

§ 120.991 Effect of other laws.

No State or local law may preclude or limit SBA's exercise of its rights with respect to notes, guarantees, Debentures and Debenture Pools, or of its enforcement rights to foreclose on collateral.

PART 121—SMALL BUSINESS SIZE REGULATIONS

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AUTHORITY: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c) and 662(5).

SOURCE: 61 FR 3286, Jan. 31, 1996, unless otherwise noted.

Subpart A—Size Eligibility Provisions and Standards

PROVISIONS OF GENERAL APPLICABILITY

§ 121.101 What are SBA size standards?

SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the Standard Industrial Classification (SIC) System. The SIC System is described in the "Standard Industrial Classification Manual" published by the Office of Management and Budget, Executive Office of the President, and sold by the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. The SIC System assigns four-digit SIC codes to all economic activity within ten major divisions. Section 121.201 describes the size standards now established. A full table matching a size standard with each four-digit SIC

code is also published annually by SBA in the FEDERAL REGISTER.

§ 121.102 How does SBA establish size standards?

(a) SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.

(b) As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry. SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.

(c) Please address any requests to change existing size standards or establish new ones for emerging industries to the Assistant Administrator for Size Standards, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

§ 121.103 What is affiliation?

(a) *General Principles of Affiliation.* (1) Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are eco-

nomically dependent through contractual or other relationships, may be treated as one party with such interests aggregated.

(4) SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.

(b) *Exclusion from affiliation coverage.* (1) Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958, as amended, are not considered affiliates of such investment companies or development companies.

(2) Business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

(3) Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development as authorized by the Small Business Act are not affiliates of one another because of the pool.

(4) Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses are not affiliated with the leasing company solely on the basis of a leasing agreement.

(5) For financial, management or technical assistance under the Small Business Investment Act of 1958, as amended, (and applicant is not affiliated with the investors listed in paragraphs (b)(5) (i) through (vi) of this section.

(i) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 29 CFR 2510.3-101(d);

(ii) Employee benefit or pension plans established and maintained by the Federal government or any state, or their political subdivisions, or any

agency or instrumentality thereof, for the benefit of employees;

(iii) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1001, *et seq.*);

(iv) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under section 501(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. 501(c));

(v) Investment companies registered under the Investment Company Act of 1940, as amended (1940 Act) (15 U.S.C. 80a-1, *et seq.*); and

(vi) Investment companies, as defined under the 1940 Act, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than the operation of commercial enterprises.

(6) A protege firm is not an affiliate of a mentor firm solely because the protege firm receives assistance from the mentor firm under Federal Mentor-Protege programs.

(c) *Affiliation based on stock ownership.* (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock.

(2) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

(d) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Since stock options, convertible debentures, and agreements to merge (including agreements in principle) affect the power to control a concern, SBA treats them as though the rights granted have been exercised (except that an affiliate can-

not use them to appear to terminate control over another concern before it actually does so). SBA gives present effect to an agreement to merge or sell stock whether such agreement is unconditional, conditional, or finalized but unexecuted. Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and, thus, are not given present effect.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors or general partners controls the board of directors and/or the management of another concern.

(f) *Affiliation based on joint venture arrangements.* (1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Concerns bidding on a particular procurement or property sale as joint venturers are affiliated with each other with regard to performance of that contract.

(3) A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

(4) For size purposes, a concern must include in its revenues its proportionate share of joint venture receipts.

(g) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common

ownership, common management or excessive restrictions upon the sale of the franchise interest.

[61 FR 3286, Jan. 31, 1996, as amended at 62 FR 26381, May 14, 1997]

§ 121.104 How does SBA calculate annual receipts?

(a) *Definitions.* In determining annual receipts of a concern:

(1) *Receipts* means “total income” (or in the case of a sole proprietorship, “gross income”) plus the “cost of goods sold” as these terms are defined or reported on Internal Revenue Service (IRS) Federal tax return forms (Form 1120 for corporations; Form 1120S for Subchapter S corporations; Form 1065 for partnerships; and Form 1040, Schedule F for farm or Schedule C for other sole proprietorships). However, the term receipts excludes net capital gains or losses, taxes collected for and remitted to a taxing authority if included in gross or total income, proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS), and amounts collected for another by a travel agent, real estate agent, advertising agent, or conference management service provider.

