GSA Schedule. Final Report, Chapter 4 at 310 (publicly available at <https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf>).

Finally, during the SBA's Jobs Act tour, the SBA received input from many small businesses that it would be beneficial if multiple award contracts under the Jobs Act included the GSA MAS Program. Those small businesses holding GSA Schedule Contracts stated that it was time consuming to attain the GSA Schedule Contract, and even more difficult to receive orders against the contract. They noted that if no orders are placed on the contract within a certain time frame, they would then lose the contract. Consequently, these small businesses supported the set-aside of orders against GSA Schedule Contracts. In fact, from the input received, it would appear that the Jobs Act would have a greater impact on small businesses if set-asides were permitted against the GSA Schedule since more small businesses have a GSA Schedule Contract than other types of multiple award contracts.

Based on all of these considerations, the SBA has proposed to define the term multiple award contract to mean: (1) A multiple award schedule contract issued by the GSA (e.g., GSA Federal Supply Schedule contract) or agencies granted Multiple Award Schedule contract authority by GSA (e.g., Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4; (2) a multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; and (3) any other IDIQ contract entered into with two or more sources pursuant to the same solicitation. SBA notes that although it is proposing to include a specific reference to GSA Schedules as part of the definition of multiple award contract, the proposed rule is not meant to infringe upon GSA's authority for the MAS Program pursuant to 41 U.S.C. 152(3). The SBA welcomes comments on this definition.

The proposed rule also defines the terms "partial set-asides" and "reserve" since those terms are used in the Jobs Act as it relates to multiple award contracts. The SBA has defined those terms in the definitions section of part 125 (§ 125.1), which is discussed next; however, it has also set forth the

mechanics of how such partial set-asides and reserves work in § 125.2(e), which is discussed later in the preamble supplementary information to this proposed rule.

With respect to partial set-asides, currently the FAR requires partial set-asides for small businesses when a total set-aside is not appropriate; the requirement is severable into two or more economic production runs or reasonable lots; one or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price; and the acquisition is not subject to simplified acquisition procedures. FAR § 19.502-3(a).

In general, the SBA's proposed rule has adopted this definition but has updated the procedures. For example, instead of dividing the requirement into production runs or lots, the SBA's proposed rule recommends severing the acquisition into discrete components or categories, similar to how SBA proposes NAICS codes can be assigned to a multiple award contract. Thus, according to the definition in the proposed rule, a partial set-aside occurs when market research indicates that the "rule of two" (i.e., the contracting officer has a reasonable expectation that it will receive at least two offers from small businesses and award can be made at fair market price) will not be met for the entire requirement (e.g., each CLIN or SIN). However, the procurement can be broken into smaller, discrete portions such that the "rule of two" can be met and applied for some of those discrete components or categories (e.g., one or more CLINs). Under a partial set-aside, orders placed against the multiple award contract must be set-aside and competed among only small businesses for the portion of the contract that has been set aside; however, the contracting officer may state in the solicitation that small businesses can also compete against other-than-small businesses for the non-set-aside portion if they also submitted an offer on the non-set-aside portion.

The SBA believes that with this proposed rule, the contracting officer would not be required to award the non-set-aside portion first and negotiate with eligible concerns on the set-aside portion only after all awards have been made on the non-set-aside portion, as required by the current FAR § 19.502-3(c). Further, small businesses would not be required to submit offers for both the set-aside and non-set-aside portions of the solicitation and the contracting officer would no longer be required to conduct negotiations only with those

offerors who have submitted responsive offers on the non-set-aside portion, as currently required under the FAR; nor is there any statutory requirement to do so. The small business could submit an offer for both or either the set-aside and non-set-aside portions.

The SBA notes that it considered an additional definition for a partial set-aside. The SBA has seen instances where an agency issues one solicitation that is entirely set-aside for some or all of the various categories of small businesses. The solicitation is divided into categories where one is for HUBZone small businesses, another is for SDVO SBCs, etc. The agency then states an intention to issue orders against the various categories so that only the HUBZone small businesses would be competing against each other, etc. The SBA believes that this could be another type of partial set-aside, where the multiple award contract is set-aside in part for the different small business programs. The SBA requests comments on this alternative.

The SBA has also defined the term "reserve," which is a term used in the Jobs Act, but not specifically defined. We understand that agencies have been "reserving" contract awards for small businesses for several years, but there has been no clear definition of that term or understanding of a "reserve." For example, we have seen, and heard during the Jobs Act tour, that agencies "reserve" an award for small business participation, but do not require the small business to meet any contractor performance requirements (e.g., limitations on subcontracting). Some agencies then require that the small business compete with other-than-small businesses for orders, which some small businesses stated during the Jobs Act tour is difficult to do. This rule proposes to amend that practice to afford small businesses more opportunities to compete on orders where a reserve has been used by the procuring agency for a multiple award contract.

The SBA proposes that a reserve is separate and distinct from a partial set-aside since the Jobs Act refers separately to both partial set-asides of multiple award contracts and reserves. In addition, the Jobs Act explains that an agency may reserve one or more awards for small businesses—a partial set-aside would require that the "rule of two" be met for the portion that is set-aside for small businesses.

Thus, as proposed, a reserve is used when an acquisition for a multiple award contract will be conducted using full and open competition and the contracting officer's market research and recent past experience evidence that:

- At least two small businesses could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete categories such that the solicitation could have been partially set-aside; or

- At least one small business can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns at fair market price

for all the work contemplated throughout the term of the contract.

If either is the case, the contracting officer must then state an intention to make one or more awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) for the portion of the requirements they can perform and compete any orders solely amongst the specified types of small business concerns in accordance with that program's specific procedures. In

the alternative, the contracting officer can state an intention to make several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and compete the orders solely amongst all of the small businesses for the portion of the requirements they can perform.

The following sets forth two examples of how a set-aside, partial set-aside and reserve could be used for a multiple award contract:

TABLE 1

Supply requirement	Total set-aside	Partial set-aside	Reserve
Description of Requirement.	<ul style="list-style-type: none"> • Five year requirement for couches and modular office furniture. • No individual order expected to exceed 5 units. • Total requirement not expected to exceed 1000 units over 5 years. 	<ul style="list-style-type: none"> • Five year requirement for couches and modular office furniture. • No individual order expected to exceed 5 units but orders for modular furniture could range from 5–50 units. • Total requirement not expected to exceed 1000 units over 5 years. 	<ul style="list-style-type: none"> • Five year requirement for couches and modular office furniture. • Orders for couches and modular office furniture could range from 5–50 units per order. • Total requirement not expected to exceed 1000 units over 5 years
Market Research ...	Shows that many small businesses can meet the projected needs.	Shows that many small businesses can provide the couches, but none can provide the modular office furniture at the potential level of demand.	Shows that many small businesses can provide 5–15 units but none can provide more than 25 units at a time.
Action	Total set-aside of contract for small businesses.	Partial set-aside for small businesses—break the requirement into separate CLINS etc. and set-aside the requirement for couches for small businesses. Compete orders for couches only among small business awardees.	Reserve for small businesses—announce in solicitation that agency will make one or more awards to small businesses and if two or more awards to small businesses, apply the rule of two when placing orders.

TABLE 2

Service requirement	Total set-aside	Partial set-aside	Reserve
Description of Requirement.	<ul style="list-style-type: none"> • Five year requirement for IT services and IT supplies. • No individual order expected to exceed \$250,000. • Total requirement not expected to exceed \$10 million over 5 years. 	<ul style="list-style-type: none"> • Five year requirement for IT services and IT supplies. • No orders expected to exceed \$250,000 for IT services in certain geographic regions, but some orders for IT services could exceed \$500,000 in other geographic regions and delivery of IT supplies must be accomplished in short period of time. • Total requirement not expected to exceed \$100 million over 5 years 	<ul style="list-style-type: none"> • Five year requirement for IT services and supplies. • Orders for IT services and supplies could range from \$250,000 to \$2 million. • Total requirement not expected to exceed \$100 million over 5 years.
Market Research ...	Shows that many small businesses can meet the projected needs.	Shows that many small businesses can provide the services and supplies in certain geographic regions and in a certain time allotment, but none can provide the IT services and supplies in other regions in the abbreviated timeframe.	Shows that many small businesses can provide IT services and supplies at certain dollar thresholds, but none can provide IT services and supplies for all orders proposed to be issued up to \$2 million.
Action	Total set-aside of contract for small businesses.	Partial set-aside for small businesses—break the requirement into separate CLINS for IT services and IT supplies in certain geographic regions. Compete orders for IT services and supplies in those regions only among small business awardees.	Reserve for small businesses—announce in solicitation that agency will make one or more awards to small businesses and if there are two or more awards to small businesses, apply the rule of two when placing orders.

In the examples above, the contracting officer can reserve one or more awards for a specific category of small businesses that can show they can perform some of the work (e.g., an SDVO SBC reserve). In the alternative, the contracting officer can reserve one or more awards for several categories of small businesses (e.g., one for 8(a), one for HUBZone, one for SDVO SBCs, and one for WOSBs or EDWOSBs), which would be known as a small business reserve. Under a small business reserve, an agency cannot state that an award will be made to a HUBZone small business concern only if no award is made to an 8(a) BD Participant or vice versa. In other words, unless the agency has specific statutory authority to “cascade” the awards as such, it cannot do so. Once awarded, certain orders will be competed amongst only small business awardees if the “rule of two” is met at the order level. All other orders will be competed amongst all of the awardees (which can include the small businesses if their contract includes those supplies or services).

In addition, the SBA has proposed that a reserve can occur on a bundled contract where a Small Business Teaming Arrangement will submit an offer or receive a contract award. In that case, the individual members of the Small Business Team Arrangement will not be affiliated for the bundled contract or other purposes, the small business subcontracting limitations or nonmanufacturer rule requirement will apply (as applicable) to each order, and the cooperative efforts of the team members will be able to meet the subcontracting limitations requirement. Under such a reserve, the Small Business Teaming Arrangement would be competing on the orders with all awardees.

The SBA is proposing this type of reserve because, as discussed above, there is a statutory exception to affiliation for the small business team members in a Small Business Teaming Arrangement for bundled contracts. Affiliation is important when size would be an issue, which is generally not the case for bundled contracts, which are competed using full and open competition. The SBA believes, therefore, that the purpose of this provision and the exception to affiliation (as well as the Jobs Act’s Small Business Teaming Pilot Program, which will offer assistance to small business teams and joint ventures) is to permit such teams to compete on a bundled contract against large businesses and retain their small business size status for future federal acquisitions.

Some of the above are types of “reserves” SBA has seen used to promote small businesses as prime contractors when an acquisition is conducted using full and open competition. The SBA has also seen instances where agencies will issue a multiple award contract using full and open competition, but state in the solicitation that all orders valued at less than a certain dollar threshold (e.g., \$150,000) are “reserved” for small businesses. However, we believe that this could actually be a partial set-aside, since the agency could place into a separate category all orders at this dollar threshold, but welcomes comments on this issue.

The SBA understands that a reserve is a new type of procurement mechanism. Therefore, the SBA specifically requests comments on the proposed definition of the term “reserve,” including: (1) Whether the definition effectively implements the statutory intent of the Jobs Act; (2) whether there are other instances of “reserves” being used by Federal agencies that promote small businesses as prime contractors that would not be covered under the proposed definition; (3) how the agency should handle the situation where there is only one small business awardee under a reserve (e.g., award certain task orders solely to the small business awardee); (4) whether there is a clear enough distinction between a partial set-aside and a reserve; and (5) whether the agency should require in the solicitation and contract that a certain percentage of the orders must be awarded to small businesses (e.g., a minimum of 30% of total dollar value of contract will be awarded to small businesses) and, if so, whether this option could be used in connection with not requiring the agency to compete orders solely amongst small businesses if the “rule of two” is met.

SBA has also proposed adding a definition for a common term used by procurement professionals—“rule of two”. The “rule of two” is the commonly used phrase to identify the requirement that in order for an agency to proceed with a set-aside, the contracting officer must have a reasonable expectation that he or she will obtain offers from at least two small businesses and award will be made at fair market price. This basic premise—that at least two offers will be received at fair market price—serves as the foundation for a set-aside pursuant to the 8(a) BD, HUBZone, SDVO SBC and WOSB programs as well as small business set-asides in general. Because the term “rule of two” is referenced in the proposed regulations as it relates to

reserves, the SBA believed it was necessary to propose a definition for the term. This definition of the “rule of two” is not meant in any way to change the set-aside requirements set forth in SBA’s regulations or the FAR (e.g., shall set aside for small businesses, may set-aside for SDVO SBC). It is simply meant to be a definition for the “rule of two”.

