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Small Business Mentor Protégé Programs; Final Rule

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 124, 125, 126, 127, and 134**

RIN 3245-AG24

Small Business Mentor Protégé Programs**AGENCY:** U.S. Small Business Administration.**ACTION:** Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations to implement provisions of the Small Business Jobs Act of 2010, and the National Defense Authorization Act for Fiscal Year 2013. Based on authorities provided in these two statutes, the rule establishes a Government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for Participants in SBA's 8(a) Business Development (BD) program. The rule also makes minor changes to the mentor-protégé provisions for the 8(a) BD program in order to make the mentor-protégé rules for each of the programs as consistent as possible. The rule also amends the current joint venture provisions to clarify the conditions for creating and operating joint venture partnerships, including the effect of such partnerships on any mentor-protégé relationships. In addition, the rule makes several additional changes to current size, 8(a) Office of Hearings and Appeals and HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, standards of review and interested party status for some appeals. Finally, SBA notes that the title of this rule has been changed.

DATES: This rule is effective August 24, 2016.

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SUPPLEMENTARY INFORMATION: This rule initially appeared in the Regulatory Agenda of Fall 2010 with the title "Small Business Jobs Act: Small Business Mentor-Protégé Programs." SBA carried this rule title until the Regulatory Agenda of Spring 2013 when the reference to the Jobs Act was taken out, and the title changed to "Small Business Mentor-Protégé Programs." This change reflected the statutory amendments in section 1641 of NDAA 2013. However, when the proposed rule

was published, the title had been changed to: "Small Business Mentor Protégé Program; Small Business Size Regulations; Government Contracting Programs; 8(a) Business Development/ Small Disadvantaged Business Status Determinations; HUBZone Program; Women-Owned Small Business Federal Contract Program; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals." In drafting this final rule, SBA concluded that the simpler current title ("Small Business Mentor Protégé Programs") is easier for the public to understand and would be consistent with the title that has been publicly reported in the Regulatory Agenda since 2013.

I. Background

On September 27, 2010, the President signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, 124 Stat. 2504, which was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. With the enactment of the Jobs Act, Congress recognized that mentor-protégé programs serve an important business development function for small business and authorized SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB) Program, each modeled on SBA's existing mentor-protégé program available to 8(a) Business Development (BD Program) Participants. See section 1347(b)(3) of the Jobs Act.

On January 2, 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112-239, 126 Stat. 1632. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provides that a small business mentor-protégé program must be identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary, given the types of small business concerns to be included as protégés. Section 1641 also provides that a Federal department or agency could not carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. Finally, section 1641 requires the head of each Federal department or agency carrying out an agency-specific mentor-protégé program to report

annually to SBA the participants in its mentor-protégé program, the assistance provided to small businesses through the program, and the progress of protégé firms to compete for Federal prime contracts and subcontracts.

On February 5, 2015, SBA published in the **Federal Register** a comprehensive proposal to implement a new Government-wide mentor-protégé program for all small businesses. 80 FR 6618. SBA decided to implement one new small business mentor-protégé program instead of four new mentor-protégé programs (one for small businesses, one for SDVO small businesses, one for WOSBs and one for HUBZone small businesses) since the other three types of small businesses (SDVO, HUBZone and women-owned) would be necessarily included within any mentor-protégé program targeting all small business concerns. SBA did not eliminate the 8(a) BD mentor-protégé program. Thus, the intent was to propose two separate mentor-protégé programs, one for 8(a) BD Participants and one for all small businesses (including 8(a) Participants if they choose to create a small business mentor-protégé relationship instead of a mentor-protégé relationship under the 8(a) BD program). The small business mentor-protégé program was drafted to be as similar to the 8(a) mentor-protégé program as possible.

The proposed rule called for a 60-day comment period, with comments required to be made to SBA by April 6, 2015. The overriding comment SBA received in the first few weeks after the publication was to extend the comment period. In response to these comments, SBA published a notice in the **Federal Register** on April 7, 2015, extending the comment period an additional 30 days to May 6, 2015. 80 FR 18556. In addition to providing a 90-day comment period, SBA also conducted a series of tribal consultations pursuant to Executive Order 13175, Tribal Consultations. SBA conducted three in-person tribal consultations (in Washington, DC on February 26, 2015, in Tulsa, Oklahoma on April 21, 2015, and in Anchorage, Alaska on April 23, 2015) and two telephonic tribal consultations (one on April 7, 2015, and a Hawaii/Native Hawaiian Organization specific one on April 8, 2015).

Currently, the mentor-protégé program available to firms participating in the 8(a) BD program is used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial

assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD mentor-protégé relationship is to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the mentor-protégé program for all small business concerns is designed to require approved mentors to provide assistance to protégé firms in order to enhance the capabilities of protégés, to assist protégés with meeting their business goals, and to improve the ability of protégés to compete for contracts.

One commenter opposed expanding the mentor-protégé program beyond the 8(a) BD program. The commenter believed that it has not been established that the 8(a) mentor-protégé program is bestowing a substantial benefit on 8(a) Participants, and, therefore, SBA should perform additional research and analysis before expanding the program. SBA disagrees. In the current 8(a) BD mentor-protégé program, in order for any mentor-protégé relationship to continue, the 8(a) protégé firm must demonstrate annually what benefits it has derived from the mentor-protégé relationship. Where the benefits provided to the protégé firm are minimal or where it appears that the relationship has been used primarily to permit a non-8(a) (oftentimes, large) mentor to benefit from contracts with its approved protégé, through one or more joint ventures, that it would otherwise not be eligible for, SBA will terminate the mentor-protégé relationship. The proposed rule also provided that SBA may terminate the mentor-protégé agreement (MPA) where it determines that the parties are not complying with any term or condition of the MPA. This rule requires similar reporting of benefits for non-8(a) protégé firms and similar consequences where the benefits provided to the protégé firm do not adequately justify the mentor-protégé relationship. One commenter requested clarification as to when and how SBA would cancel a MPA. SBA's analysis as to whether a protégé firm is adequately benefitting from the relationship or whether non-compliance with one or more specific terms or conditions of the MPA should warrant termination of the agreement is a fact specific determination to be made based on the totality of the circumstances. SBA would not terminate a particular MPA where there are de minimus or inadvertent violations of the agreement.

In addition, it is not SBA's intent to terminate a particular MPA without considering the views of the protégé firm. However, the mere fact that a protégé wants the mentor-protégé relationship to continue will not be dispositive if SBA believes that termination is justified.

Conversely, SBA received a significant number of comments supporting a small business mentor-protégé program. These commenters believed that a small business mentor-protégé program would enable firms that are not in the 8(a) BD program to receive critical business development assistance that would otherwise not be available to them. Many of these commenters expressed support for the opportunity to gain meaningful expertise that would help them to independently perform more complex and higher value contracts in the future.

This rule implements a mentor-protégé program similar to the 8(a) BD mentor-protégé program for all small business concerns. The rule adds this program to a new § 125.9 of SBA's regulations. SBA proposed one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. However, SBA specifically requested comments as to whether SBA should finalize one small business mentor-protégé program, as proposed, or, rather, five separate mentor-protégé programs for the various small business entities. Most commenters supported having one new small business mentor-protégé program instead of four new mentor-protégé programs (one for SDVO small businesses, one for HUBZone small businesses, one for WOSBs, and one for small businesses not falling into one of the other categories). They agreed that it would be less confusing to deal with one new program, rather than four new programs, and that it was not necessary to have four separate mentor-protégé programs since the three subcategories of small business are necessarily included within the overall category of small business. Many of the commenters were concerned, however, that changes could be made to the current 8(a) BD mentor-protégé program. Specifically, commenters were concerned that SBA might want to eliminate the 8(a) BD mentor-protégé program as a separate program and instead roll it into the small business mentor-protégé program. SBA has considered those concerns and has decided to keep the 8(a) BD mentor-protégé program as a separate program. That program has independently operated successfully for a number of years and SBA believes that it serves

important business development purposes that should continue to be coordinated through SBA's Office of Business Development, rather than through a separate mentor-protégé office managed elsewhere within the Agency. As such, this final rule makes no changes as to how MPAs are processed for the 8(a) BD program.

In addition, the final rule revises the joint venture provisions contained in § 125.15(b) (for SDVO SBCs, and which are now contained in § 125.18(b)), § 126.616 (for HUBZone SBCs), and § 127.506 (for WOSB and Economically Disadvantaged Women-Owned Small Business (EDWOSB) concerns) to more fully align those requirements to the requirements of the 8(a) BD program. The rule also adds a new § 125.8 to specify requirements for joint ventures between small business protégé firms and their mentors. The rule also makes several additional changes to current size, 8(a) BD and HUBZone regulations that are needed to clarify certain provisions or correct interpretations of the regulations that were inconsistent with SBA's intent. These changes, the comments to the proposed rule, and SBA's response to the comments are set forth more fully below.

In response to the 90-day comment period, SBA received 113 comments, with most of the commenters commenting on multiple proposed provisions. With the exception of comments that did not set forth any rationale or make suggestions, SBA discusses and responds fully to all the comments below.

Summary of Comments and SBA's Response

Definition of Joint Venture (13 CFR 121.103(h))

SBA's size regulations recognize that joint ventures may be formal or informal. The proposed rule amended § 121.103(h) to clarify that every joint venture, whether a separate legal entity or an "informal" arrangement that exists between two (or more) parties, must be in writing. SBA never meant that an informal joint venture arrangement could exist without a formal written document setting forth the responsibilities of all parties to the joint venture. SBA merely intended to recognize that a joint venture need not be established as a limited liability company or other formal separate legal entity.

A few comments opposed that provision of the proposed rule that identified informal joint ventures as partnerships, believing that entering into a formal or informal partnership

often comes with certain obligations that may not be intended under a joint venture. For example, partners generally have fiduciary duties to each other, bind one another with their actions, and are jointly and severally liable for the debts of the business. One commenter recommended that SBA should replace the phrase “formal or informal partnership” with the words “contractual affiliation.” SBA does not agree that this recommended change would be beneficial. First, SBA believes that the term “contractual affiliation” is not precise and would cause confusion. Moreover, SBA continues to believe that state law would recognize an “informal” joint venture with a written document setting forth the responsibilities of the joint venture partners as some sort of partnership. As such, this rule merely identifies the consequences of forming an informal joint venture and should assist firms in determining what type of joint venture meets the parties’ needs in each case. If the joint venture partners do not want the associated consequences of being considered a partnership, then it might be beneficial for the joint venture to be formed as a limited liability company. Therefore, this final rule adopts the proposed language and specifies that a joint venture may be a formal or informal partnership or exist as a separate limited liability company or other separate legal entity. However, regardless of form, the joint venture must be reduced to a written agreement.

In addition, the proposed rule specified that if a joint venture exists as a formal separate legal entity, it may not be populated with individuals intended to perform contracts awarded to the joint venture. This is a change from the current regulation that allows a separate legal entity joint venture to be unpopulated, to be populated with administrative personnel only, or to be populated with its own separate employees that are intended to perform contracts awarded to the joint venture. SBA explained that it is concerned that allowing populated joint ventures between a mentor and protégé would not ensure that the protégé firm and its employees benefit by developing new expertise, experience, and past performance. The separate joint venture entity would gain those things. If the individuals hired by the joint venture to perform the work under the contract did not come from the protégé firm, there is no guarantee that they would ultimately end up working for the protégé firm after the contract is completed. In such a case, the protégé firm would have gained nothing out of that contract. The

company itself did not perform work under the contract and the individual employees who performed work did not at any point work for the protégé firm.

SBA received comments on both sides of this issue. Several commenters supported the proposed change, noting that forming a separate legal entity is an undue burden, and questioned whether the firm admitted to the 8(a) program (the protégé small business) would gain any direct benefits if all the work was performed by a separate legal entity. In addition, several of the commenters appreciated SBA’s attempt to simplify these regulatory requirements. Several other commenters opposed the elimination of populated joint ventures. Many of these commenters believed that populated joint venture companies are an important mechanism for an entity-owned firm to remain competitive. They argued that this method of business organization facilitates the development of the disadvantaged small business because it makes the company more competitive in the marketplace. Specifically, these commenters pointed out that a populated joint venture has its own lower indirect costs, which, in turn, lowers the cost to the Government. Although SBA understands the benefit of using lower indirect costs from a populated joint venture, SBA continues to believe that a small protégé firm does not adequately enhance its expertise or ability to perform larger and more complex contracts on its own in the future when all the work through a joint venture is performed by a populated separate legal entity. A joint venture between a protégé firm and its mentor is intended to promote the business development of the protégé firm. SBA questions how that can be accomplished where the protégé itself performs no work on a particular joint venture contract, and the employees who do the work for the separate legal entity may or may not have any present or future connection to the protégé firm. In the 8(a) BD context, the purpose is to promote the business development of the firm that was admitted to the 8(a) BD program, the protégé firm, not a separate legal entity that is not itself a certified 8(a) Participant. In addition, populated joint ventures create unique problems in the HUBZone program. HUBZone’s unique requirements with regard to employees, principal office, and residency make maintaining HUBZone status while participating in populated joint ventures difficult. In determining whether an individual should be determined an employee, the HUBZone program utilizes the totality of the circumstances approach and

oftentimes a firm will have some individuals not on its payroll considered an employee for HUBZone eligibility purposes. Populated joint ventures present a problem because it can be difficult for firms to determine whom should be counted as an employee at any given time.

SBA continues to believe that the benefits received by a protégé from a joint venture are more readily identifiable where the work done on behalf of the joint venture is performed by the protégé and the mentor separately. In such a case, it is much easier to determine that the protégé firm performed at least 40% of all work done by the joint venture, performed more than merely ministerial or administrative work, and otherwise gained experience that could be used to perform a future contract independently. Thus, this rule adopts the proposed language to allow a separate legal entity joint venture to have its own separate employees to perform administrative functions, but not to have its own separate employees to perform contracts awarded to the joint venture.

SBA also proposed to require joint venture partners to allow SBA’s authorized representatives, including representatives authorized by the SBA Inspector General, to access its files and inspect and copy records and documents when necessary. Several commenters requested SBA to clarify that the access should be limited to documents and records relating to the joint venture, not to unrelated documents of the joint venture partners themselves. SBA agrees and has amended §§ 124.513(i), 125.8(h), 125.18(b)(8), 126.616(h), and 127.506(i) to clarify that SBA’s access would be related to files, records and documents of the joint venture. A few commenters also recommended that SBA should provide reasonable notice before it sought access to such records. SBA disagrees. SBA’s Office of Inspector General must be able to have unlimited access when investigating potential violations of SBA’s regulations. In a potential fraud case, providing notice could cause a destruction of records or provide time for a party to create the appearance of complying with applicable requirements. As such, this final rule does not require SBA to provide reasonable notice before seeking access to joint venture files, records and documents. SBA notes, however, that in its normal oversight responsibilities not related to any investigation of alleged wrongdoing, SBA would generally provide reasonable notice.

Place of Performance

In the case of *Latvian Connection General Trading and Construction LLC*, B-408633, Sept. 18, 2013, 2013 CPD ¶ 224, GAO ruled that § 19.000(b) of the Federal Acquisition Regulation (FAR) limits the application of FAR part 19 (dealing with SBA's small business programs) to acquisitions conducted in the United States (and its outlying areas). The basis for GAO's ruling was that SBA's regulations were silent on this issue and therefore, the more specific FAR regulation controlled. Heeding this advice, SBA promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR 125.2 on October 2, 2013. As a result, SBA issued a final rule recognizing that small business contracting could be used "*regardless of the place of performance.*" 13 CFR 125.2(a) and (c).

The February 5, 2015 proposed rule proposed to add similar language to §§ 124.501, 125.22(b), 126.600, and 127.500, thus specifically authorizing contracting in the 8(a) BD, SDVO, HUBZone and WOSB programs regardless of the place of performance, where appropriate. Although SBA believes that the authority to use those programs in appropriate circumstances overseas already exists, the proposed rule merely sought to make that authority clear. Nothing in the Small Business Act would prohibit the use of those programs in appropriate circumstances overseas. SBA received a few comments on this issue. The commenters supported clarification of the current authority. The regulatory text merely highlights contracting officers' discretionary authority to use these programs where appropriate regardless of the place of performance.

HUBZone Joint Ventures (13 CFR 126.616)

The HUBZone program is a community growth and development program in which businesses are incentivized to establish principal office locations in, and employ individuals from, areas of chronically high unemployment and/or low income in order to stimulate economic development. To further this purpose, the HUBZone program regulations permitted a joint venture only between a HUBZone SBC and another HUBZone SBC. In authorizing a mentor-protégé relationship for HUBZone qualified SBCs, the proposed rule provided language to allow joint ventures for HUBZone contracts between a HUBZone protégé firm and its mentor,

regardless of whether the mentor was itself a HUBZone qualified SBC.

SBA received a significant number of comments on this provision. The commenters overwhelmingly supported allowing a HUBZone qualified SBC that obtained an SBA-approved small business mentor-protégé relationship to be able to joint venture with its mentor on all contracts for which the protégé individually qualified, including HUBZone contracts. The commenters felt that such a provision would allow protégés to perform contracts that they otherwise could not have obtained and truly provide them with expertise and past performance that would help them to individually perform additional contracts in the future.