(2) *Completed fiscal year* means a taxable year including any short period. Taxable year and short period have the meaning attributed to them by the IRS.

(3) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

(b) *Period of measurement.* (1) Annual receipts of a concern which has been in business for 3 or more completed fiscal years means the receipts of the concern over its last 3 completed fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than 3 complete fiscal years means the receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Annual receipts of a concern which has been in business 3 or more complete fiscal years but has a short year as one of those years means the receipts for the short year and the two

full fiscal years divided by the number of weeks in the short year and the two full fiscal years, multiplied by 52.

(c) *Use of information other than the Federal tax return.* Where other information gives SBA reason to regard Federal Income Tax returns as false, SBA may base its size determination on such other information.

(d) *Annual receipts of affiliates.* (1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period or before small business self-certification, the annual receipts in determining size status include the receipts of both firms. Furthermore, this aggregation applies for the entire applicable period used in computing size rather than only for the period after the affiliation arose. Receipts are determined for the concern and its affiliates in accordance with paragraph (b) of this section even though this may result in different periods being used to calculate annual receipts.

(2) The annual receipts of a former affiliate are not included as annual receipts if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period used in computing size, rather than only for the period after which the affiliation ceased.

§ 121.105 How does SBA define “business concern or concern”?

(a) A business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

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(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

§ 121.106 How does SBA calculate number of employees?

(a) Employees counted in determining size include all individuals employed on a full-time, part-time, temporary, or other basis. SBA will consider the totality of the circumstances, including factors relevant for tax purposes, in determining whether individuals are employees of the concern in question.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4) The treatment of employees of former affiliates or recently acquired affiliates is the same as for size determinations using annual receipts in § 121.104(d).

§ 121.107 How does SBA determine a concern's "primary industry"?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing

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business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

§ 121.108 What are the penalties for misrepresentation of size status?

In addition to other laws which may be applicable, section 16(d) of the Small Business Act, 15 U.S.C. 645(d), provides severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs. Section 16(a) of the Act also provides, in part, for criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing in any way the actions of the Agency.

SIZE STANDARDS USED TO DEFINE SMALL BUSINESS CONCERNS

§ 121.201 What size standards has SBA identified by Standard Industrial Classification codes?

The size standards described in this section apply to all SBA programs unless otherwise specified. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small. The following is a listing of size standards for industries under the SIC System. Size standards are listed by Division and apply to all industries in that Division except those specifically listed with separate size standards for a specific two-digit major group or four-digit industry code. The industry code applicable to a business that cannot be otherwise classified will be SIC code 9999, Nonclassifiable Establishments, with a corresponding size standard of \$5.0 million in annual receipts.

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SIZE STANDARDS BY SIC INDUSTRY

