Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 124

RIN 3245–AF06

Size for Purposes of the Multiple Award Schedule and Other Multiple Award Contracts; Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations to address the time at which size is determined for purposes of the General Services Administration's (GSA) Multiple Award Schedule (MAS) Program, including the Federal Supply Schedule (FSS), and other multiple award contracts, including Governmentwide Acquisition Contracts and multi-agency contracts. SBA also proposes to amend its 8(a) Business Development regulations to address when a business concern may receive orders as an 8(a) program participant under GSA's MAS Program, including the FSS, and other multiple award contracts.

DATES: Comments must be received on or before June 24, 2003.

ADDRESSES: Written comments should be addressed to Linda G. Williams, Associate Administrator, Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or by FAX to (202) 205–6390 or by e-mail to *Linda.Williams@sba.gov*. You may also submit comments electronically to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research, Office of Government Contracting, (202) 205–7322, *dean.koppel@sba.gov*.

SUPPLEMENTARY INFORMATION: The SBA's small business size regulations (13 CFR part 121) are used to determine eligibility for all SBA and Federal programs that require a concern to be a small business. Currently, SBA's regulations provide that SBA determines the size of a concern as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer, including price. 13 CFR 121.404. Therefore, for a multiple award schedule (MAS), Federal Supply Schedule (FSS), multiple award, or Governmentwide Acquisition (GWAC) contract, size is determined as of the date of a concern's initial offer, including price. If a concern is small as of that date, agencies may place orders pursuant to the original contract and consider these orders as awards to a ''small business'' for the length of the MAS, FSS, multiple award contract or GWAC.

This has led to skewed and, in SBA's view, misleading results. Such contracts may have terms of five, ten, or twenty years, and can be amended to incorporate goods and services with varying size standards, and unlimited quantities. Therefore, orders to concerns receiving such contracts would be considered to be awards to small business even though a firm had grown to be large (either through natural growth or by merger or acquisition) during the term of the contract, and even though the firm is not (and may never have been) small with respect to the size standard corresponding to the work to be performed under a particular order.

For example, SBA has reviewed Federal Procurement Data System (FPDS) statistics as they relate to four business concerns that received contracts as small businesses under the GSA's MAS Program, but which have become other than small since that time. These four business concerns are continuing to receive orders issued pursuant to a MAS contract in which each certified that they were small at the time of the original MAS contract. In fiscal year 2000, these four business concerns received over $190 million in such orders. Because these concerns were considered small at the time of the original MAS contract, each of these 1,313 contracting actions, valued at over $190 million, could be counted as awards to small businesses. The figures for these same concerns in fiscal year 2001 are equally astounding—1,271 contracting actions amounting to over $200 million in awards to other than small businesses.

In addition, SBA's Office of Hearings and Appeals (OHA) recently decided a size appeal relating to an order issued pursuant to the FSS. In *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ–4477 (2002) (OHA decisions are available at *www.sba.gov/oha/searchpage.html* or by contacting OHA by e-mail at *oha@sba.gov* or by phone at 202–401–8200), OHA ruled that a request for quotations (RFQ) issued pursuant to a FSS contract was a new small business set-aside procurement. As such, OHA held that size should be determined as of the date of the firm's submission of its certification as an eligible small business with its price quotation in response to the RFQ, and not at the date of the firm's offer in response to the initial FSS solicitation.

Further, the U.S. General Accounting Office (GAO) weighed in on the issue in a recent bid protest. In *CMS Information Services, Inc.*, B–290541 (Aug. 7, 2002) (available at *http://www.gao.gov* or contact the Government Printing Office at 202–512–1530), the procuring agency limited competition to small businesses and required businesses to certify their size at the time they submitted their quotations. The protester argued that this certification requirement was improper because the offerors had each certified their size at the time they submitted their initial offer to GSA for award of its FSS contract. GAO ruled that when an agency limits competition to small business vendors under a competitive RFQ issued pursuant to the FSS, the agency may properly require firms to certify as to their small business size status as of the time they submit their quotations.