SBA also proposed a definition for the term “Small Business Teaming Arrangement” in § 125.1. The Jobs Act requires that agencies encourage the participation of small business teams for bundled acquisitions, since by definition, a small business alone could not perform on a bundled contract. The FAR defines the term “contractor team arrangements” in FAR § 9.601 and GSA also permits Contractor Team Arrangements for orders competed against its Multiple Award Schedule contracts where two or more GSA Schedule contractors work together to meet the ordering activity’s needs. In order to avoid confusion, the SBA has proposed the term “Small Business Teaming Arrangement” and set forth a specific definition for this term.

Under such an arrangement, two or more small businesses can form a joint venture or enter into a written agreement where one small business acts as the prime and the other small business or small businesses are the subcontractors. The SBA requires the agreement be in writing and submitted to the contracting officer as part of the proposal so that he/she understands that a small business team has submitted the proposal.

SBA is also proposing to amend its definition of the term subcontracting to clarify subcontracting costs. SBA has removed the language, “or services”, in order to provide clarity on costs that should properly be considered subcontracting costs, and not cost for materials.

In addition to adding a definition section to § 125.1, the SBA has proposed amending § 125.2. Specifically, the SBA has reorganized this section by breaking it into specific parts to address SBA’s and the procuring agency’s responsibilities when providing small business contracting assistance. The SBA has not entirely re-written this section of the rule, but has generally reorganized it for easier reference.

Paragraph 125.2(a) addresses the general objective of SBA’s contracting programs, which is to assist small businesses in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales.

Proposed paragraph 125.2(b) sets forth SBA’s responsibility during an agency’s acquisition planning. At the earliest

stage possible, the SBA's PCR's work with the buying activity or agency by reviewing acquisitions and ensuring that it has complied with all applicable statutory and regulatory small business requirements. SBA's PCR's work with the procuring agency's small business specialist (SBS) and the procuring agency's OSDBU or OSBP to identify bundled or consolidated requirements, and promote set-asides and reserves. The PCR's may make recommendations to break up the procurement so that small businesses can compete as prime contractors or encourage small business prime contractor participation on justified, bundled contracts through Small Business Teaming Arrangements and through increased small business subcontracting goals. In addition, with respect to the new Jobs Act provision relating to multiple award contracts, PCR's may work more closely with agencies that have not met their small business goals in the prior year to identify small business opportunities on multiple award contracts. However, the ultimate decision of whether to apply a section 1331 Jobs Act tool (partial set-aside, reserve, or set-aside of an order) to any given procurement action is a decision of the contracting officer.

Proposed paragraph 125.2(c) addresses the procuring agency's responsibilities. This includes structuring the acquisition to ensure competition by small business concerns, avoiding unnecessary bundling and consolidation, and conducting sufficient market research to help determine the type of acquisition to be used. This paragraph also addresses the need for and requirement that the procuring agency work closely with SBA and its PCR's on acquisitions to promote the use of small businesses.

Proposed paragraph 125.2(d) addresses contract consolidation and bundling and adds new provisions set forth in the Jobs Act. Specifically, the proposed regulation explains that an agency may not conduct an acquisition that is a consolidation of contract requirements with a total value of more than \$2 million unless the SPE or CAO justifies the consolidation and identifies the negative impact on small businesses. The Jobs Act states that the agency can justify the action if the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation.

The Jobs Act does not define the terms "substantially exceed" or "benefits". The SBA has therefore proposed to use the definitions for those terms currently set forth in the bundling regulations in part 125. The SBA does

not believe that those terms should be defined differently or inconsistently, but welcomes comments on this approach.

The SBA also sets forth the same requirements for bundling and substantial bundling that are currently set forth in § 125.2(d). However, the SBA reorganized those sections and proposed updates to all of the dollar values to be consistent with the FAR. Specifically, the FAR Council has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. The FAR Council publishes a notice of the adjusted dollar thresholds in the **Federal Register**. The adjusted dollar thresholds must take effect on the date of publication. In this case, the FAR Council adjusted the bundling thresholds on August 30, 2010 in 75 FR 53129. The proposed amendment seeks to ensure that the FAR and SBA's regulations will be consistent.

In addition, the SBA has proposed regulations to address the Jobs Act requirement that agencies post their rationale for any bundled requirement. The SBA actually published a direct rule implementing this Jobs Act requirement at 76 FR 63542 (Oct. 13, 2011), which was effective November 28, 2011. According to the Jobs Act and implementing rule, an agency must publish on its Web site a list and rationale for each bundled requirement on which the agency solicited offers or issued an award. With this proposed rule, however, SBA is encouraging agencies to post the list and rationale prior to the time the agency solicits offers, rather than wait until awards have been made.

The SBA believes that posting the bundling rationale and list prior to or at the same time the agency announces the solicitation should be easy for each agency to achieve, especially since the Act already requires agencies to notify every affected small business of its intent to bundle. In addition, we note that DoD is already posting such a notice at least 30 days prior to issuance of a bundled solicitation. Specifically, DFARS § 205.205-70, "Notification of bundling of DoD contracts" states that a contracting officer must publish in FedBizOpps.gov a notification of the intent to bundle all DoD funded acquisitions that involve bundling, including the measurably substantial benefits that are expected to be derived as a result of the bundling. The contracting officer must post the requirement at least 30 days prior to the release of the solicitation or 30 days before placing an order. 48 CFR 205.205-70. The SBA welcomes

comments on this issue, and in particular comments on whether agencies should be required to post the rationale prior to the release of the solicitation.

The SBA has also proposed amendments to § 125.2(e), which addresses application of SBA's programs to multiple award contracts, and is one of the key provisions of the Jobs Act. SBA proposed to define certain terms relating to this key provision—such as multiple award contract, partial set-aside and reserve in § 125.1, which was discussed above. In § 125.2, the SBA proposes regulations to explain how and when such partial set-asides, reserves and set-asides of orders can be used in an acquisition involving multiple award contracts.

The SBA notes that on November 2, 2011, the FAR Council issued an interim rule to address the basic authorities of this provision. See 76 FR 68032. Proposed § 125.2(e) is intended to provide additional guidance to help contracting officers as they take advantage of the discretionary authorities in section 1331 to use a partial set-aside or reserve for a multiple award contract or set-aside of orders against a multiple award contract.

The proposed rule first addresses the contracting officer's authority to use these Jobs Act provisions. The Jobs Act states that agencies may, at their discretion, partially set-aside or reserve a multiple award contract, and may set-aside orders issued against a multiple award contract, for small businesses. Therefore, the contracting officer is not required to partially set-aside or reserve a multiple award contract, or set-aside an order against a full and openly competed multiple award contract for small businesses; rather, the contracting officer has the discretion to do so.

However, the Small Business Act, SBA's regulations, and the FAR state that small businesses "shall" receive awards for acquisitions valued above the micro-purchase threshold but below the simplified acquisition threshold (SAT) when the "rule of two" is met. In addition, the Act also states that small businesses "shall receive any award or contract or any part thereof, * * * as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business

concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; * * *.” 15 U.S.C. 644(a) (emphasis added).

To ensure that agencies comply with this and other provisions relating to small businesses, the Act sets forth certain Governmentwide statutory goals, the percentages of which are based on the aggregate of all Federal procurement. *Id.* § 644(g)(1). The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for small businesses. *Id.* This agency goal is separate from the Governmentwide goal. With respect to the agency goal, the Small Business Act explains that if an agency is not meeting its goals, it must explain to SBA why it did not meet its goals, and offer strategies to expand the award of contracts to small business concerns.

In consideration of the foregoing, this proposed rule explains that if the “rule of two” is met, then the contracting officer must set-aside the contract. If however, the “rule of two” is not met, then the contracting officer has the discretion to: (1) Set-aside part or parts of the multiple award contract for small business concerns, including the subcategories of small business concerns; (2) reserve one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns; or (3) set aside orders for small business concerns, including the subcategories of small business concerns, under multiple award contracts awarded that are full and openly competed where the rule of two is met for a specific order.

When exercising his or her discretion to decide among these options, there is no order of precedence—the contracting officer is not required to consider partial set-asides first, and then reserves and then the set-aside of orders. In other words, if an agency could do a partial set-aside or set-aside orders under a full an open competition, there is no preference for doing the former over the latter. Rather, all three should be considered as part of acquisition planning and, if more than one option is available (the circumstances fit the definition of more than one tool), the agency should give careful consideration to the option that works best for the agency. Whether the agency ultimately uses any of the three authorities is left to the agency’s discretion, but the agency must keep in

mind that it will be held accountable for taking all reasonable steps to meet their small business goals. In other words, when utilizing this discretion, the procuring agency and contracting officer should consider the statutory requirements and small business contracting goals that are designed to help ensure that small businesses receive a fair proportion of awards. All agencies, especially those that are not meeting their small business contracting goals, are to consider strategies that can expand opportunities for making contract awards to all categories of small businesses.

We believe that awarding multiple award contracts to small businesses is one strategy to improve the agency’s ability to attain its small business goals. Consequently, the SBA has proposed that if the contracting officer decides not to partially set-aside or reserve a multiple award contract, or include a clause in the contract that commits the agency to set-aside or preserve the right to set-aside orders against a multiple award contract that is full and openly competed, then the contracting officer must explain the decision and document it in the contract file. The procuring agency contracting officer would need to document the contract file only if he/she decides not use any of these Jobs Act authorities. Of course, once an agency has exercised its discretion at the contract level to use one of the § 1331 tools, it must honor the commitment when placing orders. For example, if an agency inserts a clause in the contract awarded pursuant to full and open competition stating that it will set aside orders when the rule of two is met, it must do so.

SBA considered whether documentation requirement would create a chilling effect and prevent contracting officers from using these new Jobs Act authorities, which are discretionary. The SBA believes, that the requirement to document a decision to not utilize small businesses is already in the FAR and therefore not a new requirement.

When conducting acquisition planning, the contracting officer must consider small business utilization. In fact, FAR § 7.103 states that agencies shall ensure that acquisition planners structure their requirements to facilitate competition by and among small business concerns. Likewise, FAR § 7.105(b)(1) requires not only that the acquisition plan indicate the prospective sources of supplies or services that can meet the need, but must include consideration of small business and address the extent and results of the market research. Further,

the acquisition plan must explain how the proposed action benefits the Government, including when “[o]rdering through an indefinite delivery contract facilitates access to small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.” FAR § 7.105(b)(5)(B)(ii).

Finally, agencies must document their decision to not proceed with a set-aside pursuant to FAR § 19.501(c). FAR § 19.501(c) states that: “The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, service-disabled veteran-owned, or WOSB programs.”

Thus, the SBA believes that this proposed rule requires no new FAR market research, acquisition planning or documentation requirements. Rather, it reinforces requirements that are already in the FAR, which is that contracting officers must give meaningful consideration to the utilization of small businesses, and serve the purpose of increasing opportunities for small businesses.

The SBA requests comments on this proposed implementation of section 1331 of the Jobs Act and whether there are more effective regulatory alternatives that might be considered. Specifically, the SBA requests comments on whether the contracting officer’s documentation for deciding not to partially set-aside, reserve contracts or commit to setting aside or preserving the right to set aside orders on a multiple award contract should be approved at a higher level and/or posted online concurrent with the issuance of the solicitation. The SBA notes that under the Jobs Act, the Senior Procurement Executive or Chief Acquisition Officer must approve certain actions related to consolidation. Further, agencies are required to post online their bundling justifications.

In addition, the SBA requests comments on what the documentation in the file should demonstrate. The SBA believes that for example, the documentation could explain that the agency has met its small business goals for the prior year or that it is currently meeting some or all of its goals, and then explain the results of the market research. The documentation, like any other market research documentation, could explain the acquisition history for the requirement and whether there is

sufficient competition at the contract or order level for a partial set-aside, reserve, or set-aside of an order against a full and openly competed multiple award contract.

Since the § 1331 authority is discretionary, an agency has the discretion to forego using these tools even if the rule of two could be met; but would still need to explain how its planned action is consistent with the best interest of the agency (e.g., agency has a history of successfully awarding significant amounts of work to small businesses for the stated requirements under multiple award contracts without set-asides, and has received substantial value from being able to select from among small and other than small businesses as needs arise; agency can get better overall value by using the fair opportunity process without restriction for the stated requirements and has developed a strategy with the help of its OSDBU or OSBP that involves use of order set asides whenever the rule of two is met on a number of multiple award contracts for other requirements).

In addition to the above, the SBA's proposed rule sets forth the mechanics of how a contracting officer would use one of these Jobs Act authorities (reserve, partial set-aside, set-aside of orders). The proposed definitions for these terms were discussed prior in the preamble. This part of the proposed rule explains that if the "rule of two" can be met at the contract level, the agency must set-aside the multiple award contract for small businesses (including a specific category of small businesses). Section 1331 does not change the requirements to set aside acquisitions at the contract level if the "rule of two" is satisfied.