The commenters expressed that they felt that the purposes of the HUBZone program would be appropriately served by allowing non-HUBZone firms to act as mentors and joint venture with protégé HUBZone firms because the HUBZone firm itself would be developed and would necessarily be required to hire additional HUBZone employees if it sought to remain eligible for future HUBZone contracts.

Joint Venture Certifications and Performance of Work Reports (13 CFR 125.8, 125.18, 126.616, 127.506)

The proposed rule required all partners to a joint venture agreement that perform a SDVO, HUBZone, WOSB, or small business set-aside contract to certify to the contracting officer and SBA prior to performing any such contract that they will perform the contract in compliance with the joint venture regulations and with the joint venture agreement. In addition, the parties to the joint venture are required to report to the contracting officer and to SBA how they are meeting or have met the applicable performance of work requirements for each SDVO, HUBZone, WOSB or small business set-aside contract they perform as a joint venture.

SBA received comments both supporting and opposing this approach. One commenter suggested use of an honor system for the reporting. SBA did not view this as a viable alternative. Others believed that certifications in the System for Award Management (SAM) should be sufficient. Other commenters supported the proposed approach as a reasonable way to ensure compliance. SBA believes that affirmative reporting by the joint venture parties to both the contracting officer and SBA will provide the necessary information to track the use and performance of joint ventures. SBA also believes that the certification and reporting requirements implemented in this rule will assist the

Government in its ability to deter wrongdoing. Regular reporting and monitoring of the limitations on subcontracting requirements will allow all parties to know where the joint venture stands with respect to those requirements and what must be done to come into compliance in the future if the joint venture's performance is below the required amount at any point in time. A contracting officer will be able to more closely oversee the performance of a contract where the reports show inadequate performance to date.

As such, the final rule adopts the proposed language requiring joint venture partners to annually report compliance to both the contracting officer and SBA.

Tracking Joint Venture Awards

The proposed rule announced that SBA was considering various methods of tracking awards to the joint ventures permitted by SBA's regulations. The possible approaches included: Requiring all joint ventures permitted by the regulations to include in their names "small business joint venture," and, if a mentor-protégé joint venture, to include in their names "mentor-protégé small business joint venture;" requiring contracting officers to identify awards as going to small business joint ventures or to mentor-protégé small business joint ventures; requiring SBCs to amend their SAM entries to specify that they have formed a joint venture; requiring each joint venture to get a separate DUNS number; or a combination of all of these actions. SBA sought to ensure that governmental agencies and members of the public could track joint venture awards, which would promote transparency and accountability. SBA specifically asked for comments on how best to track awards to joint ventures. SBA believes a tracking approach will deter fraudulent or improper conduct, and promote compliance with SBA's regulations.

SBA received numerous comments on these proposals both in support and in opposition to the alternate approaches contemplated. Several commenters opposed the naming requirement, expressing concern about the administrative burden on the participating firms to change names, establish duns numbers and meet other compliance requirements in order to meet this requirement. Other commenters recommended that the cleanest way to track awards to joint ventures would in fact be to require a joint venture to form a new entity in SAM and identify itself to be a joint venture in SAM. Several commenters suggested the SAM system adopt a

certification for joint ventures, or alternatively contracting officers designate in SAM that an award was made to a joint venture.

In response to the comments, SBA first notes that any SAM certification process is beyond SBA's authority and outside the scope of this rule. SBA also notes that current participants in the 8(a) BD program annually report to SBA the joint venture awards they have received and how they are meeting the limitations on subcontracting requirements. To track small business joint venture awards, SBA could require similar reporting. However, SBA does not seek to impose any unnecessary burdens on small business. With that in mind, SBA believes that additional reporting is not necessary, but continues to believe that some sort of joint venture identification is required. Thus, this final rule requires joint ventures to be separately identified in SAM so that awards to joint ventures can be properly accounted for. A joint venture must be identified as a joint venture in SAM, with a separate DUNS number and CAGE number than those of the individual parties to the joint venture. In addition, the Entity Type in SAM must be identified as a joint venture, and the individual joint venture partners should also be listed.

Applications for SBA's Small Business Mentor-Protégé Program (13 CFR 125.9)

As noted above, SBA proposed implementing one universal small business mentor-protégé program instead of a separate mentor-protégé program for each type of small business (*i.e.*, HUBZone, SDVO, WOSB program, and small business). In addition, the proposed rule indicated that SBA intended to maintain a separate mentor-protégé program for eligible 8(a) BD Program Participants. The proposed rule provided that a small business seeking a mentor-protégé relationship would be required to submit an application to SBA and that SBA's Director of Government Contracting (D/GC) would review and either approve or decline small business MPAs. SBA's Associate Administrator for BD (AA/BD) would continue to review and approve or decline mentor-protégé relationships in the 8(a) BD program. Under the proposed language, an eligible 8(a) BD Program Participant could choose to seek SBA's approval of a mentor-protégé relationship through the 8(a) BD program, or could seek a small business mentor-protégé relationship through SBA's mentor-protégé program for all small businesses. SBA announced it was considering having one office review and either approve or decline all MPAs

to ensure consistency in the process, and specifically sought comments as to whether that approach should be implemented. Finally, the supplementary information to the proposed rule provided that SBA may institute certain "open" and "closed" periods for the receipt of mentor-protégé applications if the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy. In such a case, SBA would then accept mentor-protégé applications only in "open" periods.

SBA received a significant number of comments regarding applications for mentor-protégé relationships. Commenters applauded SBA's proposal to keep the 8(a) BD mentor-protégé program separate from the small business mentor-protégé program. Commenters also supported establishing a separate office to process applications for the small business mentor-protégé program. The commenters were concerned, however, about the administrative burden the additional small business mentor-protégé program will have on SBA's resources. They felt that the volume of firms seeking mentor-protégé relationships could excessively delay SBA's processing of applications. Commenters also opposed the proposal to have open enrollment periods to receive small business mentor-protégé applications. They thought that such a process would cause significant delays in allowing firms to benefit from the mentor-protégé program. They also felt that open enrollment periods could cause firms to miss out on developmental procurement opportunities if they had to wait several months before they could apply to participate in the program. If there were open enrollment periods, then commenters believed that firms should be processed on a first come first served basis, and different types of small businesses should not be given priority or processed first over other types of small businesses.

SBA understands the concerns raised by the commenters. It is not SBA's intent to delay participation in the small business mentor-protégé program. In order to reduce the processing time for a small business mentor-protégé application, SBA considered changing final approval from the D/GC to six senior SBA district directors. SBA thought that six decision makers instead of one might speed up the processing time for applications and eliminate the need for open enrollment periods. However, such a structure could also cause inconsistent results and could require more overall resources (by requiring additional staff in six different

locations) than simply providing adequate staff at one location. SBA recognizes that the D/GC is responsible for many other functions, and understands several commenters' concerns that mentor-protégé applications might not be the highest priority of that office. Therefore, SBA intends to establish a separate unit within the Office of Business Development whose sole function would be to process mentor-protégé applications and review the MPAs and the assistance provided under them once approved. This final rule provides that this new unit will process and make determinations with respect to all small business MPAs, with the ultimate decision to be made by the AA/BD or his/her designee. SBA believes that the efficiencies gained by having a dedicated staff for the small business mentor-protégé program will allow SBA to timely process applications for mentor-protégé status, and that the need for open and closed enrollment periods will be reduced. Of course, it is still possible that the number of applications could overwhelm the dedicated small business mentor-protégé unit. If that is the case, open enrollment periods could still be a possibility. Several commenters suggested that SBA may have an enormous volume of applications, and others suggested otherwise. SBA believes that additional information is needed before a decision to control the acceptance of applications is necessary. If the need arises, SBA will provide advance notice to allow potential applicants the opportunity to properly plan.

Mentors (13 CFR 124.520 and 125.9)

The proposed rule permitted any for-profit business concern that demonstrates a commitment and the ability to assist small business concerns to be approved to act as a mentor and receive the benefits of the mentor-protégé relationship. SBA also proposed to limit mentors to for-profit business entities based on the language contained in the NDAA 2013. Section 1641 of the NDAA 2013 added section 45(d)(1) of the Small Business Act, 15 U.S.C. 657r(d)(1), which defines the term mentor to be "a for-profit business concern of any size." In order to make the 8(a) BD mentor-protégé program consistent with the small business mentor-protégé program, SBA proposed that mentors in the 8(a) BD mentor-protégé program must be for profit businesses as well. This was a change for the 8(a) BD program, which previously allowed non-profit entities to be mentors. SBA felt that the change to the 8(a) BD program made sense because

Congress intended the new mentor-protégé program for small businesses to be as similar to the 8(a) BD mentor-protégé program as possible.

A small number of commenters disagreed with having a small business mentor-protégé program at all, and argued that the statutory authorities were discretionary and did not require SBA to implement additional small business mentor-protégé programs. A few of these commenters also felt that if there were such a program, the mentors should be limited to other small businesses. They expressed the view that individual small businesses could be harmed competing against joint ventures in which a large business mentor was a partner. Although SBA understands that the small business mentor-protégé programs authorized by the Jobs Act and the NDAA 2013 are discretionary, SBA believes that they will serve an important developmental function that will enable many small businesses to grow to be able to independently perform procurements that they otherwise would not have been able to perform. In addition, the vast majority of commenters supported a small business mentor-protégé program and many of those comments believed that it would be critical in helping them to advance and be able to perform larger and more complex contracts on their own. SBA agrees with the majority of commenters on this issue and this final rule implements a small business mentor-protégé program. Because the language of section 45(d)(1) of the Small Business Act, 15 U.S.C. 657r(d)(1), specifies a mentor in the small business mentor-protégé program to be “a for-profit business concern of any size” and section 45(a)(2) of the Small Business Act, 15 U.S.C. 657r(a)(2), requires the mentor-protégé program for small businesses to be “identical to the [8(a) BD] mentor-protégé program . . . as in effect on the date of enactment of this section . . .,” which authorized large business mentors, this final rule authorizes only other than small businesses that are organized for profit to be mentors. Specifically, the final rule authorizes any “concern,” regardless of size, to be a mentor, and the term “concern” has historically been defined in SBA’s size regulations to mean a business entity organized for profit.

The proposed rule also required a firm seeking to be a mentor to demonstrate that it “possesses a good financial condition.” Several commenters urged SBA to clarify what it means to possess good financial condition. In addition, during the tribal consultations, several individuals spoke

of situations where SBA denied a large multi-national firm from being a mentor because one or more financial documents indicated a loss. These individuals believed SBA did not take the proper approach when considering whether a business concern should be a mentor. They stressed that SBA should look only at whether the proposed mentor can deliver what it has said it will bring to the protégé. They believed that anything beyond that was not necessary. SBA agrees that the “good financial condition” requirement has caused some confusion. SBA believes that the key issue is whether a proposed mentor can meet its obligations under its MPA. If a proposed mentor can fulfill those obligations and has the financial wherewithal to provide all of the business development assistance to the protégé firm as described in its MPA, SBA should not otherwise care about the proposed mentor’s financial condition. SBA wants to ensure that the protégé firm receives needed business development assistance through the mentor-protégé relationship. If that can be demonstrated, SBA will be satisfied with the arrangement. As such, this final rule changes the requirement that a mentor have good financial condition to one requiring that the mentor must demonstrate that it can fulfill its obligations under the MPA.

In addition, the proposed rule provided that a mentor participating in any SBA-approved mentor-protégé program would generally have no more than one protégé at a time. It also provided that SBA could authorize a concern to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship would not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm). The rule also proposed, however, that no firm could be a mentor of more than three protégés in the aggregate at one time under either of the mentor-protégé programs authorized by § 124.520 or § 125.9. A mentor could choose to have: Up to three protégés in the 8(a) BD program; or up to three protégés in the small business program; or one or more protégés in one program and one or more in another program, but no more than three protégés in the aggregate. SBA received comments on both sides of this issue. A few commenters believed that all SBA should care about is whether a mentor can adequately provide needed business development assistance to a proposed protégé. If they could, these commenters believed that a specific firm could be a

mentor for more than three protégé firms. They argued that some of the best potential mentors could be large firms that were already mentoring other small businesses, and by limiting the number of protégés that a mentor could have could deprive a particular firm of a mentor that could be an ideal partner. Conversely, several other commenters agreed with SBA that allowing one firm to mentor an unlimited number of protégé firms could allow a large business to unduly benefit from contracts that are intended to primarily benefit small business. One commenter believed that allowing three protégés at the same time for one mentor was too much, and recommended restricting it to two protégé firms at one time. SBA continues to believe that there must be a limit on the number of firms that one business, particularly one that is other than small, can mentor. Although SBA believes that the small business mentor-protégé program will certainly afford business development opportunities to many small businesses, SBA remains concerned about large businesses benefitting disproportionately. If one firm could be a mentor for an unlimited number (or even a larger limited number) of protégés, that firm would receive benefits from the mentor-protégé program through joint ventures and possible stock ownership far beyond the benefits to be derived by any individual protégé. In addition, the 8(a) BD program in effect at the time that the Jobs Act and the NDAA 2013, also limited mentors to having no more than three protégé firms. Since those authorities permitted SBA to implement a small business mentor-protégé program as similar as possible to the 8(a) BD mentor-protégé program, it makes sense that SBA should limit any mentor to a total of three protégé firms. Therefore, this final rule adopts the language of the proposed rule, which permits any mentor to have up to a total of three protégé firms at one time. One commenter requested that SBA clarify that a mentor can have no more than three protégé firms at one time, not three firms in the mentor’s entire existence. SBA believes that is adequately spelled out in the regulatory text and does not further clarify that provision in this final rule.

Finally, the proposed rule provided that a protégé in the small business mentor-protégé program may not become a mentor and retain its protégé status. That proposal was patterned off the 8(a) BD mentor-protégé program. SBA received several comments opposing this proposal. The commenters felt that firms that have

themselves been protégés may be in the best position to act as mentors. In addition, they argued that just because a firm can act as a mentor to smaller or less experienced firms does not mean that they too don't need help getting to the next level. They did not believe that it would make sense to require a current protégé to terminate the MPA with its mentor before it will be approved as a mentor to another small business concern. The commenters believed that in both the 8(a) BD and small business mentor-protégé programs a firm should be permitted to be both a protégé and mentor in appropriate circumstances. SBA agrees with this position; thus, this final rule provides that SBA may authorize a small business to be both a protégé and a mentor at the same time where the firm can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

Protégés (13 CFR 124.520 and 125.9)

In order to qualify as a protégé, the proposed rule required a business concern to qualify as small for the size standard corresponding to its primary NAICS code. This was a departure for the current 8(a) BD mentor-protégé program, which required an 8(a) Program Participant to: Have a size that is less than half the size standard corresponding to its primary NAICS code; or be in the developmental stage of its 8(a) program participation; or not have received an 8(a) contract. SBA received a significant number of comments supporting the change to loosen the requirements to qualify as a protégé for the 8(a) BD mentor-protégé program. These commenters supported consistency between the two programs and believed that allowing more mature small businesses to participate as protégés in the 8(a) BD mentor-protégé program would facilitate more dynamic developmental assistance and strengthen the contractor base for government procurements. Several commenters also felt that the proposed change made the requirement clearer to understand and implement. Conversely, a few commenters did not support changes to the size of the protégé for the 8(a) BD mentor-protégé program. These commenters believed that the 8(a) mentor-protégé program should not be made available to larger, or successful, or experienced 8(a) Participants, and that allowing participation by firms that are close to exceeding their applicable size standard would thwart the purpose of the program. SBA also received several comments recommending that a firm should be able to form a mentor-protégé relationship as long as it

qualified as small for the particular type of work for which a mentor-protégé relationship is sought, even if the firm no longer qualified as small for its primary business activity. These commenters believed that there would be no harm in allowing such a mentor-protégé relationship because the protégé firm would still have to qualify as a small business for any contract opportunity requiring status as a small business that it sought. In other words, if SBA approved a mentor-protégé relationship that focused on assisting a firm to gain access to or expand its experience in a particular industry or NAICS code where the proposed protégé firm qualified as a small business for the size standard corresponding to that NAICS code but not for the size standard corresponding to its primary industry, the protégé firm could form a joint venture with its mentor and be considered small for a contract opportunity only where the protégé firm qualified as small. It could not take that mentor-protégé relationship, form a joint venture and be considered small for contract opportunities in the protégé's primary industry if the protégé did not qualify as small for that NAICS code.