In addition, GSA implemented a Federal Acquisition Regulation (FAR) deviation requiring contractors operating under the MAS Program or any other multiple award contract (such as the FAST program in GSA's Federal Technology Service), to recertify that the concern qualifies as a small business each time their contract is up for renewal. See GSA News Release # 9991 (November 15, 2002) (available at *http://www.gsa.gov/Portal/newsreleases.jsp*).

This evidence indicates that agencies may be counting orders issued pursuant to a MAS or other multiple award

contract as awards to small businesses when, in reality, the order is actually made to an entity other than a small business. As a result, agencies, including GSA, are attempting to remedy the situation, as are administrative tribunals such as OHA and GAO. Consequently, SBA is proposing a regulation at 13 CFR 121.404(c) to specifically address size as it relates to awards issued pursuant to multiple award contracts, including specifically GSA's MAS Program.

Under the proposed rule, a firm that receives a MAS or other multiple award contract must certify annually on the anniversary date of the contract award that it continues to be a small business for a specified size standard. A concern that is small at the time of the initial offer for a MAS or other multiple award contract would be considered small for one year from the date of its certification. The concern would then have to re-certify its size each year, for the term of the contract. Under the proposed rule, procuring agencies would then publish a list of the re-certifications received, within 10 days of receipt, on their agency's Web site, in the **Federal Register**, or otherwise. The rule would permit any interested party to file a protest with the contracting officer challenging the size of the concern seeking re-certification. If the recertification is challenged, SBA would then perform a formal size determination with respect to the challenged firm. SBA specifically requests comments as to the best or most expedient way to post these re-certifications so as to ensure that interested parties may appropriately protest, but at the same time not imposing an undue burden on procuring agencies or on the small business concerns.

SBA also may review or request a formal size determination with respect to any re-certification. However, once a firm is recertified, the concern will be considered to be a small business with respect to any order it receives with a North American Industry Classification Code (NAICS) code having the same or higher size standard during that one year period. Each order issued pursuant to the contract could then be counted as an award to small business.

However, under the GAO decision in *CMS* cited above, a contracting officer would have the discretion to ask for size certifications for individual orders. This proposed rule does not seek to, and does not in fact, change such discretion.

The proposed rule is based on SBA's view that receiving a multiple award contract or getting on GSA's FSS is similar to being admitted to SBA's 8(a) Business Development (BD) or HUBZone programs, and orders issued under multiple award contracts or off the schedule are similar to the actual award of an 8(a) BD or HUBZone contract. In the 8(a) BD and HUBZone programs, a concern must be small (for its primary NAICS code) at the time it is admitted to the program, and it must be small for each 8(a) BD or HUBZone contract it is awarded. Although the proposed rule would not require a firm to certify its status as (and in fact be) a small business for each order it receives under a multiple award contract (as an 8(a) or HUBZone concern must do for individual contracts once admitted to either of those programs), its requirement for annual certification makes size relevant for orders.

SBA also recognizes, however, that an order issued pursuant to a multiple award contract is intended to be a simple, fast way to procure needed goods and services. SBA does not seek to delay the procurement process or make it more complicated.

SBA considered three other alternatives to the proposed rule. The first alternative would require that for an agency to count an award issued under a multiple award or schedule contract as an award to a small business, the concern must be small as of the date of each order (in addition to being small at the time of its self-certification for the multiple award or schedule contract). The second alternative would require a firm to re-certify its status as a small business at the time of any option on the multiple award or schedule contract. SBA believes that the first alternative might require size certifications too often (and could delay the procurement process), and that the second alternative would require them too infrequently (letting a firm that has been purchased by a large business immediately after receiving its multiple award or schedule contract, for example, to be considered a small business for almost five years after becoming large). The third alternative SBA considered is similar to that proposed, but would require annual recertification or notification for a MAS or other multiple award contract only where a firm's size status for the MAS or other multiple award contract at issue has changed. While this alternative would significantly reduce paperwork and have a minimal effect on the procurement process, SBA was concerned about timely compliance with such a requirement. For example, if a firm that has grown to be other than small is seeking a substantial order as a small business under a MAS or other multiple award contract, it might not notify the contracting officer of its changed status until after it received the order. SBA specifically requests comments on each of these three alternatives.