This section of the proposed rule also explains that if the "rule of two" is not met at the contract level, an agency has other options. Pursuant to section 1331, it may partially set-aside or reserve the requirement, or set-aside (or preserve the right to set-aside) orders against a multiple award contract that was awarded pursuant to full and open competition. These options, although discretionary, allow procuring agencies to provide more prime contracting opportunities to small businesses.

For example, an agency may have a requirement for services that would cover different parts of the country. If market research indicates that two or more small businesses can perform some of the requirement (e.g., can perform for some of the states but not all), and the solicitation can be separated into categories, the agency may partially set-aside the requirement for small business concerns (or 8(a) BD

Participants, HUBZone small business concerns, SDVO SBCs, WOSBs or EDWOSBs, if the requirements for such a set-aside are met such as the dollar value thresholds). In other words, the agency could do a partial set-aside and set-aside part of the requirement for the services for one or more states for small businesses (by setting this forth in separate categories) and the rest of the requirement for services for the remaining states for all other business concerns (which can include the small businesses on the partial set-aside).

In the alternative, if the requirement cannot be broken into smaller, discrete components or categories and market research indicates that one small business can perform the entire requirement or two or more small businesses can perform part of the requirement, it may reserve one or more awards for small business (or 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, WOSBs or EDWOSBs).

Finally, irrespective of whether an agency could do a partial contract set-aside or contract reserve, the contracting officer may issue the solicitation using full and open competition and state that it intends to set-aside orders, or preserve the right to set-aside orders, if the "rule of two" is met.

For example, the agency may specifically state in the contract that if the "rule of two" is met, it is preserving the right to set-aside orders for small businesses (or any subcategory of small business). If it preserves this right and then opts not to set-aside an order when the "rule of two" is met, it must provide a written explanation for its actions in the contract file—namely how its action is consistent with the best interest of the agency.

In sum, an agency must first determine if it can set-aside the requirement. If it cannot, it must consider whether it should partially set-aside or reserve the multiple award contract for small businesses or set aside or preserve the right to set aside orders against multiple award contracts that were awarded in full and open competition. If the agency decides not to take any one of these actions when it otherwise could, it must explain its decision and document the decision in the contract file.

We note that when setting aside orders against the GSA Schedules, certain regulations in FAR Part 8.4 must be followed. For example, the FAR states that agencies must survey at least three schedule contractors through the GSA Advantage!, or request quotations from at least three schedule contractors for acquisitions valued below the

simplified acquisition threshold. The SBA does not believe that this requirement conflicts with the set-aside "rule of two" requirement; rather, the two can be reconciled. The agency would first apply the "rule of two" to determine whether a set-aside is appropriate; however, the agency can request quotes from more than two small businesses. The same is true for acquisitions above the simplified acquisition threshold, where the FAR requires the ordering activity contracting officer to post a request for quotes (RFQ) on e-Buy or provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances. Agencies would not be required to document the circumstances for restricting consideration to less than three small business schedule contractors based on one of the reasons at FAR § 8.405.

The SBA's proposed rule also addresses multiple award contracts and partial set-asides or reserves for 8(a) BD Program Participants. If the contracting officer partially set-aside or reserved awards for a multiple award contract solely for the 8(a) Program (i.e., there was an offer and acceptance to the 8(a) Program), then orders could be issued on a sole source basis using 8(a) Program authority, if the requisite dollar thresholds are met. The SBA understands that there is at least one Governmentwide contract that has been set-aside for the 8(a) BD Program that permits 8(a) sole source awards on the order level and it has served as a useful tool for contracting officers. In order to continue to provide such flexibility to contracting officers, the SBA is proposing to permit this with the proposed rule.

In this rule, the SBA has also proposed that agencies consider the use of "on and off ramp" provisions when using set-asides, partial set-asides or reserves for multiple award contracts. These provisions, which are relatively new to contracting, are used by some agencies as a means of ensuring that there are a sufficient number of small business contract awardees for a multiple award contract that had been set-aside. Agencies use "on ramp" provisions to award new contracts to small businesses under a multiple award contract where some of the current awardees are no longer small as a result of a size recertification. Agencies use "off ramp" provisions to remove or terminate a contractor that has recertified its status as other-than-small and therefore is no longer eligible to receive new task orders as a small business.

The SBA welcomes comments on these approaches. Further, the SBA requests comments on the use of 8(a) sole source awards on orders issued against an 8(a) set-aside, partially set-aside or reserved multiple award contracts. In addition, the SBA welcomes comments on the use of “on ramp/off ramp” procedures.

The SBA notes that consistent with the interim FAR rule, SBA strongly encourages contracting officers to modify, on a bilateral basis, existing multiple award contracts in accordance with FAR 1.108(d)(3) to address the new FAR provisions on multiple award contracts, if the remaining period of performance extends at least six months after the effective date of that rule, and the amount of work or number of orders expected under the remaining performance period is substantial. There are many valuable opportunities under existing multiple award contracts to help small businesses through order set-asides. These opportunities should not be lost. To this end, GSA’s Federal Acquisition Service, which is responsible for managing the MAS Program, is in the process of modifying their existing contract vehicles to include all appropriate set-aside clauses.

The SBA has also proposed amendments to § 125.5 concerning its COC program to address multiple award contracts and permit COCs on such contracts, including “reserves,” and orders issued against multiple award contracts. SBA acknowledges that contracting officers should be making responsibility determinations at the contract level for multiple award contracts. However, if a contracting officer makes a responsibility determination at the order level that affects a small business apparent successful offeror, then the contracting officer must refer the matter to SBA for a COC.

In addition, the SBA has proposed amendments to the limitations on subcontracting set forth in § 125.6 to explain that the period of performance for each order issued against a multiple award contract will be used to determine compliance with the limitations on subcontracting requirements. The SBA has proposed amendments to the 8(a) BD (13 CFR 124.510), HUBZone (13 CFR 126.601, 126.700), and SDVO Program (13 CFR 125.15) regulations to state the same.

The SBA notes that it considered two options with respect to application of the limitations on subcontracting for multiple award contracts: (1) On an order by order basis; or (2) in the aggregate at any point in time over the

course of the contract. The SBA believed that requiring the limitations on subcontracting to apply on an order by order basis for a multiple award contract (if the contract is a set-aside, partial set-aside or reserve, or if the order was set-aside) is the best approach to allow contracting officers to monitor such compliance.

We understand that allowing a small business to meet this requirement in the aggregate at certain points in time provides greater flexibility to both the small business and procuring activity, especially with respect to multiple award contracts where the small business prime contractor may utilize different subcontractors for different task orders. However, we believe that it is too difficult to monitor compliance and that in fact, agencies are not monitoring such compliance. In fact, we believe it would be extremely difficult to monitor compliance on a multi-agency multiple award contract where contracting officers from different agencies are awarding task orders against the same contract. We note that GSA has informed SBA that it monitors compliance through designated FAC-C contracting officer representatives. SBA specifically requests comments on this issue.

We note that for 8(a) contracts, the SBA has retained a provision that permits the SBA to waive this requirement and allow an 8(a) BD Participant to meet the subcontracting limitations for the combined total of all orders issued to date at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the 8(a) BD Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. The SBA has retained this “waiver” in the proposed rule because it affords additional business development opportunities for 8(a) BD Participants, but welcomes comments on whether the “waiver” should remain solely for 8(a) contracts, or whether the requirements should be the same for all programs.

In addition, and with respect to the limitations on subcontracting, SBA has proposed that a contracting officer may document a small business concern’s performance of work requirements as part of the small business’s performance evaluation. This means that if the small business meets the applicable limitation on subcontracting, its efforts must be documented. This also means that if a small business fails to meet the applicable limitations on subcontracting

for the program, the contracting officer must document this failure. Contracting officers must use this information, which will be available to all contracting officers on the Past Performance Information Retrieval System (PPIRS), when evaluating compliance on future contract awards. The FAR requires agencies to post contractor evaluations in the PPIRS database, which now serves as the single, authorized application to retrieve contractor performance information.

We note that if a small business fails to meet the subcontracting limitations requirement set forth in the contract, the contracting officer may terminate the contract for default pursuant to FAR § 49.401. Specifically, the FAR permits the contracting officer to completely or partially terminate a contract because of the contractor’s actual or anticipated failure to perform its contractual obligations—in this case, the failure to meet the limitations on subcontracting. If the small business can establish or the contracting officer determines that the failure to perform is excusable (e.g., arose out of causes beyond the control and without the fault or negligence of the contractor), then no termination for default would be required.

C. Amendments to Other Parts Addressing SBA’s Procurement Programs—Parts 124, 125, 126 and 127

The SBA has also proposed amendments to the various parts of its regulations that cover specific procurement programs: Part 124 (8(a) BD Program); part 125 (SDVO SBC Program); part 126 (HUBZone Program); and part 127 (WOSB Program). The proposed amendments to these parts conform to the general proposed amendments in part 125 concerning multiple award contracts. For example, the SBA amended each of these parts to include multiple award contracts as types of contracts available for set-asides, partial set-asides and reserves under these programs. The SBA also amended each of these parts to address status protests and appeals relating to multiple award contracts or orders issued against multiple award contracts, and the limitations on subcontracting and nonmanufacturer rule requirements.

With respect to the WOSB Program, we note that a contracting officer may restrict competition to EDWOSBs if the contract is in an industry that SBA has designated as underrepresented and the contracting officer has a reasonable expectation based on market research that two or more EDWOSBs will submit offers, the anticipated award price (including options) does not exceed \$6.5 million for a contract assigned a NAICS

code for manufacturing or \$4 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price. The contracting officer may restrict competition for WOSBs in an industry that SBA has designated as substantially underrepresented if the contracting officer has a reasonable expectation based on market research that two or more WOSBs will submit offers, the anticipated award price (including options) does not exceed \$6.5 million for a contract assigned a NAICS code for manufacturing or \$4 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price.

Because the Jobs Act specifically permits set-asides, partial set-asides and reserves of multiple award contracts, as well as set-asides of orders against multiple award contracts that were themselves awarded through full and open competition, the SBA has proposed amending the WOSB Program regulations to address application of the contracting thresholds for that program with respect to multiple award contracts. The SBA's proposed regulations explain that the thresholds for the WOSB Program (\$6.5 million for manufacturing and \$4 million for everything else) will apply to each order issued against the multiple award contract, rather than the estimated contract value for the multiple award contract and rather than the total value of all orders issued against the multiple award contract. If SBA were to apply the thresholds to the value of the multiple award contract, then it would be difficult to set-aside, partially set-aside or reserve a multiple award contract under the WOSB Program because the estimated dollar value of the acquisition will almost always exceed the \$4 and \$6.5 million thresholds (since the estimated dollar value of such an acquisition would be the total value of several different contracts). The SBA welcomes comments on this proposal.

In addition, the SBA has proposed regulations to the SDVO SBC Program, HUBZone Program and WOSB Program to address the situation where an awardee under one of these programs is later decertified or deemed ineligible for the program. The SBA has proposed that a concern that represents itself as eligible for the program or is certified into the program and receives a contract award keeps its status throughout the life of the contract, unless the contract exceeds five years, there is a contract novation, or there has been a merger or acquisition. In those instances, the concern will have to recertify its status. Essentially, the SBA has proposed

applying the current size re-certification rule to the status of a small business for each of its programs. The SBA welcomes comments on this proposal.

IV. Request for Comments

The Jobs Act has set forth the necessary tools to ensure that small businesses receive their fair share of Federal awards. It opens the door for small businesses by providing them access to multiple award contracts and orders issued against multiple award contracts. It also sets forth limitations on contract consolidation and provides for greater bundling enforcement.

As such, the SBA requests comments on each proposed amendment to the rule. We have noted above specific issues on which the agency would like to receive comments. However, SBA seeks comments on all aspects of this proposed rule.

Compliance With Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C., Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

OMB has determined that this rule is a "significant" regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

1. Necessity of Regulation

This regulatory action implements the Small Business Jobs Act of 2010, Public Law 111-240. Specifically, it implements the following sections of the Jobs Act: section 1311 (definition of multiple award contract); section 1312 (publication on Web site a list and rationale for bundled contracts); section 1313 (consolidation of contracts definitions, policy, limitations on use, determination on necessary and justified); and section 1331 (reservation of multiple award contracts and orders against multiple award contracts for small businesses). Those sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

The SBA's current regulations address bundling with respect to multiple award contracts as well as set-asides of its various programs, in general. However, the regulations do not provide the specific guidance needed by the contracting community, which is set forth in this proposed rule. The SBA believes it is necessary and beneficial to address these recent amendments to the Small Business Act in its regulations to

ensure consistency and clarity on these issues as they relate to small businesses. This is especially true since these provisions of the Jobs Act are creating new procurement mechanisms for contracting officers to use to award small businesses contracts and orders issued against contracts.

