

(1) Refinance indebtedness which you incurred prior to the disaster event;

(2) Make payments on loans owned by another federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act;

(3) Pay, directly or indirectly, any obligations resulting from a federal, state or local tax penalty as a result of negligence or fraud, or any non-tax criminal fine, civil fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter;

(4) Repair physical damage; or

(5) Pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable remuneration directly related to their performance of services for the business.

Dated: January 19, 1996.

Philip Lader,

Administrator.

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### 13 CFR Part 125

#### Government Contracting Assistance

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** In response to President Clinton's Government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which should be revised or eliminated. This rule would eliminate seven sections which are currently contained in 13 CFR Part 125 pertaining to SBA's procurement assistance programs. The Part will be retitled Government Contracting Assistance.

**EFFECTIVE DATE:** This rule is effective on March 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** John W. Klein, Chief Counsel for Special Programs, at (202) 205-6645.

**SUPPLEMENTARY INFORMATION:** Part 125 of chapter I of title 13 of the Code of Federal Regulations sets forth the policies and procedures by which SBA regulates Government contracting. On November 27, 1995 (60 FR 58276), SBA published a proposed rule in the Federal Register to reorganize part 125, eliminating seven sections and streamlining other sections. SBA proposed minor, but substantive, rule changes—notably, removing Walsh-Healey determinations from the Certificate of Competency process;

increasing the threshold over which a contracting officer could appeal the award of a Certificate of Competency to Headquarters from \$25,000 to \$100,000, and clarifying that prospective limitations on subcontracting applied to base year contracts, irrespective of option years.

SBA received sixteen timely comments to this proposed revision. Eleven of the comments were directed at proposed § 125.4, which concerns Government property sale assistance. One was directed at the proposed elimination of § 125.10, the Procurement Automated Source System (PASS). The remainder raised objections to proposed § 125.6, dealing with subcontracting limitations.

SBA proposed a streamlined section on government property sales at § 125.4. The proposed section described the purpose of the Government property sales assistance program; described what the program does; described what sorts of economic activities are covered by the program; and referred the reader to the appropriate sections in Part 121 to obtain the size standards for the program. This section replaces present § 125.8, which recites the size standards in detail, describes who in SBA is responsible for administering the program, sets forth what interagency agreements SBA has concerning the program and with whom, sets forth the form number of the applicable certification, describes penalties for contract breach, and sets forth the program's "emphasis", not only in the present but in the past as well.

Eight of the eleven comments discussing this section expressed the mistaken belief that the proposed revision would eliminate all references to the Government property sales assistance program. All eleven of the comments expressed concern that in the absence of the current detailed regulation, the general public, the timber industry and employees of the Federal Government would lack sufficient information to properly utilize the program. Some of these commenters expressed concern that in the absence of the particulars of present § 125.8, other agencies having interagency agreements with the SBA would be unaware of their responsibilities under those agreements. Conversely, other commenters were concerned that the proposed revision would somehow "signal" those other agencies that they were no longer bound by their agreements. Some commenters were concerned that without a regulation which assigns specific duties to specific SBA employees, SBA would soon eliminate those employees. Finally, one commenter claims that

were SBA not to designate in the Code of Federal Regulations which employees were to carry out which responsibilities under the Government property sales assistance program, SBA would be in violation of the Freedom of Information Act (5 U.S.C. 552).

SBA has considered all of these comments, but believes that § 125.4 as proposed is an appropriate regulation. Current § 125.8 has little useful information for either interested small businesses or for federal agencies conducting sales under the program. The statutory language replicated in current § 125.8 is among the most general in the entire Small Business Act, guaranteeing only that a "fair" proportion of sales and leases be given to small businesses. The bare recitation of which agencies have Interagency Agreements with SBA which relate to the Government Property Sales Assistance Program provides no useful information to the interested small business. The contents of those agreements, which may be obtained from the Small Business Administration upon request, may be of help, but they are not printed in the present regulation, and to include them in the Code of Federal Regulations would be impractical. The agencies themselves, of course, know what the agreements require them to do, and a regulation is not needed to create enforceability.

SBA's own obligations under the Government Property Sales Assistance Program remain unaffected by removing specific references to which SBA employee performs which task. Descriptions of duties of employees and other internal management matters need not be contained in regulations.