SBA also proposes to amend 13 CFR 121.1004(a)(3), regarding time limits for size protests in the case of multiple award and schedule procurements, including FSS contracts. The proposed regulation would authorize size protests challenging firms seeking re-certification of their status as small businesses for a MAS or other multiple award contract. In addition, it would specifically authorize size protests in connection with orders issued under those contracts. Since time of size for an order issued under a MAS or other multiple award contract is determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer, including price (during the one-year period immediately following contract award) and as of the date the concern submits its re-certification (for the one-year period after any re-certification), a protest challenging the size of a concern for a specific order under a MAS or other multiple award contract relates to the date of the certification or re-certification, as applicable. Again, a contracting officer can request size certifications in connection with a specific order. In such a case, size would then be determined as of the date of the certification in connection with the order. Absent such a request by a contracting officer, the certification or re-certifcation date is the date at which SBA would determine a concern's size for a specific order.

SBA specifically requests comments on the appropriate time frame within which to require size protests relating to such orders. SBA recognizes that multiple award and schedule contracts are intended to be a fast, easy way for an agency to meet its procurement needs. However, SBA does not believe that a size protest would slow down the process or delay performance. A size protest in this context most probably would relate to whether an agency can count the award as an award to small business. Whether an award counts or does not count as a small business award has no bearing on whether the award can be made to a particular firm, or whether that firm can perform the award. Thus, the proposed rule would permit a protest to be made at any time prior to the expiration of the underlying multiple award or schedule contract.

Finally, the proposed rule would amend 13 CFR 124.503(h)(2) to ensure that size eligibility for 8(a) multiple award contracts is consistent with the

changes made to the size regulations generally by this rule. A concern would be able to continue to receive orders as an 8(a) small business under an 8(a) MAS contract (including the Federal Supply Schedule (FSS)) or other multiple award contract (including a GWAC, with respect to any orders issued pursuant to the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it qualified for a period of one year from the date of its certification or re-certification as a small business.

Compliance With Executive Orders 12612, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

OMB has determined that this proposed rule constitutes a significant regulatory action under Executive Order 12866.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule, if adopted in final form, would impose a new reporting requirement but not a new recordkeeping requirement. The proposed rule provides that in order to be considered small for purposes of an order issued pursuant to a multiple award or schedule contract, a concern must qualify as small at the time it receives the intial contract and annually. SBA does not believe that this requirement imposes a new recordkeeping requirement. SBCs have always been required to keep records pertaining to their size and to certify as to their size status to receive Federal benefits. Firms have always had to certify their size status with respect to new solicitations/contracts. No new records would be required in order to meet this change regarding multiple award contracts. In addition, these records are those kept in the ordinary course of business, such as federal income tax returns.

However, the proposed regulation would require business concerns to certify annually as to their size, in addition to certifying at the time of the intial MAS or other multiple award contract. Thus, the proposed regulation imposes a new reporting requirement. SBA believes that this additional certification would not be a burden to small business. In fact, small businesses have contacted SBA requesting such an additional certification in order to ensure that those receiving awards as small businesses are in fact small. The following sets forth further detail about this information collection request and specifically requests comments on the issue.

A. Application

Title: Re-Certification of Size for Multiple Award Contracts.

Summary: This application, described in proposed 13 CFR 121.404(c)(i), would require each business concern that certifies as small at the time of award for purposes of the General Services Administration's Multiple Award Schedule Program, including the Federal Supply Schedule, and other multiple award contracts, including Governmentwide Acquisition Contracts and multi-agency contracts, to re-certify once each year to the procuring agency's contracting officer that it is still small for purposes of that contract and consequently for any orders issued pursuant to the MAS or other multiple award contract having a NAICS code with the same or higher size standard. The application information provided to the contracting officers and subsequently published on the agency's Web site, in the **Federal Register**, or otherwise will allow all parties to determine whether a business concern is small pursuant to SBA's size regulations.