2. Alternative Approaches to Proposed Rule

The SBA considered numerous alternatives when drafting this regulation. The SBA considered an alternative approach with respect to the definition of multiple award contract. The Jobs Act sets forth a definition of that term. However, the DFARS also set forth a more specific definition of multiple award contracts. After reviewing legislative history and other reports relating to this issue, the SBA believes that the DFARS definition is a reasonable interpretation of the definition set forth in the Jobs Act as well as a more specific definition of the term because it specifically addresses multiple award contracts issued by the GSA as part of the MAS Program. Consequently, the SBA based its definition of multiple award contract on the DFARS definition, although it changed the wording slightly.

In addition, the SBA considered various approaches with respect to application of its programs to multiple award contracts. As noted in the discussion above, the proposed rule states that agencies may partially set-aside or reserve awards of multiple award contracts (and set-aside orders issued against multiple award contracts) for small businesses even if the agency did not meet its prior fiscal year's small business goals or is currently not meeting its goals. The SBA explored other options when drafting this rule (e.g., should the contracting officer be required to partially set-aside a multiple award contract if the agency is failing to currently meet its goals).

The SBA also considered several alternatives as it relates to partial set-asides against multiple award contracts. The FAR currently addresses partial set-asides for small businesses, but the procedures seem out-of-date and complex. The SBA believes that the best alternative is to propose a change in the current method of conducting a partial set-aside.

Other examples of alternatives considered are discussed in the preamble above (e.g., how to determine a small business is meeting the subcontracting limitations requirement).

3. What are the potential benefits and costs of this regulatory action?

The potential benefits of this rule are to increase small business participation in Federal prime contracts by limiting a procuring agency's use of bundled and consolidated contracts, ensuring small businesses have opportunities with respect to justified bundled and consolidated contracts, and ensuring that small businesses have greater access to multiple award contracts, including orders issued against such contracts. Currently, there is inadequate guidance for agencies regarding application of the SBA's programs to multiple award contracts and orders issued against such contracts. As a result, we believe that small businesses have been denied many opportunities to submit offers on and potentially receive awards on these contracts or the orders.

For example, Congress established an annual goal that 23 percent of the dollar value of prime contracts awarded by the Federal government must be awarded to small business. In fiscal year (FY) 2010, small businesses received 22.65 percent of federal dollars; in FY 2009, small businesses received 21.89 percent of federal dollars; and in FY 2008, small businesses received 21.50 percent of federal dollars. Although it is getting close, the Federal government is still not meeting this statutory goal. One benefit of this rule is to provide needed mechanisms and guidance to assist agencies and the Federal government in meeting this goal.

In addition, the Federal Procurement Data System shows that there were over 137,000 actions for small businesses on the Federal Supply Schedule in FY 2009, which amounted to over \$5,000,000,000 in obligations to small businesses. Of that amount, over \$700,000,000 was obligated as part of a BPA. There were 470 actions for small businesses on a GSA Governmentwide Acquisition Contract in FY 2009, which amounted to over \$200,000,000 in obligations to small businesses. That means there were almost 138,000 actions against a GSA multiple award contract for small businesses amounting to over \$5,200,000,000 in dollars obligated in FY 2009.

The data also shows that there were over 1500 actions where there was a set-aside for small business (or a specific category of small business), which amounted to over \$180,000,000 in obligations to small businesses. The data also shows that there were over 1400 actions against a BPA where there was a set-aside for small business (or a specific category of small business), which amounted to over \$43,000,000 in

obligations to small businesses awarded that year.

In comparison, there were over 364,000 actions against a GSA Multiple Award Schedule contract awarded to other-than-small businesses amounting to over \$7,000,000,000 in dollars obligated in FY 2009. Of that amount, over \$2,000,000,000 was obligated as part of a BPA.

According to this data, small businesses do receive orders from agencies using the GSA Schedule. However, some of these awards may have been made to businesses that represented themselves as small for a specific NAICS code assigned to one of several SINS, which are assigned to a specific GSA Schedule Contract. An agency may have awarded an order with a different or no NAICS code and still have taken credit for an award to a small business. Further, agencies may have set-aside the orders against the GSA Schedule Contract and not required any limitations on subcontracting which could have permitted a large business to perform most or all of the work.

Regardless, we do not believe that this rule would impact the agencies, who would continue to use the GSA Schedule and make awards to small businesses using one standard set of criteria when making such awards. However, we have heard from many small businesses with a GSA Schedule Contract that they are not utilized by agencies. This proposed rule aims to help increase opportunities for small businesses. The rule's intent is that more small businesses can have the chance to compete and succeed on more multiple award contract orders. Therefore, this rule could impact small businesses that are underutilized on the Schedule by providing more of them with more opportunities.

In addition, we note that the Congressional Budget Office believed that agencies would continue to encourage the use of small businesses to procure goods and services and that doing so would not significantly increase procurement costs. See S. Rep. 111-343 at 12 (publicly available at [http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1\(sr343\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr343))).

However, we do note that once implemented as final, it is likely that changes would need to be made to the Interagency Acquisition Environment (IAE). For example, modifications may need to be made to the Government's contract award database, the Federal Procurement Data System-NG (FPDS-NG). We understand that this process will take some time and the Government will incur a cost for these changes to the system.

With respect to bundled contracts, data from FY 2009 shows that there were 36 bundled contracts with a value of over \$3,448,000,000 and 63 consolidated contracts with a value of over \$7,645,000,000. This regulation is intended to reduce the number of bundled and consolidated contracts, since they exclude small business participation at the prime contract level. SBA anticipates that this will have a beneficial impact for small businesses as well as the agencies. For example, although many agencies believe that combining numerous requirements into one contract would lessen the administrative burden for the agency, the fact is that it could increase the burden. For example, if an agency awards 10 contracts in response to a single solicitation, then it could receive 10 responses every time it solicits a quote for an order. In the end, it may have been less time-consuming overall to merely have broken up the requirement into smaller pieces and issued fixed price contracts for parts of the requirement to small businesses.

Executive Order 13563

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

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

Yes, the agency utilized the most recent data available on the Federal Procurement Data System (FYs 2010 and 2009 data).

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

The Jobs Act imposes a specific statutory time by which the SBA must issue a final regulation. The SBA and OFPP worked with DoD, GSA and NASA to implement these provisions relating to multiple award contracts in an interim final rule in the FAR. The FAR interim final rule provides some, but all the guidance needed by procuring officials on this issue. Therefore, to provide this needed guidance quickly, the SBA intends to issue this rule with a 60-day comment period suggested by the executive order. As indicated above in the **ADDRESSES** section of this rule, the public is provided with the link to the online rulemaking Web site and is encouraged to use this medium to submit comments and view the comments of others.

In addition, we note that SBA has taken other steps to encourage public participation in its rulemakings. Specifically, SBA has conducted a "listening tour" to discuss the issues presented in the Jobs Act with interested members of the public. The SBA toured 13 cities, transcribed the input from the public and requested and received written comments (comments could be submitted to SBA employees or to www.regulations.gov). See 76 FR 12395 (March 7, 2011); 76 FR 16703 (March 25, 2011); 76 FR 26948 (May 10, 2011). Further, we note that as the sole agency that is charged with representing the interests of small businesses, SBA receives calls every day from small business owners and procurement officials discussing the very issues set forth in the Jobs Act. SBA gave appropriate consideration to the various suggestions, recommendations and relevant information received from these sources when drafting this rule.

The Jobs Act required SBA to consult with other agencies, such as GSA, when drafting the regulations, and SBA has done so. The SBA met with several procuring agencies to discuss the effects of the Jobs Act on each agency, in particular the GSA Schedule.

Specifically, the SBA met with agency Offices of Small Business Programs, Chief Acquisition Officers, and Senior Procurement Executives. The SBA also gathered input and ideas from various agencies on their procurement practices, which were used when drafting these rules.

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

Yes, the agency considered several approaches, as discussed in the preamble. We believe the proposed rule provides flexibility to procuring agencies with respect to application of the SBA's programs to multiple award contracts.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden. As discussed above in Section IV of the preamble, the action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Paperwork Reduction Act (PRA), 44 U.S.C., Ch. 35

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this proposed rule will not impose any new reporting or recordkeeping requirements. Small business must already represent their status at the time of submission of initial offer. This rule only seeks to clarify when such businesses represent their status for multiple award contracts and orders issued against multiple award contracts.

In addition, in accordance with FAR §§ 4.1202, 52.204-8, 52.219-1 and 13 CFR part 121, concerns must submit paper or electronic representations or certifications in connection with prime contracts and subcontracts. The Jobs Act requires that each offeror or applicant for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant.

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

SBA has determined that this proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule. The IRFA examines the objectives and legal basis for this proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this proposed rule; and whether there are any significant alternatives to this proposed rule.

1. What are the reasons for, and objectives of, this proposed rule?

This regulatory action implements several sections of the Small Business Jobs Act of 2010, Public Law 111-240. These sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

The objective of the rule is to implement these statutory changes by further defining terms and expanding on the concepts set forth in the Jobs Act.

2. What is the legal basis for this proposed rule?

Small Business Jobs Act of 2010, Public Law 111-240.

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

This rule addresses the application of all of SBA's small business programs on multiple award contracts and addresses the limitations on bundled and consolidated contracts. As of February 2011, there were over 348,000 small business registered in the Central Contractor Registration (CCR) with a Dynamic Small Business Search Supplemental (DSBS) page. According to the FAR § 4.11, prospective vendors must be registered in CCR prior to the award of a contract; basic agreement, basic ordering agreement, or blanket purchase agreement. Therefore, CCR and DSBS are the primary databases used by Federal contracting officers when conducting market research and it shows the small businesses that will be affected by this rule, since those are the small businesses that conduct or would

like to conduct business with the Federal Government.

The SBA notes that not all of these small businesses have received multiple award contracts in the past and therefore, the number of affected small businesses could be less. However, the SBA believes that this rule will open the door to many more Federal procurement opportunities to small businesses, including opportunities for orders against the GSA Schedule. Therefore, the SBA believes that all small businesses could be impacted by this rule.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

The SBA does not believe that there are any new recordkeeping requirements. The proposed rule does provide that businesses will need to report their size status at the time of contract award for a multiple award contract, similar to how it is done now. However, the business will need to represent its status for a single or multiple NAICS codes in order to be deemed a small business for the orders issued against the multiple award contract and each order will contain a NAICS code.

In addition, the SBA has proposed a new compliance requirement with respect to the limitations on subcontracting. Under the limitations on subcontracting, a small business must perform a certain percentage of the work itself and it limited as to how much work it can subcontract. This is generally easy to monitor for single award contracts, but not so easy with a multiple award contract where many task or delivery orders will be issued, sometimes by different agencies. As such, the SBA has proposed that small business comply with the limitations on subcontracting for each order, rather than the total multiple award contract.

5. What relevant federal rules may duplicate, overlap, or conflict with this rule?

This proposed rule may conflict with current FAR and General Services Administration regulations. As a result, those regulations will need to be amended once this rule is issued as final. The SBA consulted with both prior to issuing this proposed rule. However, as noted in the discussion in the preamble, SBA attempted to draft the regulations to avoid unnecessary conflicts. For example, the FAR and GSA define the term “teaming” to mean something in particular. Rather than define the term “teaming” to conflict

with those rules, SBA defined the term “Small Business Teaming Arrangement.”

6. What significant alternatives did SBA consider that accomplish the stated objectives and minimize any significant economic impact on small entities?

One of the major parts of this rule is size status for multiple award contracts and orders issued against multiple award contracts, including the GSA Schedule. The agency first considered that a business concern represent its size status at the time of submission of initial offer and on each and every order issued against a multiple award contract. The SBA proposed, however, that the small business represent its status at the time of submission of initial offer for the multiple award contract and that representation would generally be good for up to five years, including for all orders issued against that multiple award contract with the same or higher size standard. This is less of a burden on small businesses, yet ensures that an agency’s goals truly reflect awards to small businesses.

The other alternatives are discussed in the preamble as well as the Regulatory Impact Analysis.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Small business, Technical assistance.

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

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

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, 662(5), and 694a; and Public Law 105–135, sec. 401 et seq., 111 Stat. 2592.

2. Amend § 121.103 by adding new paragraph (b)(8) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(a) * * *

(b) * * *

(8) In the case of a solicitation of offers for a bundled contract with a reserve (as defined in § 125.1), a small business concern prime contractor may enter into a Small Business Teaming Arrangement with one or more other small business concerns and submit an offer as a small business for a Federal procurement without regard to affiliation so long as each team member is small under the size standard corresponding to the NAICS code assigned to the contract and there is a written, signed teaming or joint venture agreement amongst the small business concerns. See § 125.1 for the definition of Small Business Teaming Arrangement. With respect to Small Business Teaming Arrangements that are joint ventures, see 121.103(h) for specific requirements and limitations.