The size standards relevant to the timber set-aside program will be restated, with more clarity, in new §§ 121.506-121.508 of this chapter. A proposed rule revising Part 121 of these regulations was published on November 24, 1995, and will become final when this rule becomes effective. There is no substantive change to the size standard.

SBA disagrees with the contention that the Freedom of Information Act requires that SBA set forth in regulation the responsibilities of the property sales industrial representative, as the current regulation does. FOIA merely requires that agencies publish descriptions of their organization, not that they publish specific responsibilities for specific staff. Moreover, FOIA merely requires that this publication be in the Federal Register, not in regulations.

One commenter urges that § 125.10 be retained if its deletion "in any way diminishes the quality, availability, or emphasis for this program." The

deletion of this regulation will have none of these adverse effects.

Three of the commenters objected to proposed § 125.6(e), which would measure a small business offeror's compliance with subcontracting limitation percentages on the basis of the work it will perform during the base contract period only, regardless of the work it does during contract option years.

The commenters argued that SBA's proposed regulation was contrary to the legislative intent behind the statute, which was to apply the subcontracting limitations to the anticipated length of the contract, rather than to individual task orders. One of the commenters also argued that such a regulation would make it particularly difficult for small businesses to bid in high-tech fields, where the common practice of the industry is to subcontract large portions of the contract at the beginning phases and to gradually perform more and more of the work in-house. Another commenter also pointed out that the proposed rule was inconsistent with § 17.206(a) of the Federal Acquisition Regulation (48 CFR § 17.206(a)), which requires purchasing agencies to evaluate proposals over their full length, rather than simply the base year.

Unfortunately, the mere existence of option years in a contract is not necessarily dispositive of the question of the anticipated length of that contract. Some agencies offer contracts with short base periods and many option years as the best way to protect the agency's interests, without any real expectation that the awardee will perform the contract for the full period. It would defeat the purpose of § 644(o) to permit, for example, an award to a concern which ends up subcontracting most of the performance during the actual period of performance on the basis of its promise to perform with its own personnel during option years which are never awarded.

However, SBA agrees that where the purchasing activity awards the contract on the basis of an evaluation of more than the base period, SBA should accept this evaluation as evidence of the anticipated length of the contract. Accordingly, SBA has modified new § 125.6(e) so that where a proposal is evaluated on the basis of more than the base year, the contract awardee must perform the statutory minimum over the period of time upon which the evaluation is made. In all other instances, the contract awardee must perform the statutory minimum over the base period.

Another commenter objected to the language of § 125.6(a), which sets forth

the subcontracting limitations, where applicable, for each type of procurement. This commenter contended that the language of present § 124.314, which sets forth subcontracting limitations on 8(a) concerns, is more clear. SBA disagrees. SBA believes the wording of § 125.6 merely eliminates unnecessary wording. No substantive difference is intended.

One commenter asked why proposed § 125.6(a)(2), which establishes a 50% performance of work requirement for contractors for supplies (other than procurement from a regular dealer in such supplies) establishes no performance or work requirement for regular dealers. SBA believes that the statute imposes no requirement on regular dealers to perform any percentage of the work.

A commenter noted that the language of proposed § 125.6(b), which establishes the definition of certain accounting terms for purposes of complying with the limitations on subcontracting, may be too burdensome for small business offerors who normally have less formal accounting procedures. SBA does not consider it unduly burdensome for small business offerors to employ these terms. The terms need defining in a consistent way and the definitions are not overly complex.

Two commenters noted that in many instances small business offerors have not made at the time of their offer the decisions they need to make in order to determine how much of the contract they intend to subcontract. SBA must respect the need of federal agencies to determine the eligibility of small business bidders by a date certain. In the instance of a sealed bid, the contracting officer must be able to determine whether a bidder is responsible at the time of bid opening and, if it is not, must be able to move on to the next bidder. Similarly, in the instance of a negotiated procurement, the small business offeror will have substantially completed its subcontracting intentions by the time it makes its best and final offer, and must be able to commit to compliance with statutory limitations on subcontracting at that point.