SBA believes that consistency between the 8(a) BD mentor-protégé program and the small business mentor-protégé program is critical, particularly where this final rule authorizes an 8(a) mentor-protégé relationship to transition to a small business mentor-protégé relationship when the 8(a) protégé graduates from or otherwise leaves the 8(a) BD program. Therefore, SBA believes that it does not make sense to have different rules regarding who can qualify as a protégé for the two mentor-protégé programs. As such, SBA does not agree with the commenters who recommended that SBA continue to limit protégés in the 8(a) BD mentor-protégé program only to Participants whose size was less than half the size standard corresponding to their primary industry. Moreover, SBA feels that any small business could gain valuable business development assistance through the mentor-protégé program. For this reason, SBA agrees with the commenters who recommended that a firm that does not qualify as small for its primary NAICS code should be able to form a mentor-protégé relationship in a secondary NAICS code for which it does qualify as small. However, SBA would not authorize mentor-protégé relationships in secondary NAICS codes where the firm had never performed any work in that NAICS code previously or where the protégé would bring nothing

to a potential joint venture with its mentor other than its status as a small business. The intent of allowing joint ventures between a protégé firm and its mentor is to provide a protégé firm the opportunity to further develop its expertise and enhance its ability to independently perform similar contracts in the future. The mentor-protégé program is not intended to enable firms that have outgrown a particular size standard to find another industry in which they have no expertise or past performance merely to be able to continue to receive additional contracts as a small business. As long as the firm can demonstrate how the mentor-protégé relationship is a logical progression for the firm and will further develop current capabilities, SBA believes that a mentor-protégé relationship may be appropriate. Thus, the final rule provides that a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

The proposed rule provided that a protégé participating in either of the mentor-protégé programs generally would have no more than one mentor at a time. However, it authorized a protégé to have two mentors where the two relationships would not compete or otherwise conflict with each other and the protégé demonstrates that the second relationship pertains to an unrelated, secondary NAICS code, or the first mentor does not possess the specific expertise that is the subject of the MPA with the second mentor. The comments supported this provision and, therefore, SBA adopts it in this final rule.

In addition, § 125.9(c)(1) of the proposed rule required that SBA verify that a firm qualifies as a small business before approving that firm to act as a protégé in a small business mentor-protégé relationship. SBA was attempting to make eligibility for the small business mentor-protégé program similar to that of the 8(a) BD mentor-protégé program. Just as only firms that have been certified to be eligible to participate in the 8(a) BD program and verified to meet at least one of the three requirements set forth in the prior 8(a) BD regulations could be a protégé, the proposed rule would have permitted only those firms that have been affirmatively determined to be small to qualify as protégés for the small business mentor-protégé program. Several commenters believed that such a requirement was overly burdensome.

These commenters did not believe that size and 8(a) BD status were comparable. They argued that size has always been a self-certification process that is open to review and protest in connection with any individual procurement, and that the same should be true in the mentor-protégé context. They felt that SBA should be able to rely on the size self-certification of a firm seeking to qualify as small for a small business mentor-protégé relationship. The commenters believed that a firm approved to be a small business protégé would not gain any undue benefit from the program merely by entering a mentor-protégé relationship. If a firm that was approved to be a protégé was not in fact small and was awarded a joint venture contract with its mentor based solely on its status as a protégé, of course that would be objectionable. However, because the size protest procedures permit any interested party to protest the size of any apparent successful offeror, the commenters believed that a protégé that was not small would ultimately be found ineligible for award of the contract and, thus, would not unduly benefit from its mentor-protégé relationship. SBA agrees, and as long as it is clear that SBA's approval of a mentor-protégé relationship does not amount to a formal determination of size eligibility, SBA believes that the size protest procedures would in fact be sufficient to protect the integrity of the program.

The proposed rule provided that a protégé firm that graduates or otherwise leaves the 8(a) BD program but continues to qualify as a small business may transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. Several commenters supported this proposal as a natural extension of SBA's implementation of a small business mentor-protégé program. A few commenters sought clarification, however, as to whether the transfer from an 8(a) BD mentor-protégé relationship to a small business mentor-protégé relationship would be automatic or whether the protégé firm would have to apply and again receive SBA approval. It was not SBA's intent to require a firm to apply to transfer its 8(a) BD mentor-protégé relationship to a small business mentor-protégé relationship. SBA intended that a firm merely inform SBA of its intent to transfer its mentor-protégé relationship. There would be no SBA review or approval required of such a transfer. As such, this final rule adopts the language of the proposed rule and adds clarifying language that a firm seeking to transfer its mentor-protégé

relationship could do so by notification, without applying to and receiving approval from SBA to do so. In light of that change, the final rule also deletes § 124.520(d)(5) as unnecessary. That provision provided that SBA would not approve an 8(a) BD mentor-protégé relationship where the proposed protégé firm had less than six months remaining in its 8(a) program term. Because SBA will now permit an 8(a) protégé to transfer its mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) BD program (provided the firm continues to qualify as a small business), it does not make sense that SBA would not approve a mentor-protégé relationship for a proposed 8(a) protégé that has less than six months remaining in its program term. SBA will give such a firm the option of pursuing an 8(a) mentor-protégé relationship during its last six months in the 8(a) BD program, and then transferring that relationship to a small business mentor-protégé relationship when the protégé firm leaves the 8(a) BD program, or pursuing a small business mentor-protégé relationship during that same time frame.

Mentor-Protégé Programs of Other Departments and Agencies (13 CFR 125.10)

As noted above, section 1641 of the NDAA 2013 provided that a Federal department or agency cannot carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. The NDAA 2013 specifically excluded the Department of Defense's mentor-protégé program, but included all other current mentor-protégé programs of other agencies. Under its provisions, a department or agency that is currently conducting a mentor-protégé program (except the Department of Defense) may continue to operate that program for one year but must then go through the SBA approval process in order for the program to continue after one year. Thus, in order to continue to operate any current mentor-protégé program beyond one year after SBA's mentor-protégé regulations are final, each department or agency would be required to obtain the SBA Administrator's approval. These statutory provisions were proposed to be implemented in new § 125.10 of SBA's regulations.

Because the SBA's 8(a) BD and small business mentor-protégé programs will apply to all Government small business contracts, and thus to all Federal

departments and agencies, conceivably other agency-specific mentor-protégé programs for small business would not be needed. In the proposed rule, SBA specifically requested comments as to whether other Federal mentor-protégé programs should continue after the one-year grace period expires. SBA understands that many of the agency-specific mentor-protégé programs incentivize mentors to utilize their protégés as subcontractors. For instance, some agencies provide additional evaluation points to a large business submitting an offer on an unrestricted procurement where the business has an active MPA, where the business has used the protégé firm as a subcontractor previously, or where the mentor and protégé are submitting an offer as a joint venture. In addition, some mentor-protégé programs give additional credit to a large business mentor toward its subcontracting plan goals when the mentor uses the protégé as a subcontractor on the mentor's prime contract(s) with the given agency. SBA's mentor-protégé programs assume more of a prime contractor role for protégés, but would also encourage subcontracts from mentors to protégés as part of the developmental assistance that protégés receive from their mentors. Because one or more mentor-protégé programs of other agencies ultimately may not be continued after SBA's various mentor-protégé programs are finalized, SBA requested comments as to whether the subcontracting incentives authorized by mentor-protégé programs of other agencies should specifically be incorporated into SBA's mentor-protégé programs.

SBA received only a few comments regarding this proposed new section. These commenters agreed with the statutory provisions in questioning the utility of other Federal mentor-protégé programs. Their only concern was whether SBA would have the necessary resources to handle mentor-protégé applications for the entire government. SBA is working to assure that it can adequately process mentor-protégé applications, but, as noted above, if the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy, SBA may institute certain "open" and "closed" periods for the receipt of further mentor-protégé applications. In such a case, SBA would then accept mentor-protégé applications only in "open" periods.

Assuming that many agencies will decide not to continue their own mentor-protégé programs, one commenter recommended that SBA should incorporate the subcontracting incentives found in other mentor-

protégé programs to ensure that these useful benefits are not eliminated. Although SBA believes that it is up to individual procuring agencies whether to provide subcontracting incentives for any specific procurement, SBA also believes that these incentives should be authorized and used, where appropriate. As such, this final rule identifies subcontracting incentives as a possible benefit to be provided by procuring activities in appropriate circumstances. The final rule authorizes procuring activities to provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm. SBA does not intend that a mentor receive an incentive where it lists the protégé as a subcontractor that would perform merely ministerial functions that would not enhance the protégé's business development. Any such incentive would be at the discretion of the procuring activity.

Benefits of Mentor-Protégé Relationships (13 CFR 124.520 and 125.9)

As with the 8(a) BD program, under the proposed small business mentor-protégé program, a protégé may joint venture with its SBA-approved mentor and qualify as a small business for any Federal government contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement. Commenters supported this provision. They believed that it provides incentives to firms to become mentors and encourages meaningful business development assistance to protégés on any small business contracts for which they qualify as small. As such, SBA adopts the proposed language in this final rule.

This means that a joint venture between a protégé and its approved mentor in the small business mentor-protégé program will be deemed to be a small business concern for any Federal contract or subcontract. It does not mean that such a joint venture affirmatively qualifies for any other small business program. For example, a joint venture between a small business protégé firm and its SBA-approved mentor will be deemed a small business concern for any Federal contract or subcontract for which the protégé qualified as small, but the joint venture will qualify for a contract reserved or set-aside for eligible 8(a) BD, HUBZone SBCs, SDVO SBCs, or WOSBs only if the protégé firm meets the particular program-specific requirements as well.

Several commenters sought clarification of the requirement that the project manager of a joint venture between a protégé firm and its SBA-approved mentor must be an employee of the protégé firm. These comments pointed out that many times a firm that is awarded a contract will hire many, if not all, of the individuals currently performing the work under the contract for a different firm. These commenters recommended that SBA clarify that an individual identified as the project manager need not be an employee of the protégé firm at the time the joint venture makes an offer, as long as there is a commitment by the individual to work for the protégé if the joint venture wins the award. SBA agrees and has clarified that the individual identified as the project manager of the joint venture need not be an employee of the protégé firm at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the protégé firm if the joint venture is the successful offeror. The final rule also clarifies that the individual identified as the project manager cannot be employed by the mentor and become an employee of the protégé firm for purposes of performance under the joint venture. SBA is concerned that such an "employee" of the protégé has no ties to the protégé, is not bound to stay with the protégé after performance of the contract is complete, and could easily go back to the mentor at that time. If that happens, the business development of the protégé firm would be diminished.

Consistent with the 8(a) BD program, the proposed rule permitted a mentor to a small business to own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm. SBA requested comments as to whether this 40% ownership interest should be a temporary interest, being authorized only as long as the mentor-protégé relationship exists, or whether it should be able to survive the termination of the mentor-protégé relationship. SBA was concerned that allowing a mentor to own 40% of a small business protégé after the mentor-protégé relationship ends may allow far-reaching influence by large businesses that act as mentors and enable them to receive long-term benefits from programs designed to assist only small businesses. Several commenters believed that mentors should not be required to divest themselves of their ownership interest in a protégé firm once the mentor-protégé relationship ends. They noted that, outside the 8(a)

BD program (which has ownership restrictions on firms in the same or similar line of business), a large business may currently own a substantial ownership interest in a small business (up to 49% where one individual owns the remaining 51%) without a finding of affiliation, and that the affiliation rules are sufficient to protect against a large business from unduly benefitting from small business contracting programs. After further consideration, SBA agrees. During the mentor-protégé relationship, the protégé firm is shielded from a finding of affiliation where a large business mentor owns 40% of the protégé. Once the mentor-protégé relationship ends, any protection from a finding of affiliation also ends. As such, if the large business mentor's 40% ownership interest is controlling (or deemed to be controlling under SBA's affiliation rules), the two firms will be affiliated and the former protégé would not qualify as a small business. For this reason, there is no need to require a former mentor to divest itself of its 40% ownership interest in the former protégé after the mentor-protégé relationship ends. If it does not divest, the former protégé will be found to be ineligible for any contract as a small business where the 40% ownership interest causes affiliation under SBA's size rules. As such, this final rule does not add any language requiring a mentor to divest itself of its ownership interest in a protégé firm once the mentor-protégé relationship ends.

Written Mentor-Protégé Agreement (13 CFR 124.520 and 125.9)

The key to any mentor-protégé relationship is the benefits to be received by the proposed protégé firm from the proposed mentor. It is essential that such benefits be identified as clearly and specifically as possible. To this end, the proposed rule required that all MPAs be in writing, identifying specifically the benefits intended to be derived by the projected protégé firms. Commenters universally supported requiring a written MPA and that the benefits to be provided through a MPA must be clearly identified. Specifically, they felt that the proposed provision requiring that there be a detailed timeline for the delivery of the assistance in the MPA was critical to ensuring that assistance was timely provided to protégé firms. They understood that without clear and identifiable deliverables set forth in MPAs, both protégé firms and SBA would lack the ability to require mentors to provide specific business development assistance. One

commenter noted that the proposed regulatory language identified subcontracts as a benefit that a protégé can receive through its MPA. The commenter agreed that subcontracts are an important developmental benefit, but requested clarification that business development assistance can be gained by a protégé both by receiving a subcontract from its mentor and by subcontracting specific work to its mentor. SBA agrees that a subcontract in either direction can be beneficial to the protégé and that a subcontract from a protégé to its mentor should not, by itself, give rise to a finding of affiliation as something outside the MPA. As such, this final rule clarifies that a subcontract from a protégé to a mentor can be developmental assistance authorized by a MPA.

The proposed rule also required a firm seeking approval to be a protégé in either the 8(a) BD or small business mentor-protégé programs to identify any other mentor-protégé relationship it has through another Federal agency or SBA and provide a copy of each such MPA to SBA. The proposed rule required that the MPA submitted to SBA for approval must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor. Several commenters opposed this requirement. They thought that the requirement might cause disputes as to whether the proposed MPA was different enough from a MPA with another agency. One commenter questioned whether a MPA of another agency could be transferred into the SBA's 8(a) BD or small business mentor-protégé program. This commenter reasoned that if one or more mentor-protégé programs of other agencies cease because of the new Government-wide SBA small business mentor-protégé program, a firm should be able to use that agreement, or at least the assistance that had been committed but not yet provided through the agreement, in the SBA's program. SBA continues to believe that assistance that has already been provided or pledged in a MPA of another agency should not be used as the basis for an SBA MPA. The intent is that a protégé firm gain business development assistance that it otherwise would not be able to obtain. SBA agrees, however, that if certain specified assistance was identified in a MPA of another agency, but that assistance had not yet been provided, a firm should be able to choose to terminate the mentor-protégé relationship with the other agency and use the not yet provided

assistance as part of the assistance that will be provided through the 8(a) BD or small business mentor-protégé relationship. Therefore, SBA has clarified the regulatory text to better implement its intent in this final rule.

The proposed rule also provided that SBA will review a mentor-protégé relationship annually to determine whether to approve its continuation for another year. SBA intended to evaluate the relationship and determine whether the mentor provided the agreed-upon business development assistance, and whether the assistance provided appears to be worthwhile. SBA also proposed to limit the duration of a MPA to three years and to permit a protégé to have one three-year MPA with one entity and one three-year MPA with another entity, or two three-year MPAs (successive or otherwise) with the same entity. SBA invited comments regarding whether three years is an appropriate length of time and whether SBA should allow a mentor and protégé to enter into an additional MPA upon the expiration of the original agreement. Several commenters did not believe that three years was an appropriate length to authorize a mentor-protégé relationship. A few commenters disagreed with any specific limit on the number of years that a MPA may be in place. They believed that as long as the protégé continues to qualify as a small business and to receive developmental assistance, and the mentor is capable of and actually providing the assistance, then the mentor-protégé relationship should be allowed to continue. A few other commenters thought that three years was too short and recommended a longer length. They believed that in many instances it takes several years in order for both the mentor and protégé to understand how best to work with each other, and three years is not sufficient to allow that process to develop. They felt that the proposed rule would, in effect, limit a protégé to one mentor throughout its life as a small business. Although the rule proposed to authorize two three-year MPAs with two separate mentors, the commenters felt that because it takes a few years to get one mentor-protégé relationship to operate smoothly, most protégés would elect to keep the first MPA for a second three years instead of seeking a new three-year MPA with a different mentor.

SBA believes that the mentor-protégé program serves an important business development function for 8(a) Participants and other small businesses. However, SBA does not believe that any mentor-protégé relationship should last indefinitely (*i.e.*, for as long as the protégé qualifies as a small business).

The mentor-protégé program should be a boost to a small business's development that enables the small business to independently perform larger and more complex contracts in the future. It should not be a crutch that prevents small businesses from seeking and performing those larger and more complex contracts on their own. SBA understands that it may take longer than three years to develop a meaningful mentor-protégé relationship. Therefore, the final rule will continue to authorize two three-year MPAs with different mentors, but will allow each to be extended for a second three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance. SBA intends to limit all small businesses, including 8(a) Participants, to having two mentors. Although an 8(a) Participant can transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) BD program, it can have only two mentor-protégé relationships in total. If it transfers its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the program, it may enter into one additional mentor-protégé relationship. It cannot enter into two additional small business mentor-protégé relationships.

The proposed rule also solicited comments on clarifying language not currently contained in the 8(a) mentor-protégé regulations authorizing the continuation of a mentor-protégé relationship where control or ownership of the mentor changes during the term of the MPA. Specifically, the proposed rule provided (for the 8(a) BD and small business mentor-protégé programs) that if control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the MPA and that it continues its commitment to fulfill its obligations under the agreement. Commenters supported this provision, and it is not changed in this final rule.

Size of 8(a) Joint Venture (13 CFR 124.513).