* * * * *

3. Amend § 121.402 by:

a. Revising paragraphs (a) and (b);
b. Redesignating paragraphs (c), (d) and (e) as (d), (e), and (f), respectively; and

c. Adding a new paragraph (c) to read as follows:

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

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and corresponding size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Every solicitation, including a request for quotes, must contain a NAICS code.

(i) Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased.

(ii) A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract, order or subcontract where the NAICS code assigned to the contract, order or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of § 121.406(b).

(c) Multiple Award Contracts (*see* definition at § 125.1).

(i) For Multiple Award Contracts, the contracting officer must:

(A) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) above, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract. If a service NAICS code has been assigned to the Multiple Award Contract, then a service NAICS code must be assigned to the solicitation for the order, including an order for services that also requires some supplies; or

(B) Divide the solicitation into discrete categories (Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and size standard that best describes the principal purpose of the good or services to be acquired under that category (CLIN, SIN, Sector, FA or equivalent) as set forth in paragraph (b) above. A concern must meet the applicable size standard for each category (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.

(ii)(A) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. When placing an order under a multiple award contract with multiple NAICS codes, the contracting officer

must assign the NAICS code and corresponding size standard that best describes the principle purpose of each order. In cases like the GSA Schedule, where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition.

(B) With respect to an order issued against a multiple award contract, an agency will receive small business credit for goaling only if the business concern awarded the order has represented its status as small for the underlying multiple award contract for the same NAICS code as that for the order or if the contracting officer requires the business to represent its status in response to that particular order solicitation.

* * * * *

4. Amend § 121.404 by:
- a. Revising the heading;
 - b. Revising paragraph (a);
 - c. Revising paragraph (b) by removing “date of certification by SBA” and adding in its place “date the program office requests a formal size determination in connection with a concern that is otherwise eligible for program certification.”
 - d. Revising paragraph (f);
 - e. Revising the first sentence in paragraph (g), introductory text and adding a new second sentence;
 - f. Revising paragraph (g)(2) by redesignating it as paragraph (g)(2)(i) and adding the following new paragraph (g)(2)(ii);
 - g. Revising the first sentence in paragraph (g)(3);
 - h. Revising the second sentence in paragraph (g)(3)(iv);
 - i. Removing paragraph (g)(3)(vi);
 - j. Redesignating paragraph (g)(4) as (g)(5); and
 - k. Adding a new paragraph (g)(4), to read as follows:

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

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation), which includes price.

(1) With respect to Multiple Award Contracts and orders issued against the Multiple Award Contract:

(i) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for the Multiple Award Contract based upon the size standard set forth in the solicitation for the Multiple Award Contract if a single NAICS code is

assigned as set forth in § 121.402(c)(i)(A). If a business is small at the time of offer for the Multiple Award Contract, it is small for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order.

(ii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for the Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.*, CLIN, SIN, Sector, FA or equivalent) for which a business concern submits an offer and represents it is small for a Multiple Award Contract as set forth in § 121.402(c)(i)(B). If the business concern submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent). If a business is small at the time of offer for a discrete category on the Multiple Award Contract, it is small for each order issued against that category with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order issued against a Multiple Award Contract if the contracting officer requires the business concern to recertify its status at the time of initial offer for an order.

(2) With respect to “Agreements” such as Blanket Purchase Agreements (BPAs) (except for BPA’s issued against a GSA Schedule Contract), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit for the order.

* * * * *

(f) For purposes of architect-engineering or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may not include price).

(g) A concern that represents itself as a small business and qualifies as a small

business at the time of initial offer (or other formal response to a solicitation), which includes price, is considered a small business throughout the life of that contract. This means that if a business concern is small at the time of initial offer for a Multiple Award Contract (see 121.1042(c) for designation of NAICS codes on a Multiple Award Contract), then it will be considered small for each order issued against the contract with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order. * * *

* * * * *

(2)(i) * * *

(ii) Recertification is required:

(A) when a concern acquires or is acquired by another concern;

(B) from both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and

(C) from a joint venture when the acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business.

* * * * *

(3) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. * * *

* * * * *

(iv) * * * The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract and must be assigned in accordance with § 121.402(b) & (c).

(4) The requirements in paragraphs (1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, was partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation or merger or acquisition where no novation is required and the resulting contractor is now otherthansmall, the agency cannot exercise the next option and cannot count any new orders issued pursuant to the contract, including options on current orders, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants,

HUBZone SBCs, SDVO SBCs, and WOSB/EDWOSBs.

* * * * *

5. Amend § 121.406 by revising paragraph (a) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract?

(a) *General.* In order to qualify as a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract, apartial set-aside, reserve, or set-aside of orders against a multiple award contract to provide manufactured products or other supply items, an offeror must either: * * *

* * * * *

§ 121.407 [Removed and Reserved]

6. Remove and reserve § 121.407.

7. Amend § 121.1001 by:

a. Revising paragraph (a)(1);

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

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business (including a partial set-aside), the following entities may file a size protest in connection with a particular procurement, sale or order: * * *

* * * * *

8. Amend § 121.1004 by revising paragraphs (a)(1), (a)(2) and (a)(3) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA—*(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and

legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Long-Term Contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multi-agency contracts (MACs), Government Wide Acquisition Contracts and Multiple Award Contracts: * * *

* * * * *

9. Amend § 121.1103 by revising paragraph (a) to read as follows:

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

(a)(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (see part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.

(2) A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code, or a question relating to the size standard in effect at the time the solicitation was issued or amended.

* * * * *

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

10. The authority citation for 13 CFR part 124 is amended to read as follows:

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

11. Amend § 124.501 by adding a sentence after the first sentence in paragraph (a) to read as follows:

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

(a) * * * This includes set-asides, partial set-asides and reserves of Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. * * *

* * * * *

12. Amend § 124.503 by:

- a. Revising heading in paragraph (h);
- b. Revising paragraphs (h)(1)(i), (h)(1)(ii), and (h)(1)(iv);
- c. Revising the heading and first sentence in paragraph (h)(2); and
- d. Adding new paragraph (h)(3) to read as follows:

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

* * * * *

(h) *Task or Delivery Order Contracts, including Multiple Award Contracts—*

(1) *Contracts set-aside for exclusive competition among 8(a) Participants.* (i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures, including an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, application of the performance of work requirements set forth in § 124.510, and the nonmanufacturer rule, if applicable, (see § 121.406(b)).

(ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants. * * *

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met.

(2) *Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.* In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a) award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met: * * *

* * * * *

(3) *Reserves.* A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a)

concerns (e.g., an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) concerns under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since that is not an 8(a) contract award.

* * * * *

- 13. Amend § 124.504 by:
 - a. Revising paragraph (a) to read as follows; and
 - b. Revising paragraph (c)(3) by removing “reserved for” and replacing it with “in”.

§ 124.504 What circumstances limit SBA’s ability to accept a procurement for award as an 8(a) contract?

* * * * *

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. The AA/BD may permit the acceptance of the requirement, however, under extraordinary circumstances.

* * * * *

14. Amend § 124.505 by revising the heading to read as follows: “§ 124.505 *When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?*”.

15. Amend § 124.510 by revising paragraph (c) to read as follows:

§ 124.510 What percentage of work must a Participant perform on an 8(a) contract?

* * * * *

(c) *Indefinite delivery and indefinite quantity contracts.* (1) In order to ensure that the required percentage of costs on an indefinite delivery or indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate that it has performed the required percentage for each order. This includes Multiple Award Contracts that were set-aside, partially set-aside or reserved solely for 8(a) BD Participants as well as orders issued against Multiple Award Contracts that were set-aside solely for 8(a) BD Participants. For a

service or supply contract, this means that the Participant must perform 50 percent of the applicable costs for each task or delivery order with its own employees or the cost of manufacturing the supplies or products, whichever is applicable.

(2) The applicable SBA District Director may waive the provisions in paragraph (c)(1) of this section requiring a Participant to meet the applicable performance of work requirement for each task or delivery order. Instead, the District Director may permit the Participant to meet the applicable performance of work for the combined total of all orders issued to date at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance. However, the 8(a) Participant and procuring activity’s contracting officer must provide written assurances that the contract will ultimately comply with the requirements of this section. The procuring activity’s contracting officer does not have authority to waive the provisions in paragraph (c)(1) of this section requiring a Participant to meet the applicable performance of work requirement for each task or delivery order, even if the agency has a Partnership Agreement with SBA.

Example. Two task orders are issued under an 8(a) indefinite quantity service contract during the first six months of the contract. The contract requires \$100,000 in personnel costs to be incurred on the first task order, and 90% of those costs (\$90,000) are incurred for performance by the Participant’s own work force. The second task order issued during the first six months also requires \$100,000 in personnel costs to be incurred. Where the relevant SBA District Director has waived the requirements of paragraph (c)(1), the 8(a) Participant would have to incur only 10 percent of the personnel costs on the second task order (\$10,000) because it would still have performed 50% of the total personnel costs (\$200,000) at the end of the six-month period (\$100,000).

(3) Where the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant. Further, the contracting officer must document an 8(a) Participant’s performance of work requirements as part of its performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104–6.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

16. The authority citation for 13 CFR part 125 is amended to read as follows:

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

17. Revise § 125.1 to read as follows:

§ 125.1 What definitions are important to SBA's Government Contracting Programs?

(a) *Chief Acquisition Officer* means the employee of a Federal agency designated as such pursuant to section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a)).

(b) *Commercial off-the-shelf item* has the same definition as set forth in 41 U.S.C. 101 (as renumbered) and Federal Acquisition Regulation (FAR) § 2.101.

(c) *Consolidation of contract requirements, consolidated contract or consolidated requirement* means a solicitation for a single contract or a Multiple Award Contract to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options).

(d) *Contract* unless otherwise noted, has the same definition as set forth in FAR § 2.101 and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or Basic Ordering Agreement (BOA)).

(e) *Contract bundling, bundled requirement, bundled contract, or bundling* means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract or a Multiple Award Contract that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement) due to:

(1) The diversity, size, or specialized nature of the elements of the performance specified;

(2) The aggregate dollar value of the anticipated award;

(3) The geographical dispersion of the contract performance sites; or

(4) Any combination of the factors described in the above paragraphs (1), (2), and (3) of this section.

(f) *Cost of the contract* means all allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(g) *Cost of contract performance incurred for personnel* means direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(h) *Cost of manufacturing* means costs incurred by the business concern in the production of the end item being acquired, including the costs associated with crop production. These are costs associated with producing the item being acquired, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(i) *Cost of materials* means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial items that require additional manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, include the acquisition of services or products from outside sources following normal commercial practices within the industry.

(j) *General Services Administration (GSA) Schedule Contract* means a Multiple Award Contract issued by GSA and includes the Federal Supply Schedules and other Multiple Award Schedules.

(k) *Multiple Award Contracts* means contracts that are:

(1) A multiple award schedule contract issued by GSA (e.g., GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (e.g., Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; and

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

(l) *Office of Small and Disadvantaged Business Utilization (OSDBU) or the Office of Small Business Programs (OSBP)* means the office in each Federal agency having procurement powers that is responsible for ensuring that small

businesses receive a fair proportion of Federal contracts in that agency. The office is managed by a Director, who is responsible and reports directly to the head of the agency or deputy to the agency (except that for DoD, they report to the Secretary or the Secretary's designee).

(m) *Personnel* means individuals who are "employees" under § 121.106 of this chapter except for purposes of the HUBZone program, where the definition of "employee" is found in § 126.103 of this chapter.

(n) *Partial set-aside (or partially set-aside)* means, for a Multiple Award Contract, a contracting vehicle that can be used: When market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. A contracting officer has the discretion, but is not required, to set-aside the discrete portions or categories for different small businesses participating in SBA's small business programs (e.g., CLIN 0001, 8(a) set-aside; CLIN 0002, HUBZone set-aside; CLIN 0003, SDVO SBC set-aside; CLIN 0004, WOSB set-aside; CLIN 0005 EDWOSB set-aside; CLIN 0006, small business set-aside).

(o) *Reserve* means, for a Multiple Award Contract:

(1) An acquisition conducted using full and open competition where the contracting officer's market research and recent past experience evidence that—

(i) At least two small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete portions or discrete categories by utilizing individual Contract Line Items (CLINs), Special Item Numbers (SINs), Functional Areas (FAs), or other equivalent; or

(ii) At least one small business, 8(a) BD Participant, HUBZone SBC, SDVO SBC, WOSB or EDWOSB can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs at a fair market price for all the work contemplated throughout the term of the contract; and

(2) The contracting officer makes—

(i) Two or more contract awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the rule of two or any alternative set-aside requirements provided in the small business program have been met;

(ii) Several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the rule of two has been met; or

(iii) One contract award to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(3) A bundled contract where the contracting officer's market research and recent past experience evidence that one or more Small Business Teaming Arrangement (but not any individual small business concerns) may submit an offer or receive a contract award and the contracting officer states an intention to make at least one award to a Small Business Teaming Arrangement.