Need and Purpose: Pursuant to SBA's current regulations, a concern's size status is determined as of the date that it submits its initial offer, including price, for MAS and other multiple award contracts. If a concern is small as of that date, it is deemed to be small for the life of the contract and all orders issued pursuant to that contract. Contracts issued pursuant to some multiple award schedules are being extended for ten or twenty years. Therefore, a business concern that certified as small to receive a schedule contract ten years ago may still be considered small for orders issued pursuant to the same contract even if the business concern is clearly no longer small. Agencies are then able to count these orders as awards to small business even though the firm may have grown to be other than small or has merged with or been acquired by a large business many years ago. Unfortunately, this means that Federal agencies that meet their SBC goals by counting awards to former SBCs do so at the expense of legitimately defined SBCs. The information submitted in the re-certification will help determine whether or not these business concerns continue to be small and thus whether the orders issued pursuant to the initial schedule or other multiple award contract may be deemed an award to a small business concern.

Description of Respondents: All business concerns that certified as small for the initial MAS or other multiple award contract will be required to re-certify each year as to the concern's size pursuant to this proposed rule. SBA estimates that approximately 6,000 SBCs receive MAS or other multiple award contracts each year. SBA estimates the burden of this collection of information as follows: A business concern will re-certify annually as to its size for each MAS or other multiple award contract it receives and to which it initially certified itself as small. SBA estimates the time needed to complete this collection will average at most a half hour. SBA estimates the cost to complete this collection will be approximately $30 per hour. The total estimated aggregated burden is 3,000 hours per annum costing an aggregated $45,000 for the year.

SBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Please send comments about this information collection request by the closing date for this proposed rule to David Rostker, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 and to Linda Williams, Associate Administrator for Government Contracting, Office of Government Contracting and Business Development, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.

For purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications warranting the preparation of a Federalism Assessment.

SBA has determined that this proposed rule, if adopted in final form, could have a significant economic impact on a substantial number of small

entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Therefore, SBA has prepared an Initial Regulatory Flexibility Act (IRFA) analysis addressing the proposed regulation.

B. IRFA

The RFA provides that when preparing a Regulatory Flexibility Analysis, an agency shall address all of the following: the reasons, objectives, and legal basis for the proposed rule; the kind and number of small entities which may be affected; the projected recordkeeping, reporting, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; federal rules which may duplicate, overlap, or conflict with the proposed rule; and any significant alternatives to the proposed rule. This IRFA considers these points and the impact the proposed regulation concerning multiple award or schedule contracts may have on small entities.

(a) Reasons, Objectives and Legal Basis

Under the Small Business Act, SBA is authorized to specify detailed definitions and standards by which an entity may be determined to be a small business concern. 15 U.S.C. 632(a)(2). SBA's definitions and standards relating to SBCs are set forth in 13 CFR part 121.

Pursuant to SBA's current regulations, a concern's size status is determined as of the date that it submits its initial offer, including price, for the MAS or other multiple award contract. If a concern is small as of that date, it is deemed to be small for the life of the contract and for all orders issued pursuant to that contract. It is our understanding that contracts issued pursuant to some multiple award schedules are being extended for ten or twenty years. This means that a concern that certified as small to receive a schedule contract ten years ago, could still be considered small for orders issued pursuant to the same contract even if the business concern is clearly no longer small. Agencies are then able to count these orders as awards to small business even though the firm may have grown to be other than small or has merged with or been acquired by a large business many years ago. Unfortunately, this means that Federal agencies that meet their SBC goals by counting awards to former SBCs do so at the expense of legitimately defined SBCs. Agencies may not seek other procurement opportunities with legitimate SBCs because they have met their SBC goal through schedule orders to firms that are no longer small. As a result of the increasing use of these schedules and other multiple award contracts, SBA believes it is necessary to amend its regulations and address these size eligibility issues for orders issued pursuant to MAS and other multiple award contracts.

(b) Description and Estimate of the Number of Small Entities to Which the Rule May Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' SBA's programs do not apply to ''small organizations'' or ''small governmental jurisdictions'' because they are non-profit or governmental entities and do not qualify as ''business concerns'' within the meaning of SBA's regulations. SBA's programs apply only to for-profit business concerns. Therefore, the proposed regulation (like the regulation currently in effect) will not impact small organizations or small governmental jurisdictions.