The rule also proposed to amend § 124.513 to clarify that interested parties may protest the size of an SBA-approved 8(a) joint venture that is the apparent successful offeror for a competitive 8(a) contract. This change alters the rule expressed in *Size Appeal of Goel Services, Inc. and Grunley/Goel Joint Venture D LLC*, SBA No. SIZ-5320 (2012), which concluded that the size of

an SBA-approved 8(a) joint venture could not be protested because SBA had, in effect, determined the joint venture to qualify as small when it approved the joint venture pursuant to § 124.513(e). SBA's decision to authorize a joint venture between a current 8(a) Program Participant and another party by its Office of Business Development was never intended to act as a formal size determination. Only SBA's Office of Government Contracting may issue formal size determinations. SBA received a few comments supporting this proposed change, believing that the size protest procedures should be available with respect to any apparent successful offeror in a competitive 8(a) procurement, including joint ventures. Accordingly, this revision makes clear that unsuccessful offerors on a competitive 8(a) set-aside contract may challenge the size of an apparently successful joint venture offeror.

One commenter encouraged SBA to add additional language to clarify that the only issue that may be challenged is size, and not the underlying terms, conditions, or structure of the joint venture agreement itself. SBA believes such a clarification is not necessary. As part of a size protest, an SBA Office of Government Contracting Area Office will review a joint venture agreement to make sure that the agreement complies with § 124.513, but in no way would that office seek or have the authority to invalidate certain terms or conditions of the joint venture.

A few commenters also sought clarification of SBA's regulations regarding when SBA will determine the eligibility of an 8(a) joint venture. They questioned whether approval would occur as part of the offer and acceptance process or at some later point in time. SBA's regulations provide that SBA approval of an 8(a) joint venture must occur prior to the award of an 8(a) contract. § 124.513(e)(1). That being the case, requiring an eligibility determination for a joint venture as part of the offer and acceptance process would make that requirement meaningless. SBA believes that a district office has flexibility to determine the eligibility of a particular 8(a) joint venture depending upon its workload. As long as that determination occurs any time prior to award, SBA has complied with the regulatory requirement. For a competitive 8(a) procurement, SBA does not receive an offering letter on behalf of any particular 8(a) Participant or potential offeror. As such, requiring SBA to determine the eligibility of a potential joint venture offeror at the time of acceptance would

not make any sense. There is no certainty that the joint venture will submit an offer, and, if it does, that it will be the apparent successful offeror. Section 124.507(e) provides that within five working days after being notified by a contracting officer of the apparent successful offeror, SBA will verify the 8(a) eligibility of that entity. If the apparent successful offeror is a joint venture and SBA has not yet approved the joint venture, the five-day period for determining general eligibility would then apply to the joint venture also. If the SBA district office has asked for clarifications or changes with respect to the joint venture and has not received them by the end of this five-day period (and the contracting officer has not granted SBA additional time to conduct an eligibility determination), SBA will have to say that it was unable to verify the eligibility of the apparent successful offeror joint venture.

Agency Consideration of the Past Performance and Capabilities of Team Members (13 CFR 124.513(f), 125.8(e), 125.18(b)(5), 126.616(f), and 127.506(f))

In the proposed rule, SBA proposed that an Agency must consider the past performance of the members of a joint venture when considering the past performance of an entity submitting an offer as a joint venture. SBA proposed this for both 8(a) joint ventures (proposed § 124.513(f)) and small business joint ventures (proposed § 125.8(e)). This proposal was in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity. Where an agency required the specific joint venture entity itself to have experience and past performance, it made it extremely hard for newly established (and impossible for first-time) joint venture partners to demonstrate positive past performance. Each partner to a joint venture may have individually performed on one or more similar contracts previously, but the joint venture would not be credited with any experience or past performance of its individual partners. Commenters generally supported these changes. A few commenters recommended that SBA clarify that the same policy should also apply to joint ventures in the SDVO, HUBZone and WOSB programs, arguing that joint ventures in those programs could also be hurt where a procuring agency did not consider the experience and past performance of the individual partners to a joint venture. SBA agrees. As such, this final rule adds similar language to that proposed for

8(a) and small business joint ventures to SDVO joint ventures (§ 125.18(b)(5)), HUBZone joint ventures (§ 126.616(f)), and WOSB joint ventures (§ 127.506(f)).

Recertification When an Affiliate Acquires Another Concern (13 CFR 121.404(g)(2)(ii)(A))

In the final rule, SBA is clarifying its position that recertification is required when an affiliate of an entity acquires another concern. Under SBA's general principles of affiliation, if a firm is an affiliate it means that one entity controls or has the power to control the other or a third party controls both, and SBA aggregates the receipts or employees of the concern in question and its affiliates. In our view, an acquisition by an affiliate must be deemed an acquisition by the concern in question. Otherwise, firms could easily circumvent SBA's recertification rules by simply creating affiliates to acquire or merge with other firms. The clear intent of SBA's recertification rule was to require recertification when an entity exceeds the size standard due to acquisition, merger or novation, and there is no public policy rationale for not requiring recertification based on the whether it is the entity in question that acquires another concern, or an affiliate of the entity in question. The bottom line is the entity, including its affiliates, no longer qualifies as small and agencies should not receive future small business credit for dollars awarded to the concern in question, or its affiliates.

Establishing Social Disadvantage for the 8(a) BD Program (13 CFR 124.103)

SBA also proposed amendments to § 124.103(c) in order to clarify that an individual claiming social disadvantage must present a combination of facts and evidence which by itself establishes that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world. Under the proposed rule, SBA could disregard a claim of social disadvantage where a legitimate alternative ground for an adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground. A statement that a male co-worker received higher compensation or was promoted over a woman does not amount to an incident of social disadvantage by itself. Additional facts are necessary to establish an instance of social disadvantage. A statement that a male co-worker received higher compensation or was promoted over a woman and that the woman had the

same or superior qualifications and responsibilities would constitute an incident of social disadvantage.

A few commenters opposed this proposed change. They did not believe that it would be appropriate to require proof of certain events that are not easily documented. One commenter noted that SBA currently permits individuals to prove social disadvantage with affidavits and sworn statements attesting to events in their lives that they believe were motivated by bias or discrimination, and questioned how an individual could in fact present additional evidence to prove his or her claim of alleged discriminatory conduct. SBA believes that these commenters misunderstood SBA's intent. SBA does not intend that individuals provide additional supporting documentation or evidence. Rather, SBA is merely looking for the individual's statement to contain a more complete picture. As noted in the proposed rule, the example of a man being promoted over a woman without additional facts does not lead to a more likely than not conclusion of discriminatory conduct. If the man had 10 years of experience to the woman's 3 years of experience, there could be a legitimate reason for his promotion over the woman. However, if she can say that the two had similar experience and qualifications and yet he was promoted and she was not, her claim of discriminatory conduct would have merit. All SBA is looking for is the complete picture, or additional facts, that would make an individual's claim of bias or discriminatory conduct more likely than not. Absent any evidence to the contrary, SBA would continue to rely on affidavits and sworn statements, and as long as those statements presented a clear picture, they would be sufficient to establish an instance of social disadvantage.

SBA is not intending to raise the evidentiary burden placed on an 8(a) applicant above the preponderance of the evidence standard. SBA is not seeking definitive proof, but rather additional facts to support the claim that a negative outcome (*e.g.*, failure to receive a promotion or needed training) was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons. It is not SBA's intent to disbelieve an applicant. In fact, SBA intends to rely on personal narratives to support claims of social disadvantage. As long as those claims are complete and are not contradictory, SBA will depend solely on the narratives, and consider them to be instances of social disadvantage.

Control of an 8(a) BD Applicant or Participant

Section 124.106 of SBA's regulations currently provides that one or more disadvantaged individuals must control the daily business operations of an 8(a) BD applicant or Participant. In determining whether the experience of one or more disadvantaged individuals claiming to manage the applicant or Participant is sufficient for SBA to determine that control exists, SBA's regulations require that the individuals must have managerial experience "of the extent and complexity needed to run the concern." Although the regulations also provide that a "disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant," several comments indicated that there is confusion as to what type of managerial experience is needed to satisfy SBA's requirements. SBA did not intend to require in all instances that a disadvantaged individual must have managerial experience in the same or similar line of work as the applicant or Participant. A middle manager in a multi-million dollar large business or a vice president in a concern qualifying as small but nevertheless substantial may have gained sufficient managerial experience in a totally unrelated business field. The words "of the extent and complexity needed to run the concern" were meant to look at the degree of management experience, not the field in which that experience was gained. For example, an individual who has been a middle manager of a large aviation firm for 20 years and can demonstrate overseeing the work of a substantial number of employees may be deemed to have managerial experience of the extent and complexity needed to run a five-employee applicant firm whose primary industry category was in emergency management consulting even though that individual had no technical knowledge relating to the emergency management consulting field. SBA believes, however, that more specific industry-related experience may be needed in appropriate circumstances to ensure that the disadvantaged individual(s) claiming to control the day-to-day operations of the firm do so in fact. This would be particularly true where a non-disadvantaged owner (or former owner) who has experience related to the industry is actively involved in the day-to-day management of the firm. In order to clarify SBA's intent, this rule adds language to § 124.106 to specify that management experience need not be related to the

same or similar industry as the primary industry classification of the applicant or Participant.

8(a) BD Application Processing (13 CFR 124.202, 124.203, 124.104(b), and 124.108(a))

SBA's regulations require applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. The regulations also required that an applicant must submit a signed IRS Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. A commenter questioned the need for every applicant to submit IRS Form 4506T. SBA agrees that this form is not needed in every case. SBA always has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. As such, this final rule eliminates the requirement from § 124.203 that an applicant must submit IRS Form 4506T in very case, and clarifies that SBA may request additional documentation when necessary.

In addition, a commenter noted that SBA's regulations provide that applications for the 8(a) BD program must generally be filed electronically, and questioned the need to allow hard copy applications at all. The commenter was concerned that there is a greater possibility for one or more attachments to be misplaced when an applicant files a hard copy application, that SBA staff could incorrectly transpose information when putting it into an electronic format, and that in today's business world there is no excuse for not having access to the internet and SBA's electronic application. SBA agrees. As such, this final rule amends § 124.202 to require applications to be filed electronically, with the understanding that certain supporting documentation may also be required under § 124.203.

Section 124.203 also requires that an applicant must provide a wet signature from each individual claiming social disadvantage status. Several commenters questioned the need for "wet" signatures, arguing that this requirement placed a significant burden on applicants. These commenters noted that an applicant that files an electronic

8(a) BD application must also sign and manually send a wet signature to SBA. They argued that such a requirement did not make sense, as long as the individual(s) upon whom eligibility is based take responsibility for any information submitted on behalf of the applicant. SBA agrees and has eliminated the requirement for a wet signature. Any electronic signing protocol must ensure the Agency is able to specifically identify the individual making the representation in an electronic system. As long as applicants know that the individual(s) upon whom eligibility is based take responsibility for the accuracy and truthfulness of any information submitted on behalf of the applicant, an electronic, uploaded signature should be sufficient.

SBA's regulations also provided that if during the processing of an application, SBA receives adverse information regarding possible criminal conduct by the applicant or any of its principals, SBA would automatically suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. Commenters believed that both of these provisions unnecessarily delayed SBA's processing of 8(a) applications. These commenters believed that referral to SBA's OIG should not occur in every instance, such as where a minor infraction occurred many years ago, but that SBA should have the discretion to refer matters to SBA's OIG in appropriate instances. SBA is committed to reducing the processing time for 8(a) applications and agrees that mandatory OIG referral may be unnecessary. SBA agrees that an application evidencing a 20 year old disorderly conduct offense for an individual claiming disadvantaged status when that individual was in college should not be referred to the OIG where that is the only instance of anything concerning the individual's good character. Such an offense has nothing to do with the individual's business integrity. In addition, even if it did, an offense that was that old (with no other instances of such misconduct) could also be determined not to be relevant for a present good character determination, and thus, not be one that caused SBA to suspend an 8(a) application and refer the matter to the OIG for review. This final rule provides necessary discretion to SBA to allow SBA to determine when to refer a matter to the OIG.

In addition, SBA's regulations provide that each individual claiming economic disadvantage must describe such economic disadvantage in a narrative statement, and must submit personal

financial information to SBA. SBA believes that the written narrative on economic disadvantage is an unnecessary burden imposed on applicants to the 8(a) BD program. SBA's determination as to whether an individual qualifies as economically disadvantaged is based solely on an analysis of objective financial data relating to the individual's net worth, income and total assets. As such, this final rule eliminates the requirement that each individual claiming economic disadvantage must submit a narrative statement in support of his or her claim of economic disadvantage.

Substantial Unfair Competitive Advantage Within an Industry Category (13 CFR 124.109, 124.110, and 124.111)

Pursuant to section 7(j)(10)(J)(ii)(II) of the Small Business Act, 15 U.S.C. 636(j)(10)(J)(ii)(II), "[i]n determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) [for purposes of 8(a) BD program entry and 8(a) BD contract award], each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category." For purposes of the 8(a) BD program, the term "Indian tribe" includes any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act). 15 U.S.C. 637(a)(13). SBA's regulations have extended this broad exclusion from affiliation to the other entity-owned firms authorized to participate in the 8(a) BD program (*i.e.*, firms owned by Native Hawaiian Organizations (NHOs) and Community Development Corporations (CDCs)). See §§ 124.109(a), 124.109(c)(2)(iii), 124.110(b), and 124.111(c). The proposed rule attempted to provide guidance as to how SBA will determine whether a firm has obtained or is likely to obtain "a substantial unfair competitive advantage within an industry category."

SBA received a significant number of comments supporting the clarifying language of the proposed rule. Commenters agreed that the term "industry category" should be defined by six digit NAICS code, as that application would be consistent with other similar terms in SBA's regulations. They also agreed that an industry category should be looked at nationally

since size standards are established on a national basis. Thus, the final rule provides that an entity-owned business concern is not subject to the broad exemption to affiliation set forth in 13 CFR part 124 where one or more entity-owned firms are found to have obtained, or are likely to obtain, a substantial unfair competitive advantage on a national basis in a particular NAICS code with a particular size standard.

In making this assessment, SBA will consider a firm's percentage share of the national market and other relevant factors to determine whether a firm is dominant in a specific six-digit NAICS code with a particular size standard. SBA will review Federal Procurement Data System (FPDS) data to compare the firm's share of the industry as compared to overall small business participation in that industry to determine whether there is an unfair competitive advantage. The rule does not contemplate a finding of affiliation where an entity-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

Management of Tribally-Owned 8(a) Program Participants (13 CFR 124.109)

The proposed rule sought to add language to § 124.109(c)(4) specifying that the individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time. This language is taken directly from section 7(j)(11)(B)(iii)(II) of the Small Business Act (15 U.S.C. 636(j)(11)(B)(iii)(II)), but does not currently appear in SBA's 8(a) BD regulations. The proposed rule provided that SBA believes it is necessary to incorporate this provision into the regulations to more fully apprise tribally-owned 8(a) applicants and Participants of the control requirements applicable to them. Those commenting on this provision understood the change and supported it. Thus, this final rule adopts the proposed language.

Native Hawaiian Organizations (NHOs) (13 CFR 124.110)

The proposed rule also sought to add language to § 124.110(d) to clarify that the members or directors of an NHO need not have the technical expertise or possess a required license to be found to control an applicant or Participant owned by the NHO. Rather, the NHO, through its members and directors, must merely have managerial experience of the extent and complexity needed to run the concern. As with individually owned 8(a) applicants and Participants,

individual NHO members may be required to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day-to-day operations of the firm. This is particularly true where a non-disadvantaged owner (or former owner) who has experience related to the industry is actively involved in the day-to-day management of the firm. Commenters supported this change as a needed clarification to the control requirements for NHOs. They believed that this change will allow NHOs with significant management experience to participate in and branch out into diverse industries, and that such a change will have a positive effect on the Native Hawaiian community. The final rule adopts the language as proposed.

The Small Business Act authorizes small business concerns owned by “economically disadvantaged” NHOs to participate in the 8(a) BD program. 15 U.S.C. 637(a)(4)(A)(i)(III). Neither the statute nor its legislative history provides any guidance on how to determine whether an NHO is economically disadvantaged. Currently, § 124.110(c)(1) provides that in determining whether an NHO is economically disadvantaged, SBA will look at the individual economic status of the NHO’s members. The NHO must establish that a majority of its members qualify as economically disadvantaged under the rules that apply to individuals as set forth in § 124.104. The proposed rule solicited comments as to whether this is the most sensible approach to establishing economic disadvantage for NHOs.