A commenter noted proposed § 125.6(d) treated subcontracting limitations as a responsibility, rather than a size, issue and stated that this decision would raise questions as to whether the proposed regulation was a renunciation of the ostensible subcontractor rule found in § 121.401(l)(4). SBA has decided to treat limitations on subcontracting as a responsibility matter because it relates

to how a contractor intends to perform a specific contract and is analogous to traditional responsibility issues such as capacity and credit. Moreover, treating the issue in this way places the obligation to question compliance with the contracting officer, and insures that the contracting agency will be consulted before a negative determination is overruled by SBA. This new rule will not affect the ostensible subcontractor rule, which is being restated in new § 121.103(f)(3). Size protests will continue to be processed where the protester alleges an anticipated awardee exceeds the applicable size standard due to a joint venture relationship with a purported subcontractor, regardless of whether the limitations on subcontracting percentages will be met by the awardee.

Another comment was an objection to the provision of § 125.6(f), which provides that work which a concern intends to subcontract to subsidiaries and affiliates would not count as work performed by the concern. The commenter points out that SBA does not treat the affiliate as a separate entity for purposes of size determination and argues that it is inconsistent to treat the affiliate as a separate entity for purposes of subcontracting. The commenter also points out that an applicant can easily defeat this restriction by bidding as a joint venture with its affiliate.

SBA believes that the governing statute, 15 U.S.C. 644(o), urges this result. That statute refers to "employees of the concern" (contracts for services) and "the concern will perform work" (contracts for supplies). SBA regulations define a "concern" as "a business entity organized for profit \* \* \* (which) may be in the legal form of an individual proprietorship, partnership, corporation, joint venture, association, trust or a cooperative \* \* \*." (13 CFR 121.403).

An offeror and its affiliates are separate legal entities. Even if the statute were construed to permit a different rule, SBA believes a regulation defining "concern" differently for different purposes could be burdensome and confusing. While it is true that SBA aggregates for size purposes the employees or revenues of subsidiaries or affiliates of a concern, SBA does not treat the different legal entities as having merged or lost their separate identities in terms of ownership, management, assets and liabilities. To credit work performed by a subsidiary or an affiliate as work performed by the concern itself would be inconsistent with this approach.

Finally, two commenters inquired as to how SBA or a contracting officer can

determine an offeror's compliance with subcontracting restrictions before an award. As a responsibility matter, the contracting officer will determine whether an offeror intends to comply and if so, whether it is capable of complying. SBA may then review adverse determinations. If award occurs, the contracting officer will have a continuing responsibility to monitor contract performance to assure compliance with contract terms, including subcontracting limitations.

In addition to modifying the provision governing the period of time considered for measuring compliance with statutory subcontracting limitations, the final rule makes minor changes from the proposed rule in order to further streamline the part. SBA has removed the list of "additional responsibilities" assigned to commercial marketing representatives (CMRs) set forth in proposed § 125.3(e). CMRs will be assigned responsibilities in addition to their matching tasks as the need arises. SBA has also deleted the last sentence of proposed § 125.6(b)(4), which was inadvertently included in the proposed regulation. The treatment of leasing utility distribution facilities in the context of this section is still under review. SBA also corrected an inadvertent error contained in the proposed rule as to the eligibility of kit assemblers for a certificate of competency (§ 125.5(b)(1)(v)(B) of the proposed rule). The final rule will continue SBA's policy of making COCs available to kit assemblers regardless of the size of the manufacturer where the procurement is unrestricted, and of making COCs available to kit assemblers on small business set-asides only where they provide components manufactured only by domestic small businesses. SBA has also removed language in that subparagraph relating to the treatment of components manufactured by directed sources where the sources are large businesses. Under current regulations, contracting agencies must first obtain a waiver of the nonmanufacturing rule from SBA before they may direct large business sources in a small business set-aside. Accordingly, there is no need to include additional language governing directed sources.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of Executive Order

12866 or the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This rule eliminates seven sections of SBA's regulations that SBA has determined to be obsolete, unnecessary, or duplicative. The remaining regulations have been rewritten for clarity and ease of use. No contracting opportunities for small business will be affected by this rule. Therefore, it is not likely to have an annual economic impact of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the U.S. economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule contains no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

#### List of Subjects in 13 CFR Part 125

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

Accordingly, pursuant to the authority set forth in Section 4 of Public Law 101-515 (104 Stat. 2140), Section 610(a) of Public Law 100-202 (101 Stat. 1329-39), sections 5(b)(6), 8 and 15 of the Small Business Act, 72 Stat. 384, as amended (15 U.S.C. 631, *et seq.*), 31 U.S.C. 9701, 9702, SBA hereby revises Part 125 of Title 13 of the Code of Federal Regulations to read as follows:

### PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

- 125.1 Programs included.
- 125.2 Prime contracting assistance.
- 125.3 Subcontracting assistance.
- 125.4 Government property sales assistance.
- 125.5 Certificate of Competency program.
- 125.6 Prime contractor performance requirements (limitations on subcontracting).