SIC code and description	Size standards in number of employees or millions of dollars
DIVISION A—AGRICULTURE, FORESTRY AND FISHING	
MAJOR GROUP 01—AGRICULTURAL PRODUCTION CROPS	\$0.5
MAJOR GROUP 02—LIVESTOCK AND ANIMAL SPECIALTIES	\$0.5
Except:	
0211 Beef Cattle Feedlots (Custom)	\$1.5
0252 Chicken Eggs	\$9.0
MAJOR GROUP 07—AGRICULTURAL SERVICES	\$5.0
MAJOR GROUP 08—FORESTRY	\$5.0
MAJOR GROUP 09—FISHING, HUNTING, AND TRAPPING	\$3.0
DIVISION B—MINING	
MAJOR GROUP 10—METAL MINING	500
MAJOR GROUP 12—COAL MINING	500
MAJOR GROUP 13—OIL AND GAS EXTRACTION AND MAJOR GROUP 14—MINING AND QUARRYING OF NONMETALLIC MINERALS, EXCEPT FUELS.	500
EXCEPT:	
1081 Metal Mining Services	\$5.0
1241 Coal Mining Services	\$5.0
1382 Oil and Gas Field Exploration Services	\$5.0
1389 Oil and Gas Field Services, N.E.C.	\$5.0
1481 Nonmetallic Minerals Services, Except Fuels	\$5.0
DIVISION C—CONSTRUCTION	
MAJOR GROUP 15—GENERAL BUILDING CONTRACTORS	\$17.0
MAJOR GROUP 16—HEAVY CONSTRUCTION, NON BUILDING	\$17.0
EXCEPT:	
1629 (Part) Dredging and Surface Cleanup Activities	\$13.5 ¹
MAJOR GROUP 17—CONSTRUCTION—SPECIAL TRADE CONTRACTORS	\$7.0
DIVISION D—MANUFACTURING,²	
EXCEPT:	
2032 Canned Specialties	1,000
2033 Canned Fruits, Vegetables, Preserves, Jams and Jellies	500 ³
2043 Cereal Breakfast Foods	1,000
2046 Wet Corn Milling	750
2052 Cookies and Crackers	750
2062 Cane Sugar Refining	750
2063 Beet Sugar	750
2076 Vegetable Oil Mills, Except Corn, Cottonseed, and Soybean	1,000
2079 Shortening, Table Oils, Margarine, and Other Edible Fats and Oils, N.E.C	750
2085 Distilled and Blended Liquors	750
2111 Cigarettes	1,000
2211 Broadwoven Fabric Mills, Cotton	1,000
2261 Finishers of Broadwoven Fabrics of Cotton	1,000
2295 Coated Fabrics, Not Rubberized	1,000
2296 Tire Cord and Fabrics	1,000
2611 Pulp Mills	750
2621 Paper Mills	750
2631 Paperboard Mills	750
2656 Sanitary Food Containers, Except Folding	750
2657 Folding Paperboard Boxes, Including Sanitary	750
2812 Alkalies and Chlorine	1,000
2813 Industrial Gases	1,000
2816 Inorganic Pigments	1,000
2819 Industrial Inorganic Chemicals, N.E.C	1,000
2821 Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers	750
2822 Synthetic Rubber (Vulcanizable Elastomers)	1,000
2823 Cellulosic Manmade Fibers	1,000
2824 Manmade Organic Fibers, Except Cellulosic	1,000
2833 Medicinal Chemicals and Botanical Products	750
2834 Pharmaceutical Preparations	750
2841 Soap and Other Detergents, Except Specialty Cleaners	750
2865 Cyclic Organic Crudes and Intermediates, and Organic Dyes and Pigments	750
2869 Industrial Organic Chemicals, N.E.C.	1,000
2873 Nitrogenous Fertilizers	1,000
2892 Explosives	750
2911 Petroleum Refining	1,500 ⁴