SBA received a significant number of comments from the Native Hawaiian community on this issue, including several commenters who appeared at one or more of the tribal consultations. These commenters recommended that NHOs should establish economic disadvantage in the same way that tribes currently do for the 8(a) BD program: that is, by providing information relating to members, including the tribal unemployment rate, the per capita income of tribal members, and the percentage of tribal members below the poverty level. For the Native Hawaiian community, this would mean that an NHO would have to describe the individuals to be served by the NHO and provide the economic data regarding those individuals. SBA agrees that basing the economic disadvantage status of an NHO on individual Native Hawaiians who control the NHO does not seem to be the most appropriate way to do so. The Small Business Act defines the term “Native Hawaiian

Organization” to mean “any community service organization serving Native Hawaiians in the State of Hawaii which (A) is a nonprofit corporation . . . , (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.” 15 U.S.C. 637(a)(15). The crucial point is that an NHO must be a community service organization that benefits Native Hawaiians. It is certainly understood that an NHO must serve economically disadvantaged Native Hawaiians, but nowhere is there any hint that economically disadvantaged Native Hawaiians must control the NHO. The statutory language merely requires that an NHO must be controlled by Native Hawaiians. In order to maximize benefits to the Native Hawaiian community, SBA believes that it makes sense that an NHO should be able to attract the most qualified Native Hawaiians to run and control the NHO. If the most qualified Native Hawaiians cannot be part of the team that controls an NHO because they may not qualify individually as economically disadvantaged, SBA believes that is a disservice to the Native Hawaiian community. As such, this final rule changes the way that SBA will determine whether an NHO qualifies as economically disadvantaged. It makes NHOs similar to Indian tribes by requiring an NHO to present information relating to the economic disadvantaged status of Native Hawaiians, including the unemployment rate of Native Hawaiians and the per capita income of Native Hawaiians. The difference between tribes and NHOs, however, is that one tribe serves and intends to benefit one distinct group of people (*i.e.*, its specific tribal members), and multiple NHOs may be established to serve and benefit the same group of people (*i.e.*, the entire Native Hawaiian community). As with economic disadvantage for tribes, once an NHO establishes that it is economically disadvantaged in connection with the application of one firm owned and controlled by the NHO because the intended beneficiaries are economically disadvantaged, it need not reestablish its economic disadvantage for another firm owned by the NHO. In addition, unless a second NHO intends to serve and benefit a different population than that of the first NHO that established its economic disadvantage status, the second NHO also need not submit information to establish its economic disadvantage. Of course, in any case, the AA/BD may request an NHO to reestablish/establish its economic disadvantage status where

the AA/BD believes that circumstances of the Native Hawaiian community may have changed.

Sole Source 8(a) Awards

Pursuant to § 8(a)(1)(D) of the Small Business Act, 8(a) procurements that exceed \$7.0 million for those assigned a manufacturing NAICS code and \$4.0 million for all others must generally be competed among eligible 8(a) Program Participants. 15 U.S.C. 637(a)(1)(D). However, pursuant to section 303 of the Business Opportunity Reform Act of 1988 (Pub. L. 100–656), 102 Stat. 3853, 3887–3888, 8(a) Program Participants owned by Indian tribes and Alaska Native Corporations (ANCs) are exempt from those competitive threshold limitations. As such, a Participant owned by an Indian tribe or ANC can receive an 8(a) sole source award in any amount under the Small Business Act. Section 811 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010) (Section 811), Public Law 111–84, imposed justification and approval requirements on any 8(a) sole source contract that exceeds \$20 million. 123 Stat. 2190, 2405. Specifically, section 811 provides that the head of an agency may not award a sole source 8(a) contract for an amount exceeding \$20 million “unless the contracting officer for the contract justifies the use of a sole-source contract in writing” and “the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract. . . .” *Id.* This provision has been implemented in FAR 19.808–1(a) and 6.303–1(b), which currently provide that SBA cannot accept for negotiation a sole-source 8(a) contract that exceeds \$22 million unless the requesting agency has completed a justification in accordance with the requirements of FAR 6.303. The FAR recently increased the \$20 million amount to \$22 million in order to take into account inflation. Several commenters to the proposed rule noted that SBA’s regulations do not take into account section 811 or FAR 19.808–1, and requested that SBA amend its regulations to be consistent with the FAR. This final rule merely incorporates the section 811 and FAR requirements into SBA’s regulations. In addition, it requires a procuring agency that is offering a sole source requirement that exceeds \$22 million for award through the 8(a) BD to provide a statement in its offering letter that the necessary justification and approval under the FAR has occurred. SBA will not question and does not need to obtain a copy of the justification and

approval, but merely ensure that it has been done.

SBA believes that there is some confusion in the 8(a) and procurement communities regarding the requirements of section 811. There is a misconception by some that there can be no 8(a) sole source awards that exceed \$22 million. That is not true. Nothing in either section 811 or the FAR prohibits 8(a) sole source awards to Program Participants owned by Indian tribes and ANCs above \$22 million. All that is required is that a contracting officer justify the award and have that justification approved at the proper level. In addition, there is no statutory or regulatory requirement that would support prohibiting 8(a) sole source awards above any specific dollar amount, higher or lower than \$22 million.

As noted above, 8(a) procurements that exceed \$7.0 million for those assigned a manufacturing NAICS code and \$4.0 million for all others must generally be competed among eligible 8(a) Program Participants. This final rule also amends § 124.506(a)(2)(ii) regarding the competitive threshold amounts to make it consistent with the inflationary adjustment made to the FAR. As such, the final rule replaces the outdated \$6.5 million competitive threshold for procurements assigned a manufacturing NAICS, and replaces it with the \$7.0 million competitive threshold currently contained in § 19.805-1(a)(2) of the FAR.

Change in Primary Industry Classification (13 CFR 124.112)

The proposed rule sought to authorize SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. It also provided discretion to SBA in deciding whether to change a Participant's primary industry classification because SBA recognized that whether the greatest portion of a firm's revenues is derived from one NAICS code, as opposed to one or more other NAICS codes, is a snapshot in time that is ever changing. The rule also proposed to require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. Although the language of the proposed rule specifically authorized the opportunity for a Participant to dispute any intent to change its primary NAICS code, the

supplementary information to the proposed rule also requested comments as to whether an alternative that would permit SBA to change a Participant's primary industry automatically, based on FPDS data, should be considered instead.

SBA received a vast number of comments on this particular provision, both as formal written comments and as part of the various tribal consultations. In fact, this was the most heavily commented on provision of the proposed rule. Commenters focused on the alternative to allow SBA to change a Participant's primary industry unilaterally and strenuously opposed that alternative. Commenters presented many reasons why they opposed any automatic change in Participants' primary industry category. They felt that it would inappropriately impose a significant change on a firm based on inherently incomplete data in FPDS, which does not take all revenue streams into consideration. Commenters also noted that firms are not limited to pursuing work only in their primary NAICS code, and naturally pursue work in multiple NAICS codes. They believed that it would be contrary to the business development purposes of the program to discourage firms from branching out into several related industry categories. In addition, commenters noted that the work to be performed for a particular requirement may often be classified under more than one NAICS code. Commenters argued that if there are several reasonable NAICS codes that could be assigned to a requirement and a procuring agency selects one code (that happens to be a Participant's secondary NAICS code) instead of another (which is the Participant's primary NAICS code), the Participant should not be penalized for not performing work in its identified primary NAICS code. Commenters also felt that a unilateral change by SBA would deny a Participant due process rights and argued that there definitely should be dialogue between SBA and the Participant before any change is made to the Participant's primary NAICS code. Finally, although several commenters supported SBA's belief that it needed the ability to change a Participant's primary NAICS code in appropriate circumstances, a few different commenters opposed any change to a Participant's primary NAICS code.

SBA continues to believe that it should have the ability to change a Participant's primary NAICS code in appropriate circumstances. Because an entity-owned applicant need not have a track record of past performance to be

eligible to participate in the 8(a) BD program (*i.e.*, it can meet the potential for success requirement simply by having the entity make a firm written commitment to support the operations of the applicant), the applicant has wide latitude in selecting its primary NAICS code. If the applicant selects a primary NAICS code merely to avoid the primary NAICS code of another Participant owned by the entity and has no intention of doing any work in that NAICS code, SBA believes that it should be able to change that Participant's primary NAICS code. Without such ability, there would be no requirement that the newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application after being certified to participate in the 8(a) BD program. A firm could circumvent the intent of SBA's regulations by selecting a primary business classification that is different from the primary business classification of any other Participant owned by that same entity merely to get admitted to the 8(a) BD program, and then perform the majority, or even all, of its work in the identical primary NAICS code as another Participant owned by the entity. That should not be permitted to occur. However, SBA agrees with the commenters that SBA should not change a Participant's primary NAICS code without discussion back and forth between SBA and the Participant. SBA merely wants to ensure that the Participant has made and will continue to make good faith efforts to receive contracts (either Federal or non-Federal) in the NAICS code it identified as its primary NAICS code. For example, where a Participant details contract opportunities under its primary NAICS code that it submitted offers for in the last year, but was not successful in winning, and its concrete plans to continue to seek additional opportunities in that NAICS code, SBA would not change the Participant's primary industry classification. SBA understands the cyclical nature of business and that different factors may affect what type of contract opportunities are available. SBA does not expect a Participant to do no business when there is a downward turn in the industry identified as its primary NAICS code. Where SBA believes that a Participant's revenues for a secondary NAICS code exceed those of its identified primary NAICS code over the Participant's last three completed fiscal years, SBA would notify the Participant of its belief and ask the firm for input as to what its primary NAICS code is.

At that point, SBA would be looking for a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code. The Participant should identify: all non-Federal work that it has performed in its primary NAICS code; any efforts it has made to obtain contracts in the primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

The proposed rule also provided that if SBA determined that a change in a Participant's primary NAICS code was appropriate and that Participant was an entity-owned firm that could not have two Participants in the program with the same primary NAICS code, the entity (tribe, ANC, NHO, or CDC) would be required to choose which Participant should leave the 8(a) BD program if the change in NAICS codes caused it to have two Participants with the same primary NAICS code. Several commenters opposed requiring an entity to terminate the continued participation of one of its 8(a) BD Participants where it would have two Participants having the same primary NAICS code after SBA changes the primary NAICS of one of the firms. Instead, these commenters recommended that the second, newer firm be permitted to continue to participate in the 8(a) BD program, but not be permitted to receive any additional 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the other 8(a) Participant. SBA agrees that that would be a more suitable approach. The second firm is the one that should not have been able to have been admitted to the 8(a) BD program to perform most of its work in a NAICS code that was the primary NAICS code of another Participant owned by the same entity. Allowing the entity to choose to end the participation of the first firm, which may already be near the end of its program term, while allowing the second firm to continue to receive 8(a) contracts in a primary NAICS code that it never should have had would not appear to be much of a deterrent to others to continue this practice, and would not in any way penalize the second Participant that made no reasonable attempt to perform work in the NAICS code that it identified as its primary NAICS code to SBA. Thus, SBA adopts the

recommendation and incorporates it into this final rule.

8(a) BD Program Suspensions (13 CFR 124.305)

SBA proposed to add two additional bases for allowing a Participant to elect to be suspended from 8(a) BD program participation: Where the Participant's principal office is located in an area declared a major disaster area or where there is a lapse in Federal appropriations. The changes were intended to allow a firm to suspend its term of participation in the 8(a) BD program in order to not miss out on contract opportunities that the firm might otherwise have lost due to a disaster or a lapse in Federal funding.

SBA received only comments in support of these two new bases to allow a Participant to elect suspension from 8(a) BD program participation. As such, the final rule adopts the language contained in the proposed rule. Upon the request of a certified 8(a) firm in a major declared disaster area, SBA will be able to suspend the eligibility of the firm for up to a one year period while the firm recovers from the disaster to ensure that it is able to take full advantage of the 8(a) BD program, rather than being impacted by lack of capacity or contracting opportunities due to disaster-induced disruptions. During such a suspension, a Participant would not be eligible for 8(a) BD program benefits, including set-asides, however, but would not "lose time" in its program term due to the extenuating circumstances wrought by a disaster. Similarly, this rule will allow a Participant to elect to suspend its participation in the 8(a) BD program where: Federal appropriations for one or more Federal departments or agencies have expired without being extended via continuing resolution or other means and no new appropriations have been enacted (*i.e.*, during a lapse in appropriations); SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant; and award of the 8(a) sole source contract is pending. A Participant could not elect a partial suspension of 8(a) BD program benefits. If it elects to be suspended during a lapse in Federal appropriations, the Participant would be ineligible to receive any new 8(a) BD program benefits during the suspension.

Benefits Reporting Requirement (13 CFR 124.602)

The proposed rule included an amendment to the time frame for the reporting of benefits for entity-owned Participants in the 8(a) BD program. Previously, SBA required an entity-

owned Participant to report benefits as part of its annual review submission. SBA believes it is more appropriate that this information be submitted as part of a Participant's submission of its annual financial statements pursuant to § 124.602. SBA wants to make clear that benefits reporting should not be tied to continued eligibility, as may be assumed where such reporting is part of SBA's annual review analysis. The proposed rule changed the timing of benefits reporting from the time of a Participant's annual review submission to the time of a Participant's annual financial statement submission. SBA believes that the data collected by certain Participants in preparing their financial statements submissions may also help them report some of the benefits that flow to the native or other community. The regulatory change will continue to require the submission of the data on an annual basis but within 120 days after the close of the concern's fiscal year instead of as part of the annual submission.

Commenters supported this change, believing that it was important to remove any doubt that benefits reporting should not in any way be tied to continued eligibility. Although a few commenters opposed the reporting of benefits flowing back to the native or other community entirely, most commenters understood that this requirement was generated in response to a GAO audit and was intended to support the continued need for the tribal 8(a) program. The final rule adopts the proposed language.

Reverse Auctions (13 CFR 125.2 and 125.5)

SBA also proposed to amend §§ 125.2(a) and 125.5(a)(1) to address reverse auctions. Specifically, SBA proposed to reinforce the principle that all of SBA's regulations, including those relating to set-asides and referrals for a Certificate of Competency, apply to reverse auctions. With a reverse auction, the Government is buying a product or service, but the businesses are bidding against each other, which tends to drive the price down (hence the name reverse auction). In a reverse auction, the bidders actually get to see all of the other bidders' prices and can "outbid" them by offering a lower price. Although SBA believes that the small business rules currently apply to reverse auctions, the proposed rule intended to make it clear to contracting officials that there are no exceptions to SBA's small business regulations for reverse auctions. SBA received no adverse comments in response to this provision.

As such, the final rule makes no changes from the proposed rule.

Reconsideration of Decisions of SBA's OHA (13 CFR 134.227)

The proposed rule added clarifying language to § 134.227(c) to recognize SBA as a party that may file a request for reconsideration in an OHA proceeding in which it has not previously participated. The final rule adopts the language as proposed. This provision is intended to alter the rule expressed in *Size Appeal of Goel Services, Inc. and Grunley/Goel JVD LLC*, SBA No. SIZ-5356 (2012), which held that SBA could not request reconsideration where SBA did not appear as a party in the original appeal. The SBA believes that it is axiomatic that SBA is always an interested party regarding an appeal of an SBA decision to OHA, and that SBA may request reconsideration of an OHA appeal decision even where SBA chose not to or otherwise did not file a response to the initial appeal petition.

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

Executive Order 12866

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

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The final rule implements section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111-240, 124 Stat. 2504, which authorizes the Agency to establish mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). In addition, the final rule implements section 1641 of the NDAA 2013, Public Law 112-239, which authorized SBA to establish a mentor-protégé program for all small business concerns. SBA is also updating its rules to clarify areas where small business concerns may have been confused or where OHA's interpretations of SBA rules do not

conform to SBA's interpretation or intent.

2. What are the alternatives to this rule?

As noted above in the supplementary information, this rule seeks to implement the Jobs Act of 2010 and NDAA 2013 authorities by creating one new mentor-protégé program in which any small business could participate instead of implementing four new separate small business mentor-protégé programs (*i.e.*, having a separate mentor-protégé program for SDVO SBCs, HUBZone SBCs, WOSB concerns, and all other small business concerns, in addition to the current mentor-protégé program for 8(a) BD Participants). SBA decided to implement one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. The statutory authority for this rule specifically mandates that the new mentor-protégé programs be modeled on the existing mentor-protégé program for small business concerns participating in the 8(a) BD program. Thus, to the extent practicable, SBA has attempted to adopt the regulations governing the 8(a) mentor-protégé program in establishing the mentor-protégé program for SBCs.

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

The final rule enhances the ability of small business concerns to obtain larger prime contracts that would be normally out of the reach of these businesses. The small business mentor-protégé program should allow all small businesses to tap into the expertise and capital of larger firms, which in turn should help small business concerns become more knowledgeable, stable, and competitive in the Federal procurement arena.

SBA estimates that under the final rule, approximately 2,000 SBCs, will become active in the small business mentor-protégé program, and protégé firms may obtain Federal contracts totaling possibly \$2 billion per year. SBA notes that these estimates represent an extrapolation from data on the percentage of 8(a) BD Program Participants with signed MPAs and joint venture agreements, and are based on the dollars awarded to SBCs in FY 2012 according to data retrieved from the Federal Procurement Data System—Next Generation (FPDS-NG). With SBCs able to compete for larger contracts and thus a greater number of contracts in general, Federal agencies may choose to set aside more contracts for competition among small businesses, SDVO SBCs, HUBZone SBCs, and WOSB concerns, rather than using full and open competition. The movement from

unrestricted to set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. The added competition for many of these procurements could result in lower prices to the Government for procurements reserved for SBCs, HUBZone SBCs, WOSB concerns, and SDVO SBCs, although SBA cannot quantify this benefit. To the extent that more than two thousand SBCs could become active in the small business mentor-protégé program, this might entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities.