Small businesses that participate in federal government contracting are the specific group of small entities affected most by this proposed rule. While there is no precise estimate for the number of SBCs that will be affected by this proposed rule, SBA has reasoned the following. First, there are over 200,000 SBCs registered on PRO-Net. PRO-Net is a database containing profiles of SBCs that includes information from SBA's files and other available databases, as well as information inputted by SBCs. Second, in 2001, SBA approved over 48,000 loans. Thus, based on a simplistic review of PRO-Net, it may appear that the proposed rule could affect, at a minimum, at least 250,000 SBCs. SBA notes, however, that this rule would likely affect only those small businesses having a MAS or other multiple award contract that were small at the time of the initial schedule or multiple award contract, and are no longer small. The number of SBCs awarded a MAS or other multiple award contract are much less than the PRO-Net figure, and those that have grown to be other than small since the award of their MAS or other multiple award contract is even smaller than that. Therefore, this rule will not impact all of the ''SBCs'' with MAS or other multiple award contracts, but, as identified below, would impact at least 6–12 businesses each year.

According to the Federal Procurement Data System (FPDS), in fiscal year 2001, there were 241,581 orders issued pursuant to the FSS and 648,522 orders issued pursuant to other Federal schedules for prime contract actions of $25,000 or less. (Federal Procurement Report, Section III, Agency Views, *http://www.fpdc.gov/fpdc/fpr.htm*). Over $600 million of these FSS orders and over $180 million of the other Federal schedule orders were reported as orders to SBCs. For contract actions over $25,000, there were over 61,000 orders, or $13.8 billion in orders issued pursuant to the FSS, and over 47,000 or $15 billion in orders issued pursuant to MAS contracts. *Id.* For FSS contracts above $25,000, approximately $4 billion was reported as awarded to 2,610 small businesses. This means that the average of orders awarded to SBCs is about $1.5 million (3,950,853,000/2610=1,513,737).

In addition to examining FPDS data, SBA has examined the growth trends of businesses between the 1992 and 1997 Economic Censuses using the 1992 and 1997 Special Tabulation of the Economic Census for SBA. The data shows that the share of total businesses with 100 employees or more (an approximate average employment size of all size standards) increased by 0.2 percent. According to the Census data (*www.census.gov*), the share of total businesses with 100 employees or more increased by only 0.1 percent and according to SBA's Office of Advocacy data (*see www.sba.gov/advo/stats/us88_99.pdf*), the increase was 0.1 between 1992–1997 and about 0.15 percent between 1992–1999. Applying these general trends to the 6,000 small businesses SBA believes are participating in the GSA's MAS program, approximately 3 to 4 small businesses per year would outgrow their small business classification. SBA, however, expects the actual number of businesses that outgrow their small business classification would be two to three times higher (6 to 12 business concerns) than this estimate, since studies have shown businesses receiving Federal contracts tend to be stronger businesses. Therefore, SBA expects 6 to 12 business concerns each year that have a multiple award contract to become other than small during the year. SBA expects the number of concerns affected the first year to be greater because firms have not had to certify their size status annually since being awarded a multiple award contract, and firms may have received such contracts several years ago and

could not recertify their small business status today.

SBA welcomes comments on the potential number of small businesses that would have to change their business designation and its implications as a result of this proposed provision.

This proposed rule could have a significant economic impact on SBCs. Using both the census and FPDS data discussed above, concerns that grow and no longer qualify as SBCs (about 6–12 a year) attain over $18 million a year in FSS awards (average of task order awards to SBCs is $1.5 million). Therefore, this rule could result in a corresponding increase in over $18 million in awards to those concerns that are actually small, although such a result is unlikely.

As an example, SBA has researched four actual business concerns that it believes are no longer small, and yet are still receiving orders issued pursuant to a MAS contract where each business certified itself as small on the original contract. The concerns, and the number of schedule orders received, as well as the total value of the awards, were obtained from FPDS data and are as follows:

	FY2000 # actions	Dollars ($000)	FY2001 # actions	Dollars ($000)
Business #1	1,019	154,321	902	124,063
Business #2	88	8,043	55	6,073
Business #3	28	18,217	0	0
Business #4	178	16,235	314	77,360

SBA notes that it is difficult to access FPDS data with only a business concern's name because concerns typically have many different variations of their name (*i.e.*, divisions, sections, etc). Therefore, the total number of actions and dollar value may be higher for the four concerns listed above.