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
2952 Asphalt Felts and Coatings	750
3011 Tires and Inner Tubes	1,000 ⁵
3021 Rubber and Plastics Footwear	1,000
3211 Flat Glass	1,000
3221 Glass Containers	750
3229 Pressed and Blown Glass and Glassware, N.E.C	750
3241 Cement, Hydraulic	750
3261 Vitreous China Plumbing Fixtures and China and Earthenware Fittings and Bathroom Accessories.	750
3275 Gypsum Products	1,000
3292 Asbestos Products	750
3296 Mineral Wool	750
3297 Nonclay Refractories	750
3312 Steel Works, Blast Furnaces (Including Coke Ovens), and Rolling Mills	1,000
3313 Electrometallurgical Products, Except Steel	750
3315 Steel Wiredrawing and Steel Nails and Spikes	1,000
3316 Cold-Rolled Steel Sheet, Strip, and Bars	1,000
3317 Steel Pipe and Tubes	1,000
3331 Primary Smelting and Refining of Copper	1,000
3334 Primary Production of Aluminum	1,000
3339 Primary Smelting and Refining of Nonferrous Metals, Except Copper and Aluminum	750
3351 Rolling, Drawing, and Extruding of Copper	750
3353 Aluminum Sheet, Plate, and Foil	750
3354 Aluminum Extruded Products	750
3355 Aluminum Rolling and Drawing, N.E.C	750
3356 Rolling, Drawing, and Extruding of Nonferrous Metals, Except Copper and Aluminum	750
3357 Drawing and Insulating of Nonferrous Wire	1,000
3398 Metal Heat Treating	750
3399 Primary Metal Products, N.E.C	750
3411 Metal Cans	1,000
3431 Enameled Iron and Metal Sanitary Ware	750
3482 Small Arms Ammunition	1,000
3483 Ammunition, Except for Small Arms	1,500
3484 Small Arms	1,000
3511 Steam, Gas, and Hydraulic Turbines, and Turbine Generator Set Units	1,000
3519 Internal Combustion Engines, N.E.C	1,000
3531 Construction Machinery and Equipment	750
3537 Industrial Trucks, Tractors, Trailers, and Stackers	750
3562 Ball and Roller Bearings	750
3571 Electronic Computers	1,000
3572 Computer Storage Devices	1,000
3575 Computer Terminals	1,000
3577 Computer Peripheral Equipment, N.E.C	1,000
3578 Calculating and Accounting Machines, Except Electronic Computers	1,000
3585 Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment.	750
3612 Power, Distribution, and Specialty Transformers	750
3613 Switchgear and Switchboard Apparatus	750
3621 Motors and Generators	1,000
3624 Carbon and Graphite Products	750
3625 Relays and Industrial Controls	750
3631 Household Cooking Equipment	750
3632 Household Refrigerators and Home and Farm Freezers	1,000
3633 Household Laundry Equipment	1,000
3634 Electric Housewares and Fans	750
3635 Household Vacuum Cleaners	750
3641 Electric Lamp Bulbs and Tubes	1,000
3651 Household Audio and Video Equipment	750
3652 Phonograph Records and Prerecorded Audio Tapes and Disks	750
3661 Telephone and Telegraph Apparatus	1,000
3663 Radio and Television Broadcasting and Communications Equipment	750
3669 Communications Equipment, N.E.C	750
3671 Electron Tubes	750
3692 Primary Batteries, Dry and Wet	1,000
3694 Electrical Equipment for Internal Combustion Engines	750
3695 Magnetic and Optical Recording Media	1,000
3699 Electrical Machinery, Equipment, and Supplies, N.E.C	750
3711 Motor Vehicles and Passenger Car Bodies	1,000
3714 Motor Vehicle Parts and Accessories	750
3716 Motor Homes	1,000

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SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
3721 Aircraft	1,500
3724 Aircraft Engines and Engine Parts	1,000
3728 Aircraft Parts and Auxiliary Equipment, N.E.C	1,000 ⁹
3731 Shipbuilding and Repair of Nuclear Propelled Ships	1,000
Shipbuilding of Nonnuclear Propelled Ships and Nonpropelled Ships	1,000
Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships East of the 108 Meridian.	1,000
Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships West of the 108 Meridian.	1,000
3743 Railroad Equipment	1,000
3761 Guided Missiles and Space Vehicles	1,000
3764 Guided Missile and Space Vehicle Propulsion Units and Propulsion Units Parts	1,000
3769 Guided Missile and Space Vehicle Parts and Auxiliary Equipment, N.E.C	1,000
3795 Tanks and Tank Components	1,000
3812 Search, Detection, Navigation, Guidance, Aeronautical, and Nautical Systems and Instruments.	750
3996 Linoleum, Asphalted-Felt-Base, and other Hard Surface Floor Coverings, N.E.C	750
DIVISION E—TRANSPORTATION, COMMUNICATIONS, ELECTRIC, GAS, AND SANITARY SERVICES	
MAJOR GROUP 40—RAILROAD TRANSPORTATION	1500
EXCEPT:	
4013 Railroad Switching and Terminal Establishments	500
MAJOR GROUP 41—LOCAL AND SUBURBAN TRANSIT AND INTERURBAN HIGHWAY PASSENGER TRANSPORTATION.	\$5.0
MAJOR GROUP 42—MOTOR FREIGHT TRANSPORTATION AND WAREHOUSING	\$18.5
EXCEPT:	
4212 (Part) Garbage and Refuse Collection, Without Disposal	\$6.0
4231 Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation	\$5.0
MAJOR GROUP 44—WATER TRANSPORTATION	500
EXCEPT:	
4491 Marine Cargo Handling	\$18.5
4492 Towing and Tugboat Services	\$5.0
4493 Marinas	\$5.0
4499 Water Transportation Services, N.E.C.	\$5.0
—Offshore Marine Water Transportation Services	\$20.5
MAJOR GROUP 45—TRANSPORTATION BY AIR	1500
EXCEPT:	
4522 Air Transportation, Nonscheduled	1500
—Offshore Marine Air Transportation Services	\$20.5
4581 Airports, Flying Fields, and Airport Terminal Services	\$5.0
MAJOR GROUP 46—PIPELINES, EXCEPT NATURAL GAS,	1500
EXCEPT:	
4619 Pipelines, N.E.C.	\$25.0
MAJOR GROUP 47—TRANSPORTATION SERVICES,	\$5.0
EXCEPT:	
4724 Travel Agencies	\$1.0 ⁶
4731 Arrangement of Transportation of Freight and Cargo	\$18.5
4783 Packing and Crating	\$18.5
MAJOR GROUP 48—COMMUNICATIONS.	
4812 Radiotelephone Communications	1,500
4813 Telephone Communications, Except Radiotelephone	1,500
4822 Telegraph and Other Message Communications	\$5.0
4832 Radio Broadcasting Stations	\$5.0
4833 Television Broadcasting Stations	\$10.5
4841 Cable and Other Pay Television Services	\$11.0
4899 Communications Services, N.E.C.	\$11.0
MAJOR GROUP 49—ELECTRIC, GAS, AND SANITARY SERVICES,	\$5.0
EXCEPT:	
4911 Electric Services	4 million megawatt hrs.
4924 Natural Gas Distribution	500
4953 Refuse Systems	\$6.0
4961 Steam and Air-Conditioning Supply	\$9.0
DIVISION F—WHOLESALE TRADE	100
(Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.)	
DIVISION G—RETAIL TRADE	\$5.0