Authority: 15 U.S.C. 634(b)(6), 637, and 644; 31 U.S.C. 9701, 9702.

#### § 125.1 Programs included.

The regulations in this part relate to the Government contracting assistance programs of SBA. There are four main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; and the

Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

#### § 125.2 Prime contracting assistance.

(a) *Traditional PCR responsibilities.*

(1) SBA Procurement Center Representatives (PCRs) are located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set aside for small businesses to determine whether a set-aside would be appropriate. In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal to the secretary of the department or head of the agency. The procedures and time limits for such appeals are set forth in § 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(2) PCRs review and evaluate the small business programs of Federal agencies and buying activities and make recommendations for improvement. They also recommend small business, small women-owned business, and small disadvantaged business sources for use by contracting activities and assist these businesses in obtaining Federal contracts and subcontracts. Other authorized duties of a PCR are set forth in the FAR in 48 CFR 19.402(c) and in the Small Business Act (the Act) in Section 15(a) (15 U.S.C. 644(a)).

(b) *BPCR responsibilities.* (1) SBA is required by section 403 of Public Law 98-577 (15 U.S.C. 644(l)) to assign a breakout PCR (BPCR) to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures set forth in § 19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the

FAR and Section 15(l) of the Act (15 U.S.C. 644(l)).

**§ 125.3 Subcontracting assistance.**

(a) The purpose of the subcontracting assistance program is to achieve maximum utilization of small business by major prime contractors. The Act requires other-than-small firms awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$500,000, or \$1 million for construction of a public facility, to submit a subcontracting plan to the contracting agency. The FAR sets forth the requirements for subcontracting plans in 48 CFR part 19, subpart 19.7, and 48 CFR 52.219-9.

(b) Upon determination of the successful subcontract offeror, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror. This is applicable to all subcontracts over \$10,000.

(c) SBA Commercial Market Representatives (CMRs) facilitate the process of matching large prime contractors with small, small disadvantaged, and small women-owned subcontractors. CMRs identify, develop, and market small businesses to the prime contractors and assist the small firms in obtaining subcontracts.

(d) Each CMR has a portfolio of prime contractors and conducts periodic compliance reviews and needs assessments of the companies in this portfolio. CMRs are also required to perform opportunity development and source identification. Opportunity development means assessing the current and future needs of the prime contractors. Source identification means identifying those small, small disadvantaged, and small women-owned firms which can fulfill the needs assessed from the opportunity development process.

**§ 125.4 Government property sales assistance.**

(a) The purpose of SBA's Government property sales assistance program is to:

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and  
(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

(b) SBA property sales assistance primarily consists of two activities:

(1) Obtaining small business set-asides when necessary to insure that a fair share of Government property sales are made to small businesses; and  
(2) Providing advice and assistance to small businesses on all matters

pertaining to sale or lease of Government property.

(c) The program is intended to cover the following categories of Government property:

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

(3) Sales of royalty oil by the Department of Interior's Minerals Management Service;

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) Sales of surplus real and personal property.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this chapter.

**§ 125.5 Certificate of Competency Program.**

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract. The COC Program is applicable to all Government procurement actions. For purposes of this Section, the term "United States" includes its territories, possessions, and the Commonwealth of Puerto Rico.

(2) A contracting officer must, upon determining an apparent low small business offeror to be nonresponsible, refer that small business to SBA for a possible COC, even if the next low apparently responsible offeror is also a small business.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. To be eligible for the COC program, a firm must meet the following criteria:

(i) It must qualify as a small business concern under the size standard applicable to the procurement. Where the solicitation fails to specify a size standard or Standard Industrial Classification (SIC) code, SBA will assign the appropriate size standard to

determine COC eligibility. SBA determines size eligibility as of the date described in § 121.404 of this chapter.

(ii) A manufacturing, service, or construction concern must demonstrate that it will perform a significant portion of the proposed contract with its own facilities, equipment, and personnel. The contract must be performed or the end item manufactured within the United States.

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

(iv) A non-manufacturer making an offer on an unrestricted procurement or a procurement utilizing simplified acquisition threshold procedures with a cost that does not exceed \$25,000 must furnish end items manufactured in the United States to be eligible for a COC.