SBA also notes that some could argue that this rule provides a disincentive for contracting officers to select a small business. Contracting officers may fear that there will be a size protest that would ultimately slow down the contracting process.

SBA does not believe this rule would alter the decisions of contracting officers in any way. First, the procuring activity will select a concern for an order because it is the best value to the Federal Government. Second, SBA does not believe that the activity will refuse to issue the order, which results in the best value to the Government, because the concern has to certify its size and may no longer be small. SBA believes that the only consequence is that the procuring activity will not be able to count the award as one to a SBC.

SBA believes that this is similar to how orders issued pursuant to MAS contracts currently interact with the 8(a) BD program. Today, a contracting officer can consider an offer from an 8(a) BD program participant, a SBC, and a large business simultaneously. Under a Memorandum of Understanding between SBA and the GSA, if the contracting officer determines that the best value to the Government is the offer submitted by the 8(a) BD participant, the order to that firm may be counted as an 8(a) award and counted towards the agency's SDB goal. If the best value to the Government is the offer from the large business, the large business would receive the award and the order would not count toward any small business goal. It is SBA's view that the same would happen under the proposed rule where a schedule holder grows to be other than small. In that case, if a firm that is no longer small would provide the best value to the Government, SBA believes that the firm would still get the MAS or FSS order, but, as with an award to any other large business, the order could not count toward any small business goal.

Therefore, if implemented, SBA believes this rule will ultimately impact the data collected on orders issued to SBCs, rather than affect the number of orders received by business concerns who have grown to be other than small since they received a federal multiple award or schedule contract.

(c) Additional Reporting or Record Keeping Requirements on Small Businesses

This proposed rule would impose a new information collection requirement on small businesses. However, the information collection is the same as that small business concerns currently submit for Government contracts to receive a preference or for an agency to count the award as one to a small business.

SBA does not believe that this provision imposes any new recordkeeping requirements. SBCs have always been required to keep records pertaining to their size and to certify as to their size status to receive Federal benefits. In addition, these records are those kept in the ordinary course of businesses, such as federal income tax returns.

(d) Relevant Federal Rules That May Duplicate, Overlap or Conflict With This Rule

This rule does not duplicate, overlap, or conflict with any other Federal rules. Under this proposed rule, SBCs would have to certify that they are small at the time they receive the MAS or other multiple award contract and then annually each year thereafter, so long as the MAS or other multiple award contract is still in effect, in order for the procuring activity to count the order as an award to a SBC. SBA does not believe this rule conflicts with any FAR rule. For example, according to FAR 19.804–6, separate offers and acceptances need not be made for individual orders under MAS or FSS contracts for the 8(a) BD Program. SBA's acceptance of the original multiple award or MAS contract is valid for the term of the contract. The same is set forth in 13 CFR 124.503(h) of SBA's regulations. The rule proposed does not conflict with this FAR regulation, which addresses offer and acceptance of a contract for the 8(a) BD Program.

In addition, typically, SBCs only certify their size on initial contracts and not annually, and therefore the FAR will need to be amended to address this rule, if promulgated as final. SBA does not believe this rule conflicts with FAR rules addressing multiple award or schedule orders and notes that SBA has exclusive statutory jurisdiction in establishing size definitions and standards. It is important to remember, however, that size eligibility generally, and in this case size for purposes of a multiple award or schedule order, falls within SBA's jurisdiction. The Small Business Act gives to SBA the exclusive authority to determine when and under what circumstances a business entity may be considered small.