(p) *Rule of Two* refers to the requirements set forth in §§ 124.506, 125.2(f), 125.19(c), 126.607(c) and 127.503 of this chapter that there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

(q) *Senior Procurement Executive* means the employee of a Federal agency designated as such pursuant to section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)).

(r) *Separate contract* means a contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery/indefinite quantity contract) that has previously been performed by any business, including an other-than-small business or small business concern.

(s) *Separate smaller contract* means a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

(t) *Single contract* means any contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery/indefinite quantity contract) resulting in one or more awardee.

(u) *Small Business Teaming Arrangement* means an arrangement where:

(1) Two or more small business concerns have formed a joint venture to act as a potential prime contractor (for the definition of and exceptions to affiliation for joint ventures, *see* § 121.103); or

(2) A potential small business prime contractor agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between a prime and its small business subcontractor(s) must exist through a written agreement between the parties that is specifically referred to as a "Small Business Teaming Arrangement" or "Small Business Teaming Agreement;" and sets forth the different responsibilities, roles and percentages of work as it relates to the acquisition.

(3) A small business teaming arrangement can include two business concerns in a mentor/protégé relationship so long as both the mentor and protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to § 121.103(h)(3)(ii) or (iii) of this chapter.

(4) The agreement must be provided to the contracting officer as part of the proposal.

(v) *Subcontract or subcontracting* means that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts, supplies, or components subassemblies, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(w) *Substantial bundling* means any bundling that meets the following dollar amounts (if the acquisition strategy contemplates Multiple Award Contracts or multiple award orders issued against a GSA Schedule Contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the

Multiple Award Contracts or orders, including options):

(1) \$8.0 million or more for the Department of Defense;

(2) \$6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) \$2.5 million or more for all other agencies.

18. Amend § 125.2 by:

a. Revising the section heading;

b. Revising paragraphs (a), (b), (c), (d) and (e) to read as follows:

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

(a) *General*. The objective of the SBA's contracting programs is to assist small business concerns, including 8(a) BD Participants, HUBZone small business concerns, Service Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) *SBA's responsibilities in the acquisition planning process*—(1) *SBA Procurement Center Representative (PCR) Responsibilities*—(i) *PCR Review*.

(A) SBA has PCRs who are generally located at Federal agencies and buying activities that have major contracting programs. At the SBA's discretion, PCRs will review all acquisitions that are

issued on a sole source basis or not set-aside or reserved for small businesses above or below the Simplified

Acquisition Threshold, to determine whether a set-aside or sole source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. This review includes acquisitions that are Multiple Award Contracts where the agency has failed to set-aside all or part of the acquisition or reserve the acquisition for small businesses. It also includes acquisitions where the agency has failed to set-aside orders placed against Multiple Award Contracts for small business concerns.

(B) PCRs will work with the cognizant Small Business Specialist (SBS) and agency OSDBU or OSBP as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams and Small Business Teaming Arrangements, as prime contractors.

(C) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs may identify small businesses that are capable of performing particular requirements.

(D) PCRs will also ensure that any Federal agency decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with maximum opportunities to participate as prime contractors and subcontractors in the acquisition or sale of real property.

(E) PCRs will review whether for bundled and consolidated contracts that are re-competed, the amount of savings and benefits was achieved under the prior bundling or consolidation of contract requirements, that such savings and benefits will continue to be realized if the contract remains bundled or consolidated, or such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(ii) *PCR Recommendations in General.* The PCR must recommend to the procurement activity alternative procurement methods that would increase small business prime contract participation if a PCR believes that a proposed procurement: includes in its statement of work goods or services currently being performed by a small business and is in a quantity or

estimated dollar value the magnitude of which renders small business prime contract participation unlikely; will render small business prime contract participation unlikely (e.g., ensure geographical preferences are justified); is for construction and seeks to package or consolidate discrete construction projects; or if a PCR does not believe a bundled or consolidated requirement is necessary and justified. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements, especially construction acquisitions that can be procured as separate projects;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate;

(C) Reserving one or more awards for small businesses when issuing Multiple Award Contracts;

(D) Using a partial set-aside;

(E) Stating in the solicitation for a Multiple Award Contract that the orders will be set-aside for small businesses; and

(F) Where the bundled or consolidated requirement is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business prime contract participation to the maximum extent practicable.

(iii) *PCR Recommendations for Small Business Teaming and Subcontracting.* The PCR will work to ensure that small business participation is maximized through Small Business Teaming Arrangements and subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals, which are expected of the contractor awardee;

(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of or in addition to subcontract dollars;

(C) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor;

(D) Recommending that a separate evaluation factor with significant weight is established for the extent to which offerors attained their subcontracting goals on previous contracts;

(E) Recommending that a separate evaluation factor with significant weight is established for evaluating the offerors' proposed approach to small business utilization, the extent to which offerors

propose small business utilization, and the extent to which offerors attain their subcontracting goals on previous contracts;

(F) For bundled and consolidated requirements, requiring that a separate evaluation factor with significant weight is established for evaluating the offerors' proposed approach to small business utilization, the extent to which offerors propose small business utilization, and the extent to which offerors attain their subcontracting goals on previous contracts;

(G) For bundled or consolidated requirements, recommending the solicitation state that the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities and past performance of all proposed subcontractors. It may also include recommending that the agency reserve at least one award to a small business prime contractor with a Small Business Teaming Arrangement;

(H) For Multiple Award Contracts and multiple award requirements above the substantial bundling threshold, recommending or requiring that the solicitation state that the agency will solicit offers from small business concerns and small business concerns with Small Business Teaming Arrangements; and

(I) For consolidated contracts, ensuring that agencies have provided small business concerns with appropriate opportunities to participate as prime contractors and subcontractors and making recommendations on such opportunities as appropriate.

(iv) *Appeals of PCR and BPCR Recommendations.* In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, partial set-aside or reserve, whether or not the acquisition is a bundled, substantially bundled or consolidated requirement, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the Secretary of the Department or head of the agency. The time limits for such appeals are set forth in FAR § 19.505 (48 CFR 19.505).

(2) *SBA BPCR Responsibilities.* (i) Breakout PCRs (BPCRs) are assigned to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR. (ii) BPCRs advocate full and open

competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures in paragraph (b)(1)(v) of this section. BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) (FAR § 19.403(c)) and Section 15(l) of the Small Business Act (15 U.S.C. 644(l)).

(c) *Procuring Agency*

Responsibilities—(1) Requirement to Foster Small Business Participation. The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract. In addition, Federal agencies must ensure that all bundled and consolidated contracts contain the required analysis and justification and provide small business concerns with appropriate opportunities to participate as prime contractors and subcontractors. To comply with these requirements, agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by service-disabled veteran-owned small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(ii) Avoid unnecessary and unjustified bundling of contracts or consolidation of contract requirements that inhibits or precludes small business participation in procurements as prime contractors;

(iii) Follow the limitations on use of consolidated contracts;

(iv) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under 15 U.S.C. 694b, the contracting procurement agency must, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work;

(v) Ensure that prior to placing an order against another agency's Multiple Award Contract, a determination that use of another agency's contract vehicle

is the best procurement approach and promotes small business participation; and

(vi) Provide SBA the necessary information relating to the acquisition under review. This includes providing PCRs (to the extent of their security clearance) copies of all documents relating to the acquisition under review, including, but not limited to, the performance work statement/statement of work, technical data, market research, hard copies or their electronic equivalents of Department of Defense (DoD) Form 2579 or equivalent, etc. The DoD Form 2579 or equivalent must be sent electronically to the PCR (or if a PCR is not assigned to the procuring activity, to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(2) *Requirement for market research.* Each agency must conduct market research to determine the type and extent of small business participation in the acquisition. In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that could lead to a bundled, substantially bundled, or consolidated contract. The purpose of the market research and analysis is to determine whether the bundling or consolidation of the requirements is necessary and justified and all statutory requirements for such a strategy have been met. Agencies should be as broad as possible in their search for qualified small businesses, using key words as well as NAICS codes in their examination of the Dynamic Small Business Search Engine that is available in CCR, and must not place unnecessary and unjustified restrictions when conducting market research (e.g., requiring that small businesses prove they can provide the best scientific and technological sources) when determining whether to set-aside, partially set-aside, reserve or sole source a requirement to small businesses. During the market research phase, the acquisition team must consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located) and the activity's Small Business Specialist.

(3) *Proposed Acquisition Strategy.* A procuring activity must provide to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at

least 30 days prior to a solicitation's issuance:

(i) A copy of a proposed acquisition strategy (e.g., DoD Form 2579, or equivalent) whenever a proposed acquisition strategy:

(A) Includes in its description goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely;

(B) Seeks to package or consolidate discrete construction projects;

(C) Is a bundled or substantially bundled requirement; or

(D) Is a consolidation of contract requirements.

(ii) A written statement explaining why, if the proposed acquisition strategy involves a bundled or consolidated requirement, the procuring activity believes that the bundled or consolidated requirement is necessary and justified, the analysis required by paragraph (d)(2)(i) of this section, the acquisition plan, any bundling information required under paragraph (d)(3) of this section, and any other relevant information. The PCR and agency OSDBU or OSBP, as applicable, must then work together to develop alternative acquisition strategies identified in paragraph (b)(1) of this section to enhance small business participation.

(iii) All required clearances for the bundled, substantially bundled, or consolidated requirement.

(iv) A written statement explaining why, if the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured as separate discrete projects.

(4) *Procuring Agency Small Business Specialist (SBS) Responsibilities.* (i) As early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a

solicitation, or prior to placing an order without a solicitation, the procuring activity must coordinate with the procuring activity's SBS when the acquisition strategy contemplates an acquisition meeting the dollar amounts set forth for substantial bundling. If the acquisition strategy contemplates Multiple Award Contracts or orders under the GSA Multiple Award Schedule Program or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options. The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA's small business programs, as authorized under the Small Business Act.

(ii) The SBS must notify the agency OSDBU or OSBP if the agency's acquisition strategy or plan includes bundled or consolidated requirements that the agency has not identified as bundled, or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(iii) The SBS must coordinate on all required determinations and findings for bundling and/or consolidation, and acquisition planning and strategy documentation.

(5) *OSDBU and OSBP Oversight Functions.* The Agency OSDBU or OSBP must:

(i) Conduct annual reviews to assess the:

(A) Extent to which small businesses are receiving their fair share of Federal procurements, including contract opportunities under programs administered under the Small Business Act;

(B) Adequacy of the bundling or consolidation documentation and justification; and

(C) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling or consolidation on small businesses (*e.g.*, review agency oversight of prime contractor subcontracting plan compliance under the subcontracting program).

(ii) Provide a copy of the assessment under paragraph (c)(5)(i) of this section to the agency head and SBA Administrator.

(iii) Identify proposed solicitations that involve significant bundling of contract requirements, and work with

the agency acquisition officials and the SBA to revise the procurement strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors;

(iv) Facilitate small business participation as subcontractors and suppliers, if a solicitation for a substantially bundled contract is to be issued;

(v) Assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of Title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the FAR or any individual agency supplement to such Governmentwide regulation;

(vi) Cooperate, and consult on a regular basis, with the SBA with respect to carrying out these functions and duties;

(vii) Make recommendations to contracting officers as to whether a particular contract requirement should be awarded to any type of small business. The failure of the contracting officer to accept any such recommendations must be documented and included within the appropriate contract file; and

(viii) Coordinate on any acquisition planning and strategy documentation, including bundling and consolidation determinations at the agency level.

(6) *Communication on Achieving Goals.* All Senior Procurement Executives, senior program managers, Directors of OSDBU or Directors of OSBP must communicate to their subordinates the importance of achieving small business goals and ensuring that a fair proportion of awards are made to small businesses.

(d) *Contract Consolidation and Bundling—(1) Limitation on the Use of Consolidated Contracts.* (i) An agency may not conduct an acquisition that is a consolidation of contract requirements unless the Senior Procurement Executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy:

(A) Conducts market research;

(B) Identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) Makes a written determination, which is coordinated with the agency's OSDBU/OSBP, that the consolidation of contract requirements is necessary and justified;

(D) Identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) Certifies to the head of the Federal agency that steps will be taken to include small business concerns in the acquisition strategy.

(ii) A Senior Procurement Executive or Chief Acquisition Officer may determine that an acquisition strategy involving a consolidation of contract requirements is necessary and justified.

(A) A consolidation of contract requirements may be necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified under paragraph (d)(1)(i)(B).