The small business mentor-protégé program may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of the gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts from large businesses to SBC protégés. However, large business mentors will be able to joint venture with protégé firms for contracts reserved for small business and be eligible to perform contracts that they would otherwise be ineligible to perform. Large businesses may have fewer Federal prime contract opportunities as Federal agencies decide to set aside more Federal contracts for SBCs, SDVO SBCs, HUBZone SBCs, and WOSB concerns. In addition, some Federal contracts may be awarded to HUBZone protégés instead of large businesses since these firms may be eligible for an evaluation adjustment for contracts when they compete on a full and open basis. This transfer may be offset by a greater number of contracts being set aside for SBCs, SDVO SBCs, HUBZone SBCs, and WOSB concerns. SBA cannot estimate the potential distributional impacts of these transfers with any degree of precision.

The small business mentor-protégé program is consistent with SBA's statutory mandate to assist small businesses, and this regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses, including SDVO SBCs, HUBZone SBCs, and WOSB concerns, succeed through fair and equitable access to capital and credit, Federal contracts, and management and technical assistance.

Executive Order 13563

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, is included above in the Regulatory Impact Analysis.

Executive Order 12866

In an effort to engage interested parties in this action, SBA met with representatives from various agencies to obtain their feedback on SBA's proposed mentor-protégé program. For example, SBA participated in a Government-wide meeting involving Office of Small and Disadvantaged Business Utilization (OSDBU) representatives responsible for mentor-protégé programs in their respective agencies. It was generally agreed upon that SBA's proposed mentor-protégé program would complement the already existing Federal programs due in part to the differing incentives offered to the mentors under the various programs. SBA also presented proposed small business mentor-protégé programs to businesses in thirteen cities in the U.S. and sought their input as part of the Jobs Act tours. In developing the proposed rule, SBA considered all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies.

Finally, SBA also conducted a series of tribal consultations pursuant to Executive Order 13175, Tribal Consultations. SBA conducted three in-person tribal consultations (in Washington, DC on February 26, 2015, in Tulsa, Oklahoma on April 21, 2015, and in Anchorage, Alaska on April 23, 2015) and two telephonic tribal consultations (one on April 7, 2015, and a Hawaii/Native Hawaiian Organization specific one on April 8, 2015). These consultations highlighted those issues specifically relevant to the tribal, ANC, and NHO communities, but also solicited comments regarding all of the provisions of the proposed rule. SBA considered the statements and recommendations received during the consultation process in finalizing this rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this final rule, to the extent practicable, in accordance with the standards set forth in sections 3(a) and 3(b)(2) of that Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

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

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this final rule would impose new reporting requirements. These collections of information include the following: (1) Information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; (3) information necessary for SBA to evaluate compliance with performance of work requirements, including work performed by the joint venture; and (4) information detailing the proposed relationship between the mentor and protégé. The rule also eliminates the collection of information currently contained in SBA's regulations. Specifically, the final rule eliminates the requirement that each individual claiming economic disadvantage for purposes of 8(a) eligibility must submit a narrative statement in support of his or her claim of economic disadvantage. SBA eliminated this requirement because SBA believes it to be burdensome and unnecessary.

Finally, the final rule also makes a minor change to the benefits reporting schedule from the time of an 8(a) Participant's annual review submission to when the Participant submits its financial statement as required by § 124.602; specifically, within 120 days after the close of the Participant's fiscal year. The 8(a) Participants Benefits Report form has been approved by OMB (OMB Control No. 3245-0391). This rule makes no substantive changes to the benefits information to be reported to SBA, it merely adjusts the reporting date. The title, summary of each information collection, description of respondents, and an estimate of the reporting burden are discussed below. Included in the estimate is the time for reviewing instructions, searching existing data needed, and completing

and reviewing each collection of information.

SBA solicited public comments on these collections of information at the proposed rule stage. Except as discussed below, there was very little feedback on these changes. SBA will submit the final information collections to OMB for approval.

1. *Title and Description:* Mentor-Protégé Agreement [SBA Form 2459]. The agreement between a mentor and protégé will include an assessment of the protégé's needs and goals; a description of the how the mentor intends to assist protégé in meeting its goals; and the timeline for delivery of such assistance.

Need and Purpose: The agreement must be submitted to SBA for review and approval, to help the Agency to determine whether the proposed assistance will enhance the development of the protégé and not merely further the interest of the mentor. The information will also be beneficial to SBA's efforts to reduce fraud, waste, and abuse in Federal contracting programs.

OMB Control Number: New Collection.

Description and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to § 125.9(e). SBA estimates this number to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 2,000.

Overall, commenters agreed that the collection of information identified in the proposed rule is necessary for the proper performance of SBA's functions, and would not be overly burdensome for affected business concerns.

2. *Title and Description:* Mentor-Protégé Financial and Other Information. [Form number not applicable] The final rule requires concerns seeking to participate in the small business mentor-protégé program to submit certain financial information to SBA, including copies of Federal tax returns or audited financial statements, if applicable, filings required by the Securities and Exchange Commission, as well as payroll records.

Need and Purpose: The information requested is necessary for SBA to determine whether prospective mentors are in good financial condition and capable of meeting their obligations under the mentor-protégé agreement to provide assistance to protégés and enhance their ability to successfully compete for Federal contracts. SBA will use the information to help determine whether the mentor can meet its obligations to provide business

development assistance under the mentor-protégé agreement, and also whether the protégé is an appropriate participant in the program. This information is to be submitted along with the mentor-protégé agreement as part of the program approval process. SBA believes that any additional burden imposed by this requirement would be minimal since the firms maintain the information in their general course of business.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: Pursuant to § 125.9(b)(2), this information will be collected from concerns seeking to benefit as mentors from SBA's mentor-protégé programs under § 125.9. SBA estimates this number to be between 1500 and 2000, since SBA has estimated the number of protégés to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000.

3. *Title and Description:* Mentor-Protégé Benefits Report [SBA Form number 2460]. Protégés participating in the small business mentor-protégé program are required to submit to SBA annual reports on their mentor-protégé relationships. The information to be included in these annual reports is the same type of information that is currently required of protégés participating in SBA's 8(a) Business Development program, and as such will be modeled on the mentor-protégé annual reporting requirements in Attachment B of SBA Form 1450 (OMB Control Number 3245–0205). Such information includes identification of the technical, management and/or financial assistance provided by mentors to protégés; and a description of how that assistance has impacted the development of the protégés. Once a mentor-protégé relationship ends, the protégé must submit a close out report to SBA on whether the protégé believed the mentor-protégé relationship was beneficial and describe any lasting benefits it received.

Need and Purpose: This information collection is necessary for SBA to, among other things, evaluate whether and to what extent the protégés are benefiting or have benefitted from the relationship and in general, the effectiveness of the program in meeting its objectives. The information will also help SBA to determine whether to approve the continuation of the mentor-protégé agreement, approve a second mentor-protégé agreement with the same parties, or take other actions as necessary to protect against fraud,

waste, or abuse in SBA's mentor-protégé programs.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to proposed § 125.9(g). SBA estimates this number to be 2,000.

Estimated Response Time: 2 hours.

Total Estimated Annual Hour Burden: 4,000

4. *Title and Description:* Joint venture agreement. [Form number not applicable] The final rule requires participants to enter into a joint venture agreement that contains certain required provisions, pertaining to ownership, profits, bank accounts, itemization of equipment and specification of responsibilities. Commenters recommended that no specific format should be required for this agreement; therefore no specific format is mandated. However, the agreement must include the information outlined in § 125.8; § 125.18 ; § 126.616; and § 127.506.

Need and Purpose: This information collection is necessary to ensure that joint venture agreements contain the provisions and information required by regulation, including ownership, distribution of profits, bank accounts, itemization of equipment, and specification of responsibilities.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: This information will be collected from SBC, SDVO SBC, HUBZone SBC, and WOSB joint venture partners SBA estimates this number to be between 1,500 and 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000

5. *Title and Description:* Joint venture performance of work report [Form number not applicable]. The final rule imposes a requirement on SBC joint venture partners to annually submit to the applicable contracting officers and SBA performance of work reports demonstrating their how they are meeting or have met (for completed contracts), the applicable performance of work requirements for each SDVO, HUBZone, WOSB or small business set-aside contract they perform as a joint venture. Commenters recommended that no specific format should be required by which the information should be transmitted to SBA. Thus, SBA will permit any format that is easiest for the joint venture partners.

Need and Purpose: This requirement will greatly enhance SBA's ability to

monitor compliance with the limitations on subcontracting requirements in its effort to reduce fraud, waste, and abuse. SBA believes that any additional burden imposed by this recordkeeping requirement would be minimal because firms are already required to track their compliance with these requirements.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents: This information will be collected from SBC, SDVO SBC, HUBZone SBC, and WOSB joint venture partners under § 125.8(i), § 125.18(b), § 126.616(i), and § 127.506(j). SBA estimates this number to be between 1,500 and 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 1,500–2,000.

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

Under the Regulatory Flexibility Act (RFA), this final rule may have a significant impact on a substantial number of small businesses. Immediately below, SBA sets forth a final regulatory flexibility analysis (FRFA) addressing the impact of this final rule in accordance with section 604, Title 5, of the United States Code. The FRFA examines the need and objectives for this final rule; the significant issues raised by public comment and SBA's responses thereto; kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; and a description of the steps SBA has taken to minimize the significant economic impact on small entities.

1. *What are the need for and objective of the rule?*

This final rule implements section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111–240, and section 1641 of the NDAA 2013, Public Law 112–239. As discussed above, the Small Business Jobs Act tasked the Agency with establishing mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (13 U.S.C. 637(a)), commonly known as the 8(a) Business Development program. Similarly, section 1641 of NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns that is identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary given the types of small

business concerns included as protégés. SBA chose to implement one small business mentor-protégé program, in addition to the 8(a) BD mentor-protégé program.

2. *What are the significant issues raised by the public comments, SBA's assessment of such issues, and any changes made in the proposed rule as a result of such comments?*

As noted above, SBA received 113 comments in response to the proposed rule, with most of the commenters commenting on multiple proposed provisions. A description of the comments received, SBA's response to such comments, and the changes made to the final rule in response to the comments is identified in detail in the supplementary information section of this final rule. The most heavily commented on provision of the proposed rule was the provision authorizing SBA to change the primary NAICS code of an 8(a) BD Program Participant in appropriate circumstances. SBA believed that many of the commenters misconstrued SBA's intent. SBA alleviated the concern that SBA would unilaterally change a firm's primary NAICS code without input from the firm by clarifying in the final rule that there will be a dialogue between SBA and the affected Participant before any NAICS code change is made, and that a change will not occur where the firm provides a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code.

SBA received a significant number of comments supporting a small business mentor-protégé program. These commenters believed that a small business mentor-protégé program would enable firms that are not in the 8(a) BD program to receive critical business development assistance that would otherwise not be available to them. Many of these commenters expressed support for the opportunity to gain meaningful expertise that would help them to independently perform more complex and higher value contracts in the future.

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

The final rule will apply to all small business concerns participating in the Federal procurement market that seek to form mentor-protégé relationships. SBA estimates this number to be about two thousand, based upon the number of 8(a) Participants that have established mentor-protégé relationships in that program.

4. *What are the projected reporting, recordkeeping, and other compliance*

requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

The final rule imposes the following reporting and recordkeeping requirements: (1) Information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor is meeting its obligations under its MPA; and (3) information necessary for SBA to evaluate compliance with performance of work requirements. SDVO SBC, HUBZone SBC, and WOSB joint venture partners would be required to submit to SBA performance of work reports demonstrating their compliance with the limitations on subcontracting requirements. SBA estimates this number to be approximately 2,000.

The Paperwork Reduction Act requirements are addressed further above.

5. *What steps has SBA taken to minimize the significant economic impact on small entities?*

Thirteen Federal agencies, including SBA, currently offer mentor-protégé programs aimed at assisting small businesses to gain the technical and business skills necessary to successfully compete in the Federal procurement market. While the mentor-protégé programs offered by other agencies share SBA's goal of increasing the participation of small businesses in Government contracts, the other Federal mentor-protégé programs are structured differently than SBA's proposed mentor-protégé programs, particularly in terms of the incentives offered to mentors. For example, some agencies offer additional points to a bidder who has a signed mentor-protégé agreement in place, while other agencies offer the benefit of reimbursing mentors for certain costs associated with protégés' business development. SBA, as the agency authorized to determine small business size status, is uniquely qualified to offer mentor-protégé program participants the distinctive benefit of an exclusion from affiliation. This incentive makes SBA's mentor-protégé programs particularly attractive to potential mentors. Having a larger and more robust mentor pool increases the likelihood that small business protégés will indeed obtain valuable business development assistance.

SBA decided to implement one new small business mentor-protégé program instead of four new mentor-protégé programs (one for small businesses, one for SDVO small businesses, one for WOSBs and one for HUBZone small businesses) since the other three types of small businesses (SDVO, HUBZone

and women-owned) would be necessarily included within any mentor-protégé program targeting all small business concerns. Having one additional program instead of four additional programs will be easier for small business concerns to use and understand, and cause less of a burden on them.

In addition, where the benefits provided to a protégé firm are minimal or where it appears that the relationship has been used primarily to permit a large mentor to benefit from contracts with its approved protégé, through one or more joint ventures, that it would otherwise not be eligible for, SBA will terminate the mentor-protégé relationship. This will allow a small protégé firm to get out of a bad mentor-protégé relationship that may have a negative impact on its economic development and seek to enter a new mentor-protégé relationship that will prove to be more beneficial to the small protégé firm.

Throughout this final rule, SBA has attempted to minimize any costs to small business. SBA believes that the benefits to be gained through a productive mentor-protégé relationship will far outweigh any administrative costs associated with the mentor-protégé program. In addition, the provisions of the final rule attempt to impose safeguards that ensure that small businesses receive meaningful business development assistance, while at the same time ensuring that large businesses do not unduly benefit from small business contracts for which they would otherwise be ineligible to perform.

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

Administrative practice and procedures, Government procurement, Hawaiian natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Tribally-owned concerns, 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 businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Organization and functions (Government agencies).

For the reasons set forth in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 662, and 694a(9).

■ 2. Amend § 121.103 by revising paragraphs (b)(2)(ii), (b)(6), the last two sentences of paragraph (h) introductory text, and paragraph (h)(3)(ii) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

- (b) * * *
(2) * * *

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

(A) Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm.

(B) Contract administration services include both services that could be considered "common administrative

services" under the exception to affiliation and those that could not.

(1) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.

(2) Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (e.g., employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.

(C) Business development may include both services that could be considered "common administrative services" under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered "common administrative services" under the exception to affiliation. However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should

not be performed at a holding company or parent entity level.

* * * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 124.520 or § 125.9 of this chapter is not affiliated with its mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in § 121.903. Affiliation may be found in either case for other reasons as set forth in this section.

* * * * *

(h) * * * For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: must be in writing and must do business under its own name; must be identified as a joint venture in the System for Award Management (SAM); may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (i.e., the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(5) of this section.

* * * * *

- (3) * * *

(ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

* * * * *

■ 3. Amend § 121.404 by revising paragraph (g)(2)(ii)(A) to read as follows:

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

* * * * *

- (g) * * *
 (2) * * *
 (ii) * * *

(A) When a concern, or an affiliate of the concern, acquires or is acquired by another concern;

* * * * *

§ 121.406 [Amended]

■ 4. Amend § 121.406(b)(5) introductory text by removing the phrase “paragraph (b)(1)(iii)” and adding in its place the phrase “paragraph (b)(1)(iv)”.

§ 121.702 [Amended]

■ 5. Amend § 121.702(a)(1)(i) by adding the words “an Indian tribe, ANC or NHO (or a wholly owned business entity of such tribe, ANC or NHO),” before the words “or any combination of these”.

■ 6. Amend § 121.1001 by redesignating paragraph (b)(10) through (12) as paragraphs (b)(11) through (13), respectively, and by adding a new paragraph (b)(10) to read as follows:

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

* * * * *

- (b) * * *

(10) For purposes of the small business mentor-protégé program authorized pursuant to § 125.9 of this chapter (based on its status as a small business for its primary or identified secondary NAICS code), the business concern seeking to be a protégé or SBA may request a formal size determination.

* * * * *

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

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

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and 644; 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.

■ 8. Amend § 124.103 as follows:

- a. Add a sentence at the end of paragraph (c)(1);
 ■ b. Revise paragraph (c)(2)(ii);
 ■ c. Redesignate paragraph (c)(2)(iii) as (c)(2)(iv);
 ■ d. Add a new paragraph (c)(2)(iii);
 ■ e. Revise newly redesignated paragraph (c)(2)(iv) introductory text; and
 ■ f. Add paragraphs (c)(3) through (6).

The additions and revisions read as follows:

§ 124.103 Who is socially disadvantaged?