(e) Alternatives That SBA Considered

SBA has proposed a new provision addressing orders issued pursuant to MAS and other multiple award contracts. Currently, size is determined

as of the date of a concern's initial offer on the MAS or other multiple award contract, not for each order issued pursuant to that contract. If a concern is small on that date, orders may be placed and considered to be awards to ''small business'' for the length of the MAS or other multiple award contracts. SBA understands that such contracts may have terms of five, ten, or more years, and can be amended to incorporate goods and services with varying size standards and unlimited quantities. Orders to concerns issued pursuant to a MAS or other multiple award contract would be deemed awards to small businesses even if a concern had grown to be large many years ago and even though the concern is not small with respect to the size standard corresponding to the work to be performed under a particular task order.

In determining how to address this issue, SBA considered first not amending the current regulation. However, SBA believes that if it does not address this issue, then awards will continue to be made to concerns that are not small businesses, yet agencies will get credit for making an award to a small business. SBA believes that this would harm legitimate small business concerns by reducing the number of opportunities and additional awards to them, either through the MAS program or otherwise. In addition, SBA has been contacted by several legitimate small businesses complaining that MAS orders are going to firms clearly not small, but that such awards are being counted as awards to small business. These businesses believe that their opportunites of receiving orders are reduced because agencies can go to large businesses and count the orders as awards to small businesses.

SBA also considered that, instead of determining size eligibility annually for purposes of orders issued pursuant to a MAS or other multiple award contract, it would determine size as of the date that a firm certifies that it is small for a particular order. Although this approach is appealing to SBA, SBA believes that some procuring agencies would oppose it. They could argue that such an approach would delay the procurement process, which is contrary to the intent of the MAS program. SBA also considered a longer time period, such as five years (one contract year plus four option years), in which the concern could be considered small. SBA decided not to propose this approach because it would not adequately address the perceived problem (*i.e.*, awards to other than small businesses would continue to be counted as small business awards for too long a period of time and too often, since agencies are increasingly using multiple award and schedule contracts). SBA believes that a process which requires a concern to self-certify annually that it continues to be small for orders issued pursuant to a MAS or other multiple award contract represents little or no burden to the SBC or to the procurement process.

SBA also proposes a rule regarding time limits for size protests in the case of MAS procurements, including FSS contracts. The proposed rule would specifically authorize protests in connection with awards and orders issued under those contracts as well as multiple award contracts. SBA proposes that a protest relating to an individual order is timely so long as it is received anytime before the expiration of the contract period. SBA considered the fact that multiple award and schedule contracts are intended to be a fast and easy way for an agency to contract. SBA does not believe that a size protest would slow down the contracting process or delay performance because a size protest, in this instance, would likely relate to whether an agency can count the award as an award to a SBC, not to whether award can or should be made to a particular business entity. SBA specifically requests comments as to other options for these time limits.

(f) Conclusion

Based upon the foregoing, SBA has determined that this proposed rule may have a significant impact on a substantial number of small entities within the meaning of the RFA. SBA requests comments addressing any of the issues raised in this IRFA, including comments on the economic effect this rule could have on small entities.

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

Administrative practice and procedure, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

For the reasons set forth in the preamble, SBA proposes to amend parts 121 and 124 of Title 13 of the Code of Federal Regulations, 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(a), 634(b)(6), 637(a), 644(c) and 662(5) and Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188.

2. In § 121.404 add paragraph (c) to read as follows:

§ 121.404 When does SBA determine the size status of a business concern?

* * * * *

(c) In order to be considered small for purposes of the General Services Administration's Multiple Award Schedule (MAS) Program, including the Federal Supply Schedule, and other multiple award contracts, including Governmentwide Acquisition Contracts (GWAC) and multi-agency contracts, a concern must qualify as small as of the date it submits a written self-certification to the procuring agency as part of its initial offer including price. The concern will be considered small with respect to any orders issued under the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it qualified for a period of one year from the date of its certification.

(1) A business concern awarded a MAS or other multiple award contract must annually re-certify to the contracting officer on the anniversary date of the contract award that it continues to qualify as a small business for the contract. Contracting officers will publish a list of the re-certifications received, within 10 days of receipt, on their agency's website, and may also publish it in the **Federal Register** or otherwise. SBA may review or request a formal size determination with respect to that re-certification, and any interested party may protest that re-certification pursuant to § 121.1004(a)(3)(iii). The business concern may be considered small with respect to any orders issued pursuant to the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it re-certified for a period of one year from the date of its re-certification.