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
(Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.)	
EXCEPT:	
5271 Mobile Home Dealers	\$9.5
5311 Department Stores	\$20.0
5331 Variety Stores	\$8.0
5411 Grocery Stores	\$20.0
5511 Motor Vehicle Dealers (New and Used)	\$21.0
5521 Motor Vehicle Dealers (Used Only)	\$17.0
5541 Gasoline Service Stations	\$6.5
5599 Automobile Dealers, N.E.C.	\$5.0
—Aircraft Dealers, Retail	\$7.5
5611 Men's and Boys' Clothing and Accessory Stores	\$6.5
5621 Women's Clothing Stores	\$6.5
5651 Family Clothing Stores	\$6.5
5661 Shoe Stores	\$6.5
5722 Household Appliance Stores	\$6.5
5731 Radio, Television, and Consumer Electronics Stores	\$6.5
5734 Computer and Computer Software Stores	\$6.5
5812 (Part) Food Service, Institutional	\$15.0
5961 Catalog and Mail-Order Houses	\$18.5
5983 Fuel Oil Dealers	\$9.0
DIVISION H—FINANCE, INSURANCE, AND REAL ESTATE	\$5.0
EXCEPT:	
6021–6082 National and Commercial Banks, Savings Institutions and Credit Unions	\$100 Million in assets ⁷
6331 Fire, Marine, and Casualty Insurance	1,500
6515 (Part) Leasing of Building Space to Federal Government by Owners	\$15.0 ⁸
6531 Real Estate Agents and Managers	\$1.5 ⁶
DIVISION I—SERVICES	\$5.0
EXCEPT:	
7211 Power Laundries, Family and Commercial	\$10.5
7213 Linen Supply	\$10.5
7216 Drycleaning Plants, Except Rug Cleaning	\$3.5
7217 Carpet and Upholstery Cleaning	\$3.5
7218 Industrial Launderers	\$10.5
7311 Advertising Agencies	\$5.0 ⁶
7312 Outdoor Advertising Services	\$5.0 ⁶
7313 Radio, Television, and Publishers' Advertising Representatives	\$5.0 ⁶
7319 Advertising, N.E.C.	\$5.0 ⁶
7349 Building Cleaning and Maintenance Services, N.E.C.	\$12.0
7371 Computer Programming Services	\$18.0
7372 Prepackaged Software	\$18.0
7373 Computer Integrated Systems Design	\$18.0
7374 Computer Processing and Data Preparation and Processing Services	\$18.0
7375 Information Retrieval Services	\$18.0
7376 Computer Facilities Management Services	\$18.0
7377 Computer Rental and Leasing	\$18.0
7378 Computer Maintenance and Repair	\$18.0
7379 Computer Related Services, N.E.C.	\$18.0
7381 Detective, Guard, and Armored Car Services	\$9.0
7382 Security Systems Services	\$9.0
7389 Business Services, N.E.C.	\$5.0
Map Drafting Services, Mapmaking (Including Aerial) and Photogrammetric Mapping Services.	\$3.5
7513 Truck Rental and Leasing Without Drivers	\$18.5
7514 Passenger Car Rental	\$18.5
7515 Passenger Car Leasing	\$18.5
7534 Tire Retreading and Repair Shops	\$10.5
7699 Repair Shops and Related Services, N.E.C.	\$5.0 ⁹
7812 Motion Picture and Video Tape Production	\$21.5
7819 Services Allied to Motion Picture Production	\$21.5
7822 Motion Picture and Video Tape Distribution	\$21.5
8299 (Part) Flight Training Services	\$18.5
8711 Engineering Services	\$2.5
Military and Aerospace Equipment and Military Weapons	\$20.0