(v) An offeror intending to provide a kit consisting of finished components or other components provided for a special purpose, is eligible if:

(A) It meets the Size Standard for the SIC code assigned to the procurement;

(B) Each component comprising the kit was manufactured in the United States; and

(C) In the case of a set-aside, each component comprising the kit was manufactured by a small business under the size standard applicable to the component provided. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the "Parties Excluded From Federal Procurement Programs" section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in the Procurement section of the list due to matters not directly related to the concern itself, responsibility will be determined in accordance with paragraph (f)(2) of this section.

(3) An eligibility determination will be made on a case-by-case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA.* (1) A contracting officer who determines that an apparently successful offeror that has certified itself to be a small business with respect to a specific Government procurement lacks any element of responsibility (including competency, capability, capacity, credit, integrity or tenacity or perseverance) must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. The referral must include a copy of the following:

- (i) Solicitation;
- (ii) Offer submitted by the concern whose responsibility is at issue for the procurement (its Best and Final Offer for a negotiated procurement);
- (iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;
- (iv) Preaward survey, where applicable;
- (v) Contracting officer's written determination of nonresponsibility;
- (vi) Technical data package (including drawings, specifications, and Statement of Work); and
- (vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of 15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found

responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. Where a service or construction contract will be performed outside the United States, SBA will rely solely on documentation and other relevant information obtained within the United States. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications.* If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the case without issuing a COC and will notify the contracting officer and the concern with a declination letter.

(f) *Reviewing an application.* (1) The COC review process is not limited to the

areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(2) A small business will be rebuttably presumed nonresponsible if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part 9, subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

(g) *Decision by Area Director ("Director").* After reviewing the information submitted by the applicant and the information gathered by SBA, the Area Director will make a determination, either final or recommended as set forth in the following chart:

Contracting actions	SBA official or office with authority to make decision	Finality of decision; options for contracting agencies
\$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures.	Director may approve or deny .....	Final. The Director will notify both applicant and contracting agency in writing of the decision.
Between \$100,000 and \$25 million .....	(1) Director may deny ..... (2) Director may approve, subject to right of appeal and other options.	(1) Final. (2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section.
Exceeding \$25 million .....	(1) Director may deny ..... (2) Director must refer to SBA Headquarters recommendation for approval.	(1) Final. (2) Contracting agency may proceed under paragraph (j) of this section.

(h) *Notification of intent to issue on a contract with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer has the following options:

(1) Accept the Director's decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or

(2) Ask the Director to suspend the case for one of the following purposes:

(i) To forward a detailed rationale of the decision to the contracting officer

for review within a specified period of time;

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file;

(iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually

agreeable to the contracting officer and SBA); or

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.

(i) *Appeals of Area Director determinations.* For COC actions with a value exceeding \$100,000, contracting agencies may appeal a Director's decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded.

Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

(1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.

(2) SBA Headquarters will furnish written notice to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level of the procuring agency (with a copy to the contracting officer), that the case file has been received and that an appeal decision may be requested by an authorized official at that level. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by both agencies) after SBA receives the request for a formal appeal.

(3) The SBA Associate Administrator for Government Contracting (AA/GC) will make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds \$25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (l) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either directly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, where an award of the contract has not occurred, and one of the following circumstances exists:

(i) The COC applicant submitted false or omitted materially adverse information;

(ii) New materially adverse information has been received relating to the current responsibility of the applicant concern; or

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the firm's current circumstances).

(2) Where SBA reconsiders and reaffirms the COC the procedures under paragraph (h) of this section do not apply.

(m) *Effect of a COC.* By the terms of the Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility.

(n) *Effect of Denial of COC.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA may monitor contractor performance.

**§ 125.6 Prime contractor performance requirements (limitations on subcontracting).**

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

(2) In the case of a contract for supplies or products (other than procurement from a regular dealer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

(3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).

(4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).

(b) *Definitions.* The following definitions apply to this section:

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

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

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

(4) *Cost of materials.* Includes costs of the items purchased, handling and

associated shipping costs for the purchased items (which includes raw materials), off-the-shelf items (and similar proportionately high-cost common supply items requiring additional manufacturing or incorporation to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, the acquisition of services or products from outside sources following normal commercial practices within the industry are also included.