(2) The contracting officer must assign an appropriate NAICS code to each order issued under a MAS or other multiple award contract to assist in determining whether a concern is small for a particular order.

(3) Time of size for a specific order relates back to the date of the initial written self-certification that it is small to the procuring agency for the award of

the MAS or other multiple award contract (during the one-year period immediately following contract award) and as of the date the concern submits its re-certification (for the one-year period after any re-certification).

3. Revise § 121.1004(a)(3) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(3) *Multiple Award Contracts.* (i) Except as set forth in paragraph (a)(3)(ii) of this section, protests relating to the award of a MAS or other multiple award contract are considered timely if they meet the requirements of paragraphs (a)(1) or (a)(2) of this section.

(ii) Protests relating to the award of a contract under the General Services Administration's MAS Program, including the Federal Supply Schedule, are considered timely if received by the contracting officer within 10 days of a concern being listed on the multiple award schedule.

(iii) Protests relating to re-certifications issued pursuant to § 121.404(c) are considered timely if received by the contracting officer within 10 days of a concern being listed on an agency's website or published in the **Federal Register** or otherwise. Protests relating to individual awards or orders issued pursuant to the MAS Program or other multiple award contracts are considered timely if received by the contracting officer at any time prior to the expiration of the contract period (including renewals).

* * * * *

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

4. 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 Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, and 42 U.S.C. 9815.

5. Revise § 124.503(h)(2) to read as follows:

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

* * * * *

(h) * * *

(2)(i) A concern can continue to receive orders as an 8(a) small business under the General Services Administration's Multiple Award Schedule (MAS) Program, including the Federal Supply Schedule, and other multiple award contracts, including Governmentwide Acquisition Contracts (GWACs) and multi-agency contracts, with respect to any orders issued pursuant to the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it qualified for a period of one year from the date of its certification or re-certification as a small business.

(ii) A concern can continue to receive orders under the MAS Program, including the Federal Supply Schedule, and multiple award contracts, including GWACs and multi-agency contracts, even after it no longer meets the requirement of paragraph (h)(2)(i) of this section, but such award will not count as an award to an 8(a) small business.

* * * * *

Dated: April 21, 2003.

Hector V. Barreto,

Administrator.

[FR Doc. 03–10286 Filed 4–24–03; 8:45 am]

BILLING CODE 8025–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1026

Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission; Termination of Rulemaking

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In November 2000, the Consumer Product Safety Commission published a notice of proposed rulemaking to issue a new rule addressing the behavior of attorneys on matters before the Commission. 65 FR 66515. The Commission has now decided that such a new rule is not necessary, and has terminated this regulatory proceeding.

FOR FURTHER INFORMATION CONTACT: Melissa V. Hampshire, Office of the General Counsel, Consumer Product Safety Commission, Washington, DC 20207; (301) 504–7631; *mhampshire@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Commission does not have rules governing the behavior of attorneys outside the context of a formal adjudication. The Commission conducts the majority of its business outside of such adjudications. In November 2000 the Commission proposed a new rule that would cover attorney conduct outside of formal adjudications.

The Commission received five comments opposing the proposal. These comments criticized the proposed rule on the following grounds: (1) The rule is unnecessary because there is no attorney misconduct problem at the Commission and existing state bar regulations are adequate to regulate any future attorney misconduct; (2) the ''bad faith'' standard set forth in the proposed rule is vague and overly broad; and (3) the procedures contained in the proposed rule are inadequate to protect the rights of the attorneys subject to it. The Commission received one comment endorsing the need for a new rule and favoring the standards and enforcement procedures contained in it.

The Commission has evaluated the comments and has decided the proposed attorney conduct rules are not necessary and, accordingly, the November 2000 notice of proposed rulemaking is withdrawn.

Dated: April 22, 2003.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 03–10277 Filed 4–24–03; 8:45 am]

BILLING CODE 6355–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA264–373; FRL–7488–3]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval and limited disapproval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) and Yolo-Solano Air Quality Management District (YSAQMD) portions of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from industries storing, loading, and transfering organic liquids as part of their operations. We are proposing action on local rules regulating these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.