(B) The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to: benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$94 million or less; or benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(C) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements in a procurement unless the expected total amount of the cost savings, as determined by the Senior Procurement Executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement. To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(iii) DoD and each military department must comply with this section until the SBA determines that DoD and each military department are in compliance with its Governmentwide and agency specific contracting goals. If SBA determines that DoD and the military departments are in compliance with such goals, then consolidated contracts must be conducted in accordance with 10 U.S.C. 2382.

(iv) Each agency must ensure that any decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with opportunities to participate as prime contractors and subcontractors in the acquisition.

(v) If the consolidated requirement is also considered a bundled requirement, then the contracting officer must instead follow the provisions regarding bundling set forth in paragraphs (d)(2)–(7) or (d)(3) of this section, whichever is applicable.

(2) *Limitation on the Use of Contract Bundling.* (i) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(ii) A bundled requirement is necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(A) Benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$94 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(iii) Notwithstanding paragraph (d)(2)(ii) of this section, the Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis, determine that a bundled requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(2)(ii) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) Procurement strategy provides for maximum practicable participation by small business.

(iv) The reduction of administrative or personnel costs alone must not be a justification for bundling of contract requirements unless the administrative

or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be bundled (including options). To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(v) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(vi) The substantial benefit analysis set forth in paragraph (d)(2)(ii) of this section is still required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A–76.

(3) *Limitations on the Use of Substantial Bundling.* Where a proposed procurement strategy involves a Substantial Bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(2)(i) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(v) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.*, consider the strategies under paragraphs (b)(1)(ii) of this section).

(4) *Significant Subcontracting Opportunities in Justified Consolidated, Bundled and Substantially Bundled Requirements.* (i) Where a justified consolidated, bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the

following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified above.

(5) *Notification to Current Small Business Contractors of Intent to Bundle.* The procuring activity must notify each small business which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located). This notification must be documented in the contract file.

(6) *Notification to Public of Rationale for Bundled Requirement.* The head of a Federal agency must publish on the agency's Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification must be made within 30 days of the agency's data certification regarding the validity and verification of data entered in that Federal Procurement Data Base to the Office of Federal Procurement Policy. However, to foster transparency in Federal procurement, the agency is encouraged to provide such notification before issuance of the solicitation.

(7) *Notification to SBA of Recompeted Bundled or Consolidated Requirement.* For each bundled or consolidated contract that is to be recompeted (even if additional requirements have been added or deleted) the procuring agency must notify SBA's PCR as soon as possible but no later than 30 days prior to issuance of the solicitation of:

(i) The amount of savings and benefits achieved under the prior bundling or consolidation of contract requirements,

(ii) Whether such savings and benefits will continue to be realized if the contract remains bundled or consolidated, and

(iii) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(e) *Multiple Award Contracts*—(1) *General.* (i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set-aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement action is a decision of the contracting agency.

(iii) The procuring contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award Contract, when these authorities could have been used.

(2) *Set-aside of Multiple Award Contracts.* (i) The contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) When drafting the solicitation for the contract, agencies should consider an on-ramp provision that permits the agency to refresh the awards by adding more small business contractors. Agencies should also consider the need to transition off existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (*e.g.*, termination for convenience). However, agencies must transition off existing contractors that were required to, but unable to, recertify their small business status pursuant to § 121.104(g) of this chapter.

(iv) A business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of the contract and each order.

(3) *Partial Set-asides of Multiple Award Contracts.* (i) If the contracting

officer decides to partially set-aside a Multiple Award Contract, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section for the part or parts of the contract that have been set-aside.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that the small business will not compete against other-than-small businesses for any order issued against that part or parts of the Multiple Award Contract that are set-aside.

(iv) A contracting officer must state in the solicitation that the small business will be permitted to compete against other-than-small businesses for an order issued against the portion of the Multiple Award Contract that has not been partially set-aside if the small business submits an offer for the non-set-aside portion. The business concern will not have to comply with the limitations on subcontracting provision (*see* § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed and awarded under the portion of the contract that is not set-aside.

(v) When drafting the solicitation for the contract, agencies should consider an on-ramp provision that permits the agency to refresh these awards by adding more small business contractors to that portion of the contract that was set-aside. Agencies should also consider the need to transition off existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (*e.g.*, termination for convenience). However, for that portion of the contract that was set-aside, agencies must transition off existing contractors that were required to but unable to recertify their small business status pursuant to § 121.104(g) of this chapter.

(vi) A small business (or 8(a) Participant, HUBZone SBC, SDVO SBC or WOSB/EDWOSB) is not required to submit an offer on the part of the solicitation that is not set-aside. However, a small business may, if it chooses, submit an offer on the part or parts of the solicitation that have been set-aside and/or on the parts that have not been set-aside.

(vii) A small business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of the contract and each order that is set-aside against the contract.

(4) *Reserves of Multiple Award Contracts Awarded in Full and Open Competition.* (i) If the contracting officer decides to reserve a multiple award contract established through full and open competition, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) A contracting officer must state in the solicitation that if there are two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency will compete any orders solely amongst the specified types of small business concerns if the rule of two or an alternative set-aside requirement provided in the small business program have been met.

(iii) A contracting officer must state in the solicitation that if there are several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB), the agency will compete any orders solely amongst all of the small business concerns if the rule of two has been met.

(iv) A contracting officer must state in the solicitation that if there is only one contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may issue orders directly to that concern for work that it can perform.

(v) Small businesses are permitted to compete against other-than-small businesses for an order issued against the Multiple Award Contract if the small business has been awarded a contract for those supplies or services.

(v) A business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, for any order issued against the Multiple Award Contract if the order is competed and awarded under the set-aside portion of the contract (*see* § 121.406(b)). However, a business need not comply with the limitations on subcontracting provisions (*see* § 125.6) and the

nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst small and other-than-small business concerns.

(5) *Reserve of Multiple Award Contracts that are Bundled.* (i) If the contracting officer decides to reserve a multiple award contract established through full and open competition that is a bundled contract, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) The Small Business Teaming Arrangement must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) on all orders issued against the Multiple Award Contract, although the cooperative efforts of the team members will be considered in determining whether the subcontracting limitations requirement is met (*see* § 125.6(j)).

(iii) Team members of the Small Business Teaming Arrangement will not be affiliated (*see* § 121.103(b)(8)).

(6) *Set-aside of orders against Multiple Award Contracts that have not been Set-Aside, Partially Set-Aside or Reserved for Small Businesses.* (i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j, the contracting officer has the authority to set-aside orders against Multiple Award Contracts that were competed on a full and open basis.

(ii) The contracting officer may state in the solicitation and resulting contract for the Multiple Award Contract that:

(A) Based on the results of market research, orders issued against the Multiple Award Contract will be set-aside for small businesses or any subcategory of small businesses whenever the rule of two or any alternative set-aside requirements provided in the small business program have been met; or

(B) The agency is preserving the right to consider set-asides using the rule of two or any alternative set-aside requirements provided in the small business program, on an order-by-order basis.

(iii) After conducting market research, the contracting officer shall first consider whether there is a reasonable expectation that offers will be obtained from at least two 8(a) BD, HUBZone,

SDVO or WOSB small business concerns under the respective programs, before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs.

(iv) The contracting officer must assign a NAICS code to the solicitation for each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for each order issued against that contract.

(v) A business must comply with applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of each order that is set-aside against the contract.

(7) *Tiered evaluation of offers, or cascading.* An agency cannot create a tiered evaluation of offers or “cascade” unless it has specific statutory authority to do so. This is a procedure used in negotiated acquisitions when the contracting officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation, which states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made. For example, an agency is not permitted to state an intention to award one contract to an 8(a) BD Participant and one to a HUBZone SBC, but only if no awards are made to 8(a) BD Participants, unless the agency has specific statutory authority to do so.

19. Amend § 125.3 by:

a. Revising the section heading; and
b. Adding a new paragraph (h) to read as follows:

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

* * * * *

(h) *Subcontracting consideration in bundled and consolidated contracts.* (1) For bundled requirements, the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities of all proposed subcontractors.

(2) For substantial bundling, the agency must design actions to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(3) For significant subcontracting opportunities in consolidated contracts, bundled and substantially bundled requirements *see* § 125.2(d)(4).

20. Amend § 125.4 by revising the heading to read as follows:

§ 125.4 What is the Government property sales assistance program?

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21. Amend § 125.5 by:

a. Revising the heading;
b. Revising paragraphs (a)(1) and (a)(2);
c. Revising paragraph (b)(1)(i), (b)(1)(ii), and (b)(1)(iii);
d. Revising paragraph (b)(1)(v)(A) by removing “SIC” and replacing it with “NAICS”;
e. Revising paragraph (b)(1)(v)(C) by adding “or reserve” after “In the case of a set-aside”;
f. Revising the first sentence in paragraph (c)(1);
g. Revising paragraph (h);
h. Revising the first sentence in paragraph (i)(2);
i. Revising paragraph (l)(1)(iii); and
j. Revising paragraph (m) by inserting the following at the end of the paragraph.

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract, which includes Multiple Award Contracts and orders placed against Multiple Award Contracts, where responsibility type issues are used to determine award or establish the competitive range. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. With respect to Multiple Award Contracts, contracting officers should determine responsibility at the time of award of the contract. However, if a contracting officer makes any of the responsibility determinations set forth in paragraph (2) below for an order issued against a Multiple Award Contract, the contracting officer must refer the matter to SBA for a COC. The COC procedures apply to all Federal procurements, regardless of the location of performance or the location of the procuring activity.

(2) A contracting officer must refer a small business concern to SBA for a

possible COC, even if the next apparent successful offeror is also a small business, when the contracting officer:

- (i) Denies an apparent successful small business offeror award of a contract or order on responsibility grounds;
- (ii) Refuses to consider a business concern for award of a contract or order after evaluating the concern's offer on a pass/fail (or go/no go) basis under a responsibility-related evaluation factor (such as experience or past performance); or
- (iii) Refuses to consider a business concern for award of a contract or order because it failed to meet a definitive responsibility criterion contained in the solicitation.

(3) * * *
* * * * *

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review.

(i) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter.

(ii) To be eligible for a COC, an offeror must have agreed to comply with applicable limitations on subcontracting (see § 125.6). Whether an offeror has agreed to comply with the limitations on subcontracting is a matter of technical acceptability or responsiveness. Whether an offeror will be able to comply with the limitations on subcontracting is a matter of responsibility.

(iii) A non-manufacturer making an offer on a contract for supplies that is set-aside or reserved for small business (where the small business will be competing against other small businesses for orders) must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter for either the type of product being procured or the specific contract at issue. * * *

(c) *Referral of nonresponsibility determination to SBA.* (1) The contracting officer must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. * * *

(h) *Notification of intent to issue on a contract or order with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is

warranted, he or she will notify the contracting officer (or the procurement official with the authority to accept SBA's decision) of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer or the procurement official with the authority to accept SBA's decision has the following options: * * *

- (i) * * *
- (2) SBA Headquarters will furnish written notice to the Director, OSDBU or OSBP of the procuring agency, with a copy to the contracting officer, that the case file has been received and that an appeal decision may be requested by an authorized official. * * *

* * * * *

- (l) * * *
- (1) * * *

* * * * *

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the business concern's current circumstances and the reason why the contract has not been issued).

* * * * *

(m) * * * Where SBA issues a COC with respect to a business concern that was not going to be considered for award for the reasons contained in (a)(2)(ii) or (a)(2)(iii) of this section, award need not be made to that offeror where the contracting officer considers the offeror for award, but does not issue the award to that offeror for reasons unrelated to the SBA's responsibility determination.

22. Amend § 125.6 by:
- a. Revising the heading;
 - b. Revising paragraph (a);
 - c. Removing current paragraph (e);
 - d. Redesignating paragraphs (f), (g), (h), and (i) as (e), (f), (g), and (h) respectively;
 - e. Revising newly designated paragraph (f);
 - f. Adding a new paragraph (i); and
 - g. Adding a new paragraph (j) to read as follows:

§ 125.6 What are the prime contractor performance requirements (limitations on subcontracting)?

(a) *In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, or a small business reserve, a small business concern must agree that:*

* * * * *

(f) The period of time used to determine compliance will be the period of performance which the evaluating agency uses to evaluate the offer. If the evaluating agency fails to

state in its solicitation the period of performance it will use to evaluate the offer, it will use the base contract period (excluding options) to determine compliance. In indefinite delivery or indefinite quantity contracts, the agency will use the maximum authorized in the base contract period (excluding options) to determine compliance. In Multiple Award Contracts, the agency will use the period of performance for each order issued against the Multiple Award Contract to determine compliance unless the order is competed amongst small and other-than-small businesses (in which case the subcontracting limitations will not apply).