(5) *Off-the-shelf item.* An item produced and placed in stock by a manufacturer, or stocked by a distributor, before orders or contracts are received for its sale. The item may be commercial or may be produced to military or Federal specifications or description. Off-the-shelf items are also known as Nondevelopmental Items (NDI).

(6) *Personnel.* Individuals who are "employees" under § 121.106 of this chapter.

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

(c) SBA will determine compliance with the Prime Contractor Performance Requirements as of the following dates:

(1) In a sealed bid procurement, as of the date the bid was submitted;

(2) In a negotiated procurement, as of the date the concern submits its best and final offer. If a concern is determined not to be in compliance at the time it submits its best and final offer, it may not come into compliance later for that procurement by revising its subcontracting plan.

(d) Compliance will be considered an element of responsibility and not a component of size eligibility.

(e) The period of time used to determine compliance will be the period of performance which the

evaluating agency uses to evaluate the proposal or bid. If the evaluating agency fails to articulate in its solicitation the period of performance it will use to evaluate the proposal or bid, the base contract period, excluding options, will be used to determine compliance. In indefinite quantity contracts, performance over the guaranteed minimum will be used to determine compliance unless the evaluating agency articulates a different period of performance which it will use to evaluate the proposal or bid in its solicitation.

(f) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining whether the concern will perform the required percentage of work.

(g) The procedures of § 125.5 apply where the contracting officer determines non-compliance, the procurement is a full or partial small business set-aside or an SDB has claimed a preference, and refers the matter to SBA for a COC determination.

Dated: January 19, 1996.

Philip Lader,

*Administrator.*

[FR Doc. 96-1157 Filed 1-30-96; 8:45 am]

BILLING CODE 8025-01-P

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 165

[CGD 05-96-002]

#### Regulated Navigation Area: Chesapeake Bay Ice Navigation Season

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of implementation.

**SUMMARY:** Coast Guard Captain of the Port (COTP) Baltimore is placing in effect from January 4, 1996 to April 15, 1996 the Regulated Navigation Area for the Maryland portion of the Chesapeake Bay, the District of Columbia, the Potomac River and its tributaries on the Maryland side, and the Maryland portion of the Chesapeake and Delaware Canal. Operators of specified vessels are required to contact COTP Baltimore prior to entering or getting underway within the Regulated Navigation Area to determine if operating restrictions have been imposed due to ice conditions.

**EFFECTIVE DATES:** Section 165.503 of 33 CFR is effective from 12:01 a.m., January 4, 1996 to 12:01 a.m., April 15, 1996,

unless sooner terminated by the Captain of the Port Baltimore by publication of a notice in the Federal Register.

**SUPPLEMENTARY INFORMATION:** Call the 24 Hour recorded message at (410) 576-2682, or U.S. Coast Guard Activities Baltimore Duty Officer at (410) 576-2520 for COTP ice information.

*Drafting Information.* The drafters of this regulation are Lieutenant Eric Bautz, project officer, Captain of the Port, Baltimore, Maryland, and Lieutenant Kathleen A. Duignan, project attorney, Fifth Coast Guard District Legal Staff.

### Discussion

Ice conditions frequently exist during winter months on the northern portion of Chesapeake Bay and its tributaries, including the Chesapeake and Delaware Canal. Severe ice conditions may threaten the safety of persons, vessels and the environment. COTP Baltimore may issue specific COTP orders imposing operating restrictions due to ice conditions, vessel construction, and cargo. Mariners are also encouraged to monitor Broadcast Notices to Mariners to determine if ice conditions exist in a specific area.

Section 165.503 of 33 CFR establishes a Regulated Navigation Area (RNA). Operators of vessels carrying oil or hazardous materials in bulk as cargo or residue, power-driven vessels of three hundred gross tons or more, vessels of one hundred gross tons or more carrying one or more passengers for hire, and towing vessels of 26 feet or more in length must contact COTP Baltimore before entering or getting underway within the RNA to obtain current COTP orders. Section 165.503 will remain in effect from January 4, 1996 to April 15, 1996.

Dated: January 3, 1996.

G.S. Cope,

*Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.*

[FR Doc. 96-1882 Filed 1-30-96; 8:45 am]

BILLING CODE 4910-14-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[FRL-5406-3]

#### Protection of Stratospheric Ozone

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of stay and reconsideration.

**SUMMARY:** This action announces a three-month stay and reconsideration of