* * * * *

- (c) * * *

(1) * * * Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

- (2) * * *

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

* * * * *

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment

position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

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

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

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

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

* * * * *

■ 9. Amend § 124.104 by revising paragraph (b)(1) to read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(b) *Submission of financial information.* (1) Each individual claiming economic disadvantage must submit personal financial information.

* * * * *

■ 10. Amend § 124.105 by revising paragraph (h)(2) introductory text to read as follows:

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

* * * * *

(h) * * *

(2) A non-Participant concern in the same or similar line of business or a principal of such concern may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program, except that a former Participant in the same or similar line of business or a principal of such a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§ 124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant.

* * * * *

■ 11. Amend § 124.106 introductory text by adding a new fifth sentence to read as follows:

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

* * * Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant. * * *

* * * * *

■ 12. Amend § 124.108 by revising paragraph (a)(1) and by removing "10

percent" in paragraph (a)(4) and adding in its place "20 percent".

The revision reads as follows:

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

(a) * * *

(1) If during the processing of an application, SBA receives adverse information from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, SBA may suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. If the SBA suspends the application, but does not hear back from OIG within 45 days, SBA may proceed with application processing. The AA/BD will consider any findings of the OIG when evaluating the application.

* * * * *

■ 13. Amend § 124.109 by adding paragraphs (c)(2)(iv) and (c)(4)(iii) to read as follows:

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

* * * * *

(c) * * *

(2) * * *

(iv) In determining whether a tribally-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally as compared to the overall small business share of that industry.

(A) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(B) SBA does not contemplate a finding of affiliation where a tribally-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

(4) * * *

(iii) The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.

(A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern.

SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.

(B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

* * * * *

■ 14. Amend § 124.110 as follows:

- a. Add a sentence to the end of paragraph (b) introductory text;
- b. Add paragraphs (b)(1) and (2);
- c. Revise paragraph (c) introductory text and paragraph (c)(1);
- d. Revise paragraph (d);
- e. Redesignate paragraph (g) as paragraph (h); and
- f. Add a new paragraph (g).

The additions and revisions read as follows:

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

* * * * *

(b) * * * In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where an NHO-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(c) An NHO must establish that it is economically disadvantaged and that its business activities will principally benefit Native Hawaiians. Once an NHO establishes that it is economically disadvantaged in connection with the application of one NHO-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. If a different NHO identifies that it will serve and benefit the same Native Hawaiian community as an NHO that has already established its economic disadvantage status, that NHO need not

establish its economic disadvantage status in connection with an 8(a) BD application of a business concern that it owns, unless specifically requested to do so by the AA/BD.

(1) In order to establish that an NHO is economically disadvantaged, it must demonstrate that it will principally benefit economically disadvantaged Native Hawaiians. To do this, the NHO must provide data showing the economic condition of the Native Hawaiian community that it intends to serve, including:

(i) The number of Native Hawaiians in the community that the NHO intends to serve;

(ii) The present Native Hawaiian unemployment rate of those individuals;

(iii) The per capita income of those Native Hawaiians, excluding judgment awards;

(iv) The percentage of those Native Hawaiians below the poverty level; and

(v) The access to capital of those Native Hawaiians.

* * * * *

(d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors, managing members, managers or managing partners.

(1) The NHO need not possess the technical expertise necessary to run the NHO-owned applicant or Participant firm. The NHO must have managerial experience of the extent and complexity needed to run the concern. Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.

(2) An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.

* * * * *

(g) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers.

(1) The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.

(2) In determining whether an NHO is economically disadvantaged, SBA may consider the individual economic status of an NHO member or director even if the member or director previously used his or her disadvantaged status to qualify an individually owned 8(a) applicant or Participant.

* * * * *

■ 15. Amend § 124.111 by adding a sentence to the end of paragraph (c) and by adding paragraphs (c)(1) and (2) to read as follows:

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

* * * * *

(c) * * * In determining whether a CDC-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where a CDC-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

■ 16. Amend § 124.112 by designating the text of paragraph (e) as paragraph (e)(1), and adding paragraph (e)(2) to read as follows:

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

* * * * *

(e) * * *

(2) SBA may change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during the Participant's last three completed fiscal years has evolved from one NAICS code to another. As part of its annual review, SBA will consider whether the primary NAICS code contained in a Participant's business plan continues to be appropriate.

(i) Where SBA believes that the primary industry classification contained in a Participant's business plan does not match the Participant's actual revenues over the Participant's most recently completed three fiscal years, SBA may notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to respond.

(ii) A Participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate,

despite an increase in revenues in a secondary NAICS code beyond those received in its designated primary industry classification. The Participant should identify: All non-federal work that it has performed in its primary NAICS code; any efforts it has made and any plans it has to make to receive contracts to obtain contracts in its primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

(iii) As long as the Participant provides a reasonable explanation as to why the identified primary NAICS code continues to be its primary NAICS code, SBA will not change the Participant's primary NAICS code.

(iv) Where an SBA change in the primary NAICS code of an entity-owned firm results in the entity having two Participants with the same primary NAICS code, the second, newer Participant will not be able to receive any 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the first, older Participant for a period of time equal to two years after the first Participant leaves the 8(a) BD program.

* * * * *

■ 17. Revise § 124.202 to read as follows:

§ 124.202 How must an application be filed?

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

■ 18. Revise § 124.203 to read as follows:

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

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, copies of signed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional documents SBA deems necessary to determine eligibility. In all cases, the applicant must provide a signature from each individual claiming social and

economic disadvantage status. The electronic signing protocol will ensure the Agency is able to specifically identify the individual making the representation. The individual(s) upon whom eligibility is based take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 19. Amend § 124.305 by removing the period at the end of paragraph (h)(1)(ii) and adding in its place “; or”, adding paragraphs (h)(1)(iii) and (iv), redesignating paragraph (h)(5) as (h)(6) and adding a new paragraph (h)(5). The additions read as follows:

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

* * * * *

(h)(1) * * * (iii) A Participant has a principal place of business located in a federally declared disaster area and elects to suspend its participation in the 8(a) BD program for a period of up to one year from the date of the disaster declaration to allow the firm to recover from the disaster and take full advantage of the program. A Participant that elects to be suspended may request that the suspension be lifted prior to the end date of the original request; or

(iv) Federal appropriations for one or more federal departments or agencies have lapsed, SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant, award is pending, and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in federal appropriations.

* * * * *

(5) Where a Participant is suspended pursuant to (h)(1)(iv) of this section, the Participant must notify SBA when the lapse in appropriation ends so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern’s program term.

* * * * *

■ 20. Amend § 124.501 by revising the first sentence of paragraph (a) and by adding two sentences to the end of paragraph (b) to read as follows:

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

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies regardless of the place of performance, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to

contract the performance of these contracts to qualified Participants. * * *

(b) * * * In addition, for multiple award contracts not set aside for the 8(a) BD program, a procuring agency may set aside specific orders to be competed only among eligible 8(a) Participants, regardless of the place of performance. Such an order may be awarded as an 8(a) award where the order was offered to and accepted by SBA as an 8(a) award and the order specifies that the performance of work and/or non-manufacturer rule requirements apply as appropriate.

* * * * *

■ 21. Amend § 124.502 by revising paragraph (c)(9), by removing “and” at the end of paragraph (c)(16), by redesignating paragraph (c)(17) as (c)(18), and by adding a new paragraph (c)(17).

The revision and addition read as follows:

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

* * * * *

(c) * * * (9) The acquisition history, if any, of the requirement, including specifically whether the requirement is a follow-on requirement, and whether any portion of the contract was previously performed by a small business outside of the 8(a) BD program;

* * * * *

(17) A statement that the necessary justification and approval under the Federal Acquisition Regulation has occurred where a requirement whose estimated contract value exceeds \$22,000,000 is offered to SBA as a sole source requirement on behalf of a specific Participant; and

* * * * *

■ 22. Amend § 124.503 by adding two sentences to the end of paragraph (a)(1), by adding one sentence to the end of paragraph (a)(2), and by adding paragraph (g)(4) to read as follows:

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

(a) * * *

(1) * * * As part of its acceptance of a sole source requirement, SBA will determine the eligibility of the Participant identified in the offering letter, using the same analysis set forth in § 124.507(b)(2). Where a procuring agency offers a sole source 8(a) procurement on behalf of a joint venture, SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance, and

will approve the joint venture prior to award pursuant to § 124.513(e).

(2) * * * For a competitive 8(a) procurement, SBA will determine the eligibility of the apparent successful offeror pursuant to § 124.507(b).

* * * * *

(g) * * *

(4) A procuring agency may offer, and SBA may accept, an order issued under a BOA to be awarded through the 8(a) BD program where the BOA itself was not accepted for the 8(a) BD program, but rather was awarded on an unrestricted basis.

* * * * *

§ 124.504 [Amended]

■ 23. Amend § 124.504 by removing the reference to “§ 124.503(h)” in paragraph (d)(4) and adding in its place “§ 124.503(h)(2)”.

■ 24. Amend § 124.506 by removing “\$6,500,000” in paragraph (a)(2)(ii) and adding in its place “\$7,000,000”, and adding paragraph (b)(5).

The addition reads as follows:

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

* * * * *

(b) * * *

(5) An agency may not award an 8(a) sole source contract for an amount exceeding \$22,000,000 unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.

* * * * *

■ 25. Amend § 124.507 by redesignating paragraphs (b)(3) through (5) as paragraphs (b)(4) through (6), respectively, and by adding new paragraph (b)(3) to read as follows:

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

* * * * *

(b) * * *

(3) Where the apparent successful offeror is a joint venture and SBA has not approved the joint venture prior to receiving notification of the apparent successful offeror, review of the joint venture will be part of the eligibility determination conducted under this paragraph (b). If SBA cannot approve the joint venture within 5 days of receiving a procuring activity’s request for an eligibility determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the eligibility of the joint venture for award.

* * * * *

■ 26. Amend § 124.513 as follows:

- a. Add paragraph (b)(3);
- b. Revise paragraphs (c)(2), (c)(6) and (7), (d), and (e)(1);
- c. Add paragraphs (e)(2)(iii) and (e)(3);
- d. Redesignate paragraphs (f), (g), (h), and (i) as paragraphs (g), (h), (i) and (k), respectively;
- e. Add new paragraph (f);
- f. Revise newly redesignated paragraphs (g) and (i); and
- g. Add paragraph (j) and (l).

The additions and revisions read as follows:

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

* * * * *

(b) * * *

(3) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. See § 124.517(b).

(c) * * *

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

* * * * *

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

* * * * *

(d) *Performance of work.* (1) For any 8(a) contract, including those between a protégé and a mentor authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) * * *

(1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. A Participant may submit a joint venture agreement to SBA for approval at any time, whether or not in connection with a specific 8(a) procurement.

(2) * * *

(iii) If a second or third contract to be awarded a joint venture is not an 8(a) contract, the Participant would not have

to submit an addendum setting forth contract performance for the non-8(a) contract(s) to SBA for approval.

(3) Where a joint venture has been established and approved by SBA without a corresponding specific 8(a) contract award (including where a joint venture is established in connection with a blanket purchase agreement (BPA), basic agreement (BA), or basic ordering agreement (BOA)), the Participant must submit an addendum to the joint venture agreement, setting forth the performance requirements, to SBA for approval for each of the three 8(a) contracts authorized to be awarded to the joint venture. In the case of a BPA, BA or BOA, each order issued under the agreement would count as a separate contract award, and SBA would need to approve the addendum for each order prior to award of the order to the joint venture.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for an 8(a) contract as a joint venture approved by SBA pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) *Contract execution.* Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protégé joint venture, as appropriate.

* * * * *

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Certification of compliance.* Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(iii) The parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

* * * * *

(l) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

■ 27. Amend § 124.515 by revising paragraph (a) introductory text and by removing the words "An 8(a) contract" in paragraph (a)(1) introductory text and adding in their place the words "An 8(a) contract or order".

The revision reads as follows:

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

(a) An 8(a) contract (or 8(a) order where the underlying contract is not an 8(a) contract) must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

* * * * *

■ 28. Amend § 124.520 as follows:

- a. Revise the second sentence of paragraph (a);
- b. Revise paragraph (b)(1)(i);
- c. Remove the words "or non-profit entity" from the first sentence of paragraph (b) introductory text and from the second sentence of paragraph (b)(2);
- d. Revise the last sentence of paragraph (b)(2);
- e. Revise paragraph (b)(3);
- f. Revise paragraphs (c)(1) and (4);
- g. Remove paragraph (c)(5);
- h. Revise paragraph (d)(1)(iii);
- i. Add paragraph (d)(5);
- j. Redesignate paragraphs (e)(2) through (5) as paragraphs (e)(3) through (6), respectively;
- k. Add a new paragraph (e)(2);
- l. Revise newly designated paragraph (e)(5);
- m. Add paragraphs (e)(7) and (8); and
- n. Add paragraph (i).

The revisions and additions read as follows:

§ 124.520 What are the rules governing SBA's 8(a) Mentor-Protégé program?

(a) * * * This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. * * *

(b) * * *

(1) * * *

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

* * * * *

(2) * * * Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

(3) In order to demonstrate that it is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement, a firm seeking to be a mentor may submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings required by the Securities and Exchange Commission (SEC), for the past three years.

* * * * *

(c) * * *

(1) In order to initially qualify as a protégé firm, a concern must:

(i) Qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code; and

(ii) Demonstrate how the business development assistance to be received through its proposed mentor-protégé relationship would advance the goals and objectives set forth in its business plan.

* * * * *

(4) The AA/BD may authorize a Participant to be both a protégé and a mentor at the same time where the Participant can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(d) * * *

(1) * * *

(iii) Once a protégé firm graduates or otherwise leaves the 8(a) BD program or grows to be other than small for its primary NAICS code, it will not be eligible for any further 8(a) contracting benefits from its 8(a) BD mentor-protégé relationship. Leaving the 8(a) BD program, growing to be other than small for its primary NAICS code, or terminating the mentor-protégé relationship while a protégé is still in the program, does not, however, generally affect contracts previously awarded to a joint venture between the protégé and its mentor. A protégé firm that graduates or otherwise leaves the 8(a) BD program but continues to qualify as a small business may transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. In order to effectuate such a transfer, a firm must notify SBA of its intent to transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship. The transfer will occur without any application or approval process.

(A) A joint venture between a protégé firm that continues to qualify as small and its mentor may certify its status as small for any Government contract or subcontract so long as the protégé (and/or the joint venture) has not been determined to be other than small for the size standard corresponding to the procurement at issue (or any higher size standard).

(B) Where the protégé firm no longer qualifies as small, the receipts and/or employees of the protégé and mentor would generally be aggregated in determining the size of any joint venture between the mentor and protégé after that date.

(C) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(D) For contracts with durations of more than five years (including options), where size re-certification is required no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé firm no longer qualifies as small for its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code

assigned to that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(e) * * *

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The 8(a) BD mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the 8(a) BD mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the 8(a) BD mentor-protégé relationship.

* * * * *

(5) SBA will review the mentor-protégé relationship annually during the protégé firm's annual review to determine whether to approve its continuation for another year. Unless rescinded in writing at that time, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years. A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.

* * * * *

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the

mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not adequately benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

* * * * *

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 125.9 of this chapter.

§ 124.604 [Amended]

■ 29. Amend § 124.604 by removing the phrase "annual review submission" and adding in its place the phrase "annual financial statement submission (see § 124.602)" in the first sentence.

§ 124.1002 [Amended]

■ 30. Amend § 124.1002 by removing paragraph (b)(4).

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 31. The authority citation for part 125 is revised to read as follows:

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

■ 32. Amend § 125.2 by revising the third sentence of paragraph (a) introductory text 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.* * * * 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, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or

disposal agency determine to be in the interest of:

* * * * *

■ 33. Amend § 125.5 by revising the second and third sentences of paragraph (a)(1) to read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) * * * 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, including any contract deriving from a reverse auction. 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. * * *

* * * * *

§ 125.6 [Amended]

■ 34. Amend § 125.6 by removing "§ 125.15" from paragraph (b) introductory text and adding in its place "§ 125.18", and by removing "§ 125.15(b)(3)" from paragraph (b)(5) and adding in its place "§ 125.18(b)(3)".

§§ 125.8 through 125.30 [Redesignated as §§ 125.11 through 125.33]

■ 35. Redesignate §§ 125.8 through 125.30 as §§ 125.11 through 125.33, respectively, and locate them in the subparts as indicated in the following list:

- i. Section 125.11 in subpart A;
 - ii. Sections 125.12 through 125.16 in subpart B;
 - iii. Sections 125.17 through 125.26 in subpart C;
 - iv. Sections 125.27 through 125.31 in subpart D; and
 - v. Sections 125.32 and 125.33 in subpart E.
- 36. Add new §§ 125.8, 125.9 and 125.10 to precede subpart A to read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

(a) *General.* A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of the exceptions to

affiliation set forth in § 121.103(h)(3) of this chapter.

(b) *Contents of joint venture agreement.* (1) A joint venture agreement between two or more entities that individually qualify as small need not be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business.