* * * * *

(i) Where an offeror is exempt from affiliation under § 121.103(b)(8) of this chapter and qualifies as a small business concern for a reserve of a bundled contract, the performance of work requirements set forth in this section apply to the cooperative effort of the small business team members of the Small Business Teaming Arrangement, not its individual members.

(j) The contracting officer must document a small business concern's performance of work requirements as part of the small business' performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104-6.

23. Amend § 125.8 by revising paragraph (b) to read as follows:

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

(a) * * *

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

* * * * *

24. Revise § 125.14 it to read as follows:

§ 125.14 What are SDVO contracts?

SDVO contracts, including Multiple Award Contracts (see § 125.1), are those awarded to an SDVO SBC through any of the following procurement methods:

(a) Sole source awards to an SDVO SBC;

(b) Set-aside awards, including partial set-asides, based on competition restricted to SDVO SBCs;

(c) Awards based on a reserve for SDVO SBCs in a solicitation for a Multiple Award Contract (see § 125.1); or

(d) Orders set-aside for SDVO SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

25. Amend § 125.15 by adding new paragraphs (d) and (e) to read as follows:

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

* * * * *

(d) *Multiple Award Contracts.* (1) *Partial set-asides.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule, if applicable (see § 121.406(b)), in the performance of a contract partially set-aside for SDVO SBCs.

(2) *Set-aside of orders.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule, if applicable, (see § 121.406(b)) in the performance of each individual order that has been set-aside for SDVO SBCs.

(3) *Reserves.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule, if applicable, (see § 121.406(b)) in the performance of the contract that is reserved for one or more SDVO SBCs. However, the SDVO SBC will not have to comply with the limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst SDVO SBCs and other-than-small business concerns.

(e) *Recertification.* (1) A concern that represents itself and qualifies as an SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDVO SBC throughout the life of that contract. This means that if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order. Where a concern later fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC. The following exceptions apply:

(i) Where an SDVO contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDVO SBC to the procuring agency, or inform the procuring agency that it does not qualify as an SDVO SBC, within 30 days of the novation approval. If the concern is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

(ii) Where a concern that is performing an SDVO SBC 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 SDVO SBC status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDVO SBC. If the contractor is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) There has been an SDVO SBC status protest on the solicitation or contract. See 125.27(e) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its SDVO SBC status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as an SDVO SBC, either initially or prior to an option being exercised, may recertify itself as an SDVO SBC for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) 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 self-representation as part of its response to the solicitation for the order.

(6) 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.

26. Amend § 125.22 by revising the heading to read as follows: “§ 125.22 *May SBA appeal a contracting officer's decision not to make a procurement available for award as an SDVO contract?*”

27. Amend § 125.24 by revising paragraph (b) to read as follows:

§ 125.24 Who may protest the status of an SDVO SBC?

* * * * *

(b) For all other procurements, including Multiple Award Contracts (see § 125.1), any interested party may protest the apparent successful offeror's SDVO SBC status.

PART 126—HUBZONE PROGRAM

28. The authority citation for part 126 is amended to read as follows:

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

29. Amend § 126.103 by revising the definition of the term “Interested party” to read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

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

* * * * *

30. Revise § 126.600 to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts, including Multiple Award Contracts (see 125.1), are those awarded to a qualified HUBZone SBC through any of the following procurement methods:

(a) Sole source awards to qualified HUBZone SBCs;

(b) Set-aside awards, including partial set-asides, based on competition restricted to qualified HUBZone SBCs;

(c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs;

(d) Awards based on a reserve for HUBZone SBCs in a solicitation for a Multiple Award Contract (*see* § 125.1); or

(e) Orders set-aside for HUBZone SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

31. Amend § 126.601 by adding new paragraphs (g) and (h) to read as follows:

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

* * * * *

(g) *Multiple Award Contracts*—(1) *Partial set-asides.* The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of a contract partially set-aside for HUBZone SBCs.

(2) *Set-aside of orders.* The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of each individual order that has been set-aside for HUBZone SBCs.

(3) *Reserves.* The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of the contract that is reserved for one or more HUBZone SBCs. However, the qualified HUBZone SBC will not have to comply with the limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst qualified HUBZone SBCs and other-than-small business concerns.

(h) *Recertification of Status for an Award.* (1) A concern that is a qualified HUBZone SBC at the time of initial offer and contract award, including a Multiple Award Contract, is considered a HUBZone SBC throughout the life of that contract. This means that if a HUBZone SBC is certified at the time of initial offer and contract award for a Multiple Award Contract, then it will be considered a HUBZone SBC for each order issued against the contract, unless a contracting officer requests a new HUBZone SBC certification in connection with a specific order. Where a concern later is decertified, the procuring agency may exercise options and still count the award as an award to a HUBZone SBC. The following exceptions apply:

(i) Where a HUBZone contract (or a contract awarded through full and open

competition based on the HUBZone price evaluation preference) is novated to another business concern, the concern that will continue performance on the contract must certify its status as a HUBZone SBC to the procuring agency, or inform the procuring agency that it does not qualify as a HUBZone SBC, within 30 days of the novation approval. If the concern cannot certify that it qualifies as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

(ii) Where a concern that is performing a HUBZone 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 HUBZone SBC status to the procuring agency, or inform the procuring agency that it has been decertified or no longer qualifies as a HUBZone SBC. If the contractor is unable to recertify its status as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) There has been a HUBZone status protest on the solicitation or contract. *See* 126.803(d) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options) a contracting officer must request that a business concern recertify its HUBZone SBC status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a HUBZone SBC, either initially or prior to an option being exercised, may recertify itself as a HUBZone SBC for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) 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 self-representation as part of

its response to the solicitation for the order and at the time of award.

(6) A concern's status may be determined at the time of submission of its initial response to a solicitation for and award of an Agreement and each order issued pursuant to the Agreement.

32. Revise § 126.602 to read as follows:

§ 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

(a) Qualified HUBZone SBCs eligible for the program pursuant to § 126.200(b) must meet the HUBZone residency requirement at all times while certified in the program. However, the qualified HUBZone SBC may “attempt to maintain” (*See* § 126.103) the required percentage of employees who reside in a HUBZone during the performance of any HUBZone contract awarded to the concern on the basis of its HUBZone status, except as set forth in paragraph (d).

(b) For indefinite delivery/indefinite quantity contracts, including Multiple Award Contracts, the qualified HUBZone SBC must attempt to maintain the residency requirement during the performance of each order issued against that contract.

(c) A qualified HUBZone SBC eligible for the program pursuant to § 126.200(a) must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation. To monitor compliance, SBA will conduct program examinations, pursuant to §§ 126.400 through 126.403, where appropriate.

(d) Every time a qualified HUBZone SBC submits and offer and is awarded a HUBZone contract, it must meet all of the HUBZone Program's eligibility requirements, including the employee residency requirement at the time it submits its initial offer and up until and at the time of award. This means that if a HUBZone SBC is performing on a HUBZone contract and submits an offer for another HUBZone contract, it can no longer attempt to maintain the HUBZone residency requirement; rather, it must meet the requirement at the time it submits its initial offer and up until and at the time of award.

33. Amend § 126.610 by revising the heading to read as follows:

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

34. Amend § 126.613 by:

- a. Adding a new sentence at the end of paragraph (a)(1); and
- b. Adding an Example 4 in paragraph (b).

§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?

(a) * * *
 (1) * * * This does not apply if the HUBZone SBC will receive the contract as part of a reserve for HUBZone SBCs.
 * * * * *

(b) * * *
Example 4: In a full and open competition, a qualified HUBZone SBC submits an offer of \$98 and a large business submits an offer of \$93. The contracting officer has stated in the solicitation that one contract will be reserved for a HUBZone SBC. The contracting officer would not apply the price evaluation preference when determining which HUBZone SBC would receive the contract reserved for HUBZone SBCs, but would apply the price evaluation preference when determining the awardees for the non-reserved portion.
 * * * * *

§ 126.614 [Removed and Reserved]

35. Remove and reserve § 126.614.
 36. Amend § 126.800 by revising paragraph (b) as follows:

§ 126.800 Who may protest the status of a qualified HUBZone SBC?

(b) For all other procurements, including Multiple Award Contracts (see 125.1), SBA, the CO, or any other interested party may protest the apparent successful offeror's qualified HUBZone SBC status.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT ASSISTANCE PROGRAM

37. The authority for 13 CFR part 127 continues to read as follows:

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

38. Revise § 127.101 to read as follows:

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

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

certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

39. Amend § 127.102 by revising the following definitions to read as follows:

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

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

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

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

40. Amend § 127.300 by revising paragraph (a) to read as follows:

§ 127.300 How is a concern certified as an EDWOSB or WOSB?

(a) *General.* At the time a concern submits an offer on a specific contract (including a Multiple Award Contract) or order reserved for competition among EDWOSBs or WOSBs under this Part, it must be registered in the Central Contractor Registration (CCR), have a current representation posted on the Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB and have provided the required documents to the WOSB Program Repository, or if the repository is unavailable, be prepared to submit the documents to the contracting officer if selected as the apparent successful offeror.
 * * * * *

41. Amend § 127.400 by revising the first sentence of paragraph (a) to read as follows:

§ 127.400 What is an eligibility examination?

(a) *Purpose of examination.* Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process (including third-party certifications) or in connection with an EDWOSB or WOSB requirement. * * *

42. Amend § 127.401 by revising paragraph (a) to read as follows:

§ 127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?

(a) *Eligibility examination.* An eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB requirement. * * *

43. Amend § 127.503 by:
 a. Revising paragraphs (a)(2), (a)(3), (b)(2), and (b)(3); and
 b. Adding a new paragraph (f) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

- (a) * * *
- (1) * * *
- (2)(i) The anticipated award price (including options) of the contract does not exceed \$6,500,000 in the case of a contract assigned a NAICS code for manufacturing, or \$4,000,000 in the case of all other contracts; or
- (ii) For Multiple Award Contracts, the anticipated award price (including options) of each order issued against the Multiple Award Contract does not exceed \$6,500,000 in the case of an order assigned a NAICS code for manufacturing, or \$4,000,000 in the case of all other orders; and
- (3) Award may be made at a fair and reasonable price.
- (b) *WOSB requirements.* * * *
- (1) * * *
- (2) The anticipated award price (including options) of the contract will not exceed \$6,500,000 in the case of a contract or order assigned a NAICS code for manufacturing, or \$4,000,000 in the case of all other contracts; or
- (ii) For Multiple Award Contracts, the anticipated award price (including options) of each order issued against a Multiple Award Contract does not exceed \$6,500,000 in the case of an order assigned a NAICS code for manufacturing, or \$4,000,000 in the case of all other orders; and

(3) Award may be made at a fair and reasonable price.

* * * * *

(f) *Recertification.* (1) A concern that represents itself and qualifies as a WOSB or EDWOSB at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered a WOSB or EDWOSB throughout the life of that contract. This means that if a WOSB/EDWOSB is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an WOSB/EDWOSB for each order issued against the contract, unless a contracting officer requests a new WOSB or EDWOSB certification in connection with a specific order. Where a concern later fails to qualify as a WOSB/EDWOSB, the procuring agency may exercise options and still count the award as an award to a WOSB/EDWOSB. The following exceptions apply:

(i) Where a WOSB/EDWOSB contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as a WOSB/EDWOSB to the procuring agency, or inform the procuring agency that it does not qualify as a WOSB/EDWOSB, within 30 days of the novation approval. If the concern cannot certify its status as a WOSB/EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(ii) Where a concern that is performing a WOSB/EDWOSB 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 WOSB/EDWOSB status to the procuring agency, or inform the procuring agency

that it no longer qualifies as a WOSB/EDWOSB. If the contractor is not a WOSB/EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status if necessary.

(iii) There has been a WOSB or EDWOSB status protest on the solicitation or contract. See 127.604(f) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its WOSB/EDWOSB status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a WOSB/EDWOSB, either initially or prior to an option being exercised, may recertify itself as a WOSB/EDWOSB for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) 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 self-representation as part of its response to the solicitation for the order.

(6) 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.

44. Amend § 127.506 by:

- a. Adding the word, "order" at the end of paragraph (a); and
- b. Removing the word "contract" and adding the words "contract or order" in paragraphs (c)(2), (c)(4), (c)(5) and (d).

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

A joint venture may submit an offer on an EDWOSB or WOSB requirement if the joint venture meets all of the following requirements:

(a) Except as provided in § 121.103(h)(3) of this chapter, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code assigned to the contract or order;

* * * * *

45. Amend § 127.508 by revising the heading to read as follows:

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

46. Amend § 127.600 by revising the first sentence of paragraph (a) to read as follows:

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

An interested party may protest the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement or contract. * * *

Dated: May 4, 2012.

Karen Gordon Mills,
Administrator.

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