(2) Every joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture;

(iii) Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;

(iv) Stating that the small business must receive profits from the joint venture commensurate with the work performed by the small business, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a

multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(c) *Performance of work.* (1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by § 125.9, the joint venture must perform the applicable percentage of work required by § 125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(d) *Certification of compliance.* Prior to the performance of any contract set aside or reserved for small business by a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (b) of this section;

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (c) of this section.

(e) *Past performance and experience.*

When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(f) *Contract execution.* The procuring activity will execute a contract set aside or reserved for small business in the name of the joint venture entity or a small business partner to the joint venture, but in either case will identify the award as one to a small business

joint venture or a small business mentor-protégé joint venture, as appropriate.

(g) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(h) *Performance of work reports.* In connection with any contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner must describe how it is meeting or has met the applicable performance of work requirements for each contract set aside or reserved for small business that it performs as a joint venture.

(1) The small business partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed during the year.

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

(i) *Basis for suspension or debarment.* For any joint venture between a protégé small business and a mentor authorized by § 125.9, the Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (c) of this section; or

(3) Failure to submit the certification required by paragraph (d) of this section or comply with paragraph (g) of this section.

(j) *Compliance with performance of work requirements.* Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

(a) *General.* The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Possesses good character;

(iii) Does not appear on the federal list of debarred or suspended contractors; and

(iv) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) In order to demonstrate that it is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement, a firm seeking to be a mentor may submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings

required by the Securities and Exchange Commission (SEC), for the past three years.

(3) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(4) Generally, a mentor will have no more than one protégé at a time. However, SBA may authorize a concern to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

(c) *Protégés.* (1) In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

(i) A firm may self-certify that it qualifies as small for its primary or identified secondary NAICS code.

(ii) Where a firm is other than small for the size standard corresponding to its primary NAICS code and seeks to qualify as a small business protégé in a secondary NAICS code, the firm must demonstrate how the mentor-protégé relationship is a logical business progression for the firm and will further develop or expand current capabilities. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the firm has no prior experience.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the assistance set forth in the first mentor-protégé relationship and:

(i) The second relationship pertains to an unrelated NAICS code; or

(ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

(3) SBA may authorize a small business to be both a protégé and a mentor at the same time where the small business can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(4) Where appropriate, SBA may examine the Service-Disabled Veteran-Owned Small Business status or Women-Owned Small Business status of a concern seeking to be a protégé that claims such status in any Federal procurement database.

(d) *Benefits.* (1) A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).

(i) SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in § 125.8(b)(2), (c), and (d).

(iii) Once a protégé firm no longer qualifies as a small business for the size standard corresponding to its primary NAICS code, it will not be eligible for any further contracting benefits from its mentor-protégé relationship. However, a change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

(A) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code assigned to that contract. The rules set forth in

§ 121.404(g)(3) of this chapter apply in such circumstances.

(2) In order to raise capital, the protégé firm may agree to sell or otherwise convey to the mentor an equity interest of up to 40% in the protégé firm.

(3) Notwithstanding the mentor-protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement. However, affiliation may be found for other reasons set forth in § 121.103 of this chapter.

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(e) *Written agreement.* (1) The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (*e.g.*, management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The mentor-protégé agreement must:

(i) Address how the assistance to be provided through the agreement will help the protégé firm meet its goals as defined in its business plan;

(ii) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and

(iii) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through

another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the small business mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the small business mentor-protégé relationship.

(3) The written agreement must be approved by the Associate Administrator for Business Development (AA/BD) or his/her designee. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.

(4) The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA.

(5) SBA will review the mentor-protégé relationship annually to determine whether to approve its continuation for another year. Unless rescinded in writing as a result of the review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years. A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.

(6) SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA shall terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both of the firms pursuant to paragraph (h) of this section where appropriate.

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé

agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

(f) *Decision to decline mentor-protégé relationship.* (1) Where SBA declines to approve a specific mentor-protégé agreement, the protégé may request the AA/BD or designee to reconsider the Agency's initial decline decision by filing a request for reconsideration within 45 calendar days of receiving notice that its mentor-protégé agreement was declined. The protégé may revise the proposed mentor-protégé agreement and provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(2) SBA will issue a written decision within 45 calendar days of receipt of the protégé's request. SBA may approve the mentor-protégé agreement, deny it on the same grounds as the original decision, or deny it on other grounds.

(3) If SBA declines the mentor-protégé agreement solely on issues not raised in the initial decline, the protégé can ask for reconsideration as if it were an initial decline.

(4) If SBA's final decision is to decline a specific mentor-protégé agreement, the small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* (1) Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:

(i) All technical and/or management assistance provided by the mentor to the protégé;

(ii) All loans to and/or equity investments made by the mentor in the protégé;

(iii) All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

(2) The protégé must report the mentoring services it receives by category and hours.

(3) The protégé must annually certify to SBA whether there has been any change in the terms of the agreement.

(4) SBA will review the protégé's report on the mentor-protégé relationship, and may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement or that the assistance has not resulted in any material benefits or developmental gains to the protégé.

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor has not provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

(i) SBA will terminate the mentor-protégé agreement;

(ii) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement; and

(iii) SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with its mentor-protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may recommend to the procuring agency to authorize a substitution of the protégé firm for the joint venture.

(2) SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor-protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 CFR 180.800(b).

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 124.520 of this chapter.

§ 125.10 Mentor-Protégé programs of other agencies.

(a) Except as provided in paragraph (c) of this section, a Federal department or agency may not carry out a mentor-protégé program for small business unless the head of the department or agency submits a plan to the SBA Administrator for the program and the SBA Administrator approves the plan. Before starting a new mentor protégé program, the head of a department or agency must submit a plan to the SBA Administrator. Within one year of the effective date of this section, the head of a department or agency must submit a plan to the SBA for any previously existing mentor-protégé program that the department or agency seeks to continue.

(b) The SBA Administrator will approve or disapprove a plan submitted under paragraph (a) of this section based on whether the proposed program:

(1) Will assist protégés to compete for Federal prime contracts and subcontracts; and

(2) Complies with the provisions set forth in §§ 125.9 and 124.520 of this chapter, as applicable.

(c) Paragraph (a) of this section does not apply to:

(1) Any mentor-protégé program of the Department of Defense;

(2) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program; and

(3) A mentor-protégé program operated by a Department or agency on January 2, 2013, for a period of one year after the effective date of this section.

(d) The head of each Federal department or agency carrying out an

agency-specific mentor-protégé program must report annually to SBA:

(1) The participants (both protégé firms and their approved mentors) in its mentor-protégé program. This includes identifying the number of participants that are:

- (i) Small business concerns;
- (ii) Small business concerns owned and controlled by service-disabled veterans;
- (iii) Small business concerns owned and controlled by socially and economically disadvantaged individuals;
- (iv) Small business concerns owned and controlled by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations; and
- (v) Small business concerns owned and controlled by women;

(2) The assistance provided to small businesses through the program; and

(3) The progress of protégé firms under the program to compete for Federal prime contracts and subcontracts.

■ 37. Amend newly redesignated § 125.18 by revising paragraph (b) to read as follows:

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

* * * * *

(b) *Joint ventures.* An SDVO SBC may enter into a joint venture agreement with one or more other SBCs or its SBA-approved mentor for the purpose of performing an SDVO contract.

(1) *Size of concerns to an SDVO SBC joint venture.* (i) A joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement or sale, or be awarded a sole source SDVO contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(ii) A joint venture between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor (see §§ 125.9 and 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the SDVO procurement or sale.

(2) *Contents of joint venture agreement.* Every joint venture agreement to perform an SDVO contract, including those between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor authorized by § 124.520 or § 125.9 of this chapter, must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the SDVO SBC managing venturer as the project manager responsible for performance of the contract;

(iii) Stating that with respect to a separate legal entity joint venture, the SDVO SBC must own at least 51% of the joint venture entity;

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an SDVO contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (b)(3) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract

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

(viii) Obligating all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the SDVO SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the SDVO SBC managing venturer upon completion of the SDVO contract performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(3) *Performance of work.* (i) For any SDVO contract, including those between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6.

(ii) The SDVO SBC partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(A) The work performed by the SDVO SBC partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(B) The amount of work done by the partners will be aggregated and the work done by the SDVO SBC partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-SDVO SBC partner, all work done by the non-SDVO SBC partner and any of its affiliates at any subcontracting tier will be counted.

(4) *Certification of Compliance.* Prior to the performance of any SDVO contract as a joint venture, the SDVO SBC partner to the joint venture must

submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (b)(2) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (b)(3) of this section.

(5) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for an SDVO contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

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

(7) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(8) *Performance of work reports.* An SDVO SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each SDVO contract it performs as a joint venture.

(i) The SDVO SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(ii) At the completion of every SDVO contract awarded to a joint venture, the SDVO SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b)(2) of this section.

(9) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or

debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(i) Failure to enter a joint venture agreement that complies with paragraph (b)(2) of this section;

(ii) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (b)(3) of this section; or

(iii) Failure to submit the certification required by paragraph (b)(4) of this section or comply with paragraph (b)(7) of this section.

(10) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.22 [Amended]

■ 38. Amend newly redesignated § 125.22 by adding the phrase “, regardless of the place of performance,” in the first sentence of paragraphs (b)(1) and (b)(2)(i) after the words “for small business concerns” and before the words “when there is a reasonable expectation”.

PART 126—HUBZONE PROGRAM

■ 39. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644, and 657a; Pub. L. 111–240, 24 Stat. 2504.

■ 40. Amend § 126.306 as follows:

■ a. Revise paragraphs (a) and (b);

■ b. Redesignate paragraphs (c) and (d) as paragraphs (f) and (g), respectively; and

■ c. Add new paragraphs (c), (d) and (e).
The revisions and additions read as follows:

§ 126.306 How will SBA process the certification?

(a) The D/HUB or designee is authorized to approve or decline applications for certification. SBA will receive and review all applications and request supporting documents. SBA must receive all required information, supporting documents, and completed HUBZone representation before it will begin processing a concern's application. SBA will not process incomplete packages. SBA will make its determination within ninety (90) calendar days after receipt of a complete package whenever practicable. The decision of the D/HUB or designee is the final agency decision.

(b) SBA may request additional information or clarification of

information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until and at the time the D/HUB issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstance occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/HUB may propose decertification for any HUBZone SBC that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

* * * * *

■ 41. Amend § 126.600 by revising the introductory text to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a qualified HUBZone SBC, regardless of the place of performance, through any of the following procurement methods:

* * * * *

■ 42. Revise § 126.615 to read as follows:

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

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

■ 43. Revise § 126.616 to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer on a HUBZone contract?

(a) *General.* A qualified HUBZone SBC may enter into a joint venture

agreement with one or more other SBCs, or with an approved mentor authorized by § 125.9 of this chapter (or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter), for the purpose of submitting an offer for a HUBZone contract. The joint venture itself need not be certified as a qualified HUBZone SBC.

(b) *Size.* (1) A joint venture of at least one qualified HUBZone SBC and one or more other business concerns may submit an offer as a small business for a HUBZone procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the HUBZone procurement or sale.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform a HUBZone contract, including those between a protégé firm that is a certified HUBZone SBC and its SBA-approved mentor authorized by § 124.520 or § 125.9 of this chapter, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a HUBZone SBC as the managing venturer of the joint venture, and an employee of the HUBZone SBC managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the HUBZone SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the HUBZone SBC if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the HUBZone SBC for purposes of performance under the joint venture;

(3) Stating that with respect to a separate legal entity joint venture, the HUBZone SBC must own at least 51% of the joint venture entity;

(4) Stating that the HUBZone SBC must receive profits from the joint venture commensurate with the work performed by the HUBZone SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture.

This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a HUBZone contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the HUBZone contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the HUBZone SBC managing venturer, unless approval to keep them elsewhere

is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the HUBZone SBC managing venturer upon completion of the HUBZone contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Limitations on subcontracting.* (1) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone SBC and another qualified HUBZone SBC, the aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone protégé and a small business concern or its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter, and the HUBZone SBC partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the HUBZone SBC partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the HUBZone protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a HUBZone qualified protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

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

(i) The parties have entered into a joint venture agreement that fully

complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for a HUBZone contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

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

(h) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(i) *Performance of work reports.* The HUBZone SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each HUBZone contract it performs as a joint venture.

(1) The HUBZone SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each HUBZone contract performed during the year.

(2) At the completion of every HUBZone contract awarded to a joint venture, the HUBZone SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(j) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement

applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

(k) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

■ 44. Revise § 126.618 to read as follows:

§ 126.618 How does a HUBZone SBC's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?

(a) A qualified HUBZone SBC may enter into a mentor-protégé relationship under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter) or in connection with a mentor-protégé program of another agency, provided that such relationships do not conflict with the underlying HUBZone requirements.

(b) For purposes of determining whether an applicant to the HUBZone Program or a HUBZone SBC qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or qualified HUBZone SBC and the firm that is its mentor in an SBA-approved mentor-protégé relationship (including a mentor that is other than small) on the basis of the mentor-protégé agreement or the assistance provided to the protégé firm under the agreement. SBA will not consider the employees of the mentor in determining whether the applicant or qualified HUBZone SBC meets (or continues to meet) the 35% HUBZone residency requirement or the principal office requirement, or in determining the size of the applicant or qualified HUBZone SBC for any employee-based size standard.

(c) A qualified HUBZone SBC that is a prime contractor on a HUBZone contract may subcontract work to its mentor.

(1) The HUBZone SBC must meet the applicable performance of work requirements set forth in § 125.6(c) of this chapter.

(2) SBA may find affiliation between a prime HUBZone contractor and its mentor subcontractor where the mentor

will perform primary and vital requirements of the contract. See § 121.103(h)(4) of this chapter.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 45. The authority citation for part 127 is revised to read as follows:

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

§ 127.500 [Amended]

■ 46. Amend § 127.500 by adding the words “, regardless of the place of performance” to the end of the sentence.

■ 47. Amend § 127.506 as follows:

■ a. Revise the section introductory text and paragraph (a), add an italic subject head to paragraph (c) introductory text, and revise paragraphs (c)(2) and (3);

■ b. Redesignate paragraph (c)(4) as (c)(7) and paragraph (c)(5) as (c)(10) respectively;

■ c. Add new paragraphs (c)(4) through (6);

■ d. Revise newly redesignated paragraphs (c)(7) and (c)(10);

■ e. Add paragraphs (c)(8) and (9) and (c)(11) and (12);

■ f. Revise paragraphs (d), (e), and (f); and

■ g. Add paragraphs (g) through (l).

The revisions and additions read as follows:

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

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

(a)(1) A joint venture of at least one WOSB or EDWOSB and one or more other business concerns may submit an offer as a small business for a WOSB Program procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 and § 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the WOSB Program procurement or sale.

* * * * *

(c) *Contents of joint venture agreement.* * * *

* * * * *

(2) Designating a WOSB as the managing venturer of the joint venture, and an employee of the WOSB managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the WOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become an employee of the WOSB for purposes of performance under the joint venture;

(3) Stating that with respect to a separate legal entity joint venture, the WOSB must own at least 51% of the joint venture entity;

(4) Stating that the WOSB must receive profits from the joint venture commensurate with the work performed by the WOSB, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a WOSB Program contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the

joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the WOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the WOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the WOSB managing venturer upon completion of the WOSB Program contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* (1) For any WOSB Program contract, the joint venture (including one between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter) must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) The WOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the WOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the WOSB partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by the non-WOSB partner, all work done by the non-WOSB partner and any of its affiliates at any subcontracting tier will be counted.

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

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) *Past performance and experience.* When evaluating the past performance and experience of an entity submitting an offer for a WOSB Program contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

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

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

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Performance of work reports.* The WOSB Program participant in the joint venture must describe how it is meeting or has met the applicable performance of work requirements for each WOSB Program contract it performs as a joint venture.

(1) The WOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized

official of each partner to the joint venture, explaining how the performance of work requirements are being met for each WOSB Program contract performed during the year.

(2) At the completion of every WOSB Program contract awarded to a joint venture, the WOSB partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(k) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) or comply with paragraph (i) of this section.

(l) Any person with information concerning a joint venture's compliance

with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 48. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

■ 49. Amend § 134.227 by revising paragraph (c) to read as follows:

§ 134.227 Finality of decisions.

* * * * *

(c) *Reconsideration.* Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party in interest, including SBA where SBA did not appear as a party during the proceeding that led to the issuance of the Judge's decision, may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

■ 50. Amend § 134.406 by revising paragraph (b) to read as follows:

§ 134.406 Review of the administrative record.

* * * * *

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is not arbitrary, capricious or contrary to law, the Administrative Law Judge must uphold it on appeal.

(1) The Administrative Law Judge must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(2) If the SBA's path of reasoning may reasonably be discerned, the Administrative Law Judge will uphold a decision of less than ideal clarity.

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§ 134.501 [Amended]

■ 51. Amend § 134.501 by removing “§ 125.26” from paragraph (a) and by adding “§ 125.29” in its place.

§ 134.515 [Amended]

■ 52. Amend § 134.515 by removing “13 CFR 125.28” from paragraph (a) and by adding “§ 125.31 of this chapter” in its place.

Dated: July 1, 2016.

Maria Contreras-Sweet,
Administrator.

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