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992.	\$20.0
Marine Engineering and Naval Architecture	\$13.5
8712 Architectural Services (Other Than Naval)	\$2.5
8713 Surveying Services	\$2.5
8721 Accounting, Auditing, and Bookkeeping Services	\$6.0
8731 Commercial Physical and Biological Research	500 ¹⁰
Aircraft	1,500
Aircraft Parts, and Auxiliary Equipment, and Aircraft Engines and Engine Parts	1,000
Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts.	1,000
8741 (Part) Conference Management Services	\$5.0 ⁶
8744 Facilities Support Management Services	\$5.0 ¹¹
Base Maintenance	\$20.0 ¹²
Environmental Remediation Services	500 ¹³

Footnotes:

¹ SIC code 1629—Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

² SIC Division D—Manufacturing: For rebuilding machinery or equipment on a factory basis, or equivalent, use the SIC code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a “manufacturer” although the activities may be classified under a manufacturing SIC code. Ordinary repair services or preservation are not considered rebuilding.

³ SIC code 2033: For purposes of Government procurement for food canning and preserving, the standard of 500 employees excludes agricultural labor as defined in section 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

⁴ SIC code 2911: For purposes of Government procurement, the firm may not have more than 1,500 employees nor more than 75,000 barrels per day capacity of petroleum-based inputs, including crude oil or bona fide feedstocks. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

⁵ SIC code 3011: For purposes of Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that:

(1) The value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture;

(2) The value of pneumatic tires within Census Classification codes 30111 and 30112 comprising its total worldwide manufacture during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during that period; and

(3) the value of the principal product which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during that period.

⁶ SIC codes 4724, 6531, 7311, 7312, 7313, 7319, and 8741 (part): As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

⁷ A financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. Assets for the purposes of this size standard means the assets defined according to the Federal Financial Institutions Examination Council 034 call report form.

⁸ SIC code 6515: Leasing of building space to the Federal Government by Owners: For Government procurement, a size standard of \$15.0 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

⁹ SIC codes 7699 and 3728: Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis are classified under SIC code 3728.

¹⁰ SIC code 8731: For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.

(1) Research and Development means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

(2) For purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See § 121.701.

(3) Research and development for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

¹¹ Facilities Management, a component of SIC code 8744, includes establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which may include, but are not limited to, secretarial services, typists, telephone answering, reproduction or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, or use of information systems (not programming).

¹² SIC code 8744:

(1) If one of the activities of base maintenance, as defined in paragraph (2) of this footnote, can be identified with a separate industry and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard is that of the particular industry, and not the base maintenance size standard.

(2) “Base Maintenance” requires the performance of three or more separate activities in the areas of service or special trade construction industries. If services are performed, these activities must each be in a separate SIC code including, but not limited to, Janitorial and Custodial Service, Fire Prevention Service, Messenger Service, Commissary Service, Protective Guard Service, and Grounds Maintenance and Landscaping Service. If the contract requires the use of special trade contractors (plumbing, painting, plastering, carpentry, etc.), all such special trade construction activities are considered a single activity and classified as Base Housing Maintenance. Since Base Housing Maintenance is only one activity, two additional activities are required for a contract to be classified as “Base Maintenance.”

¹³SIC code 8744: (1) For SBA assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement, a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition including, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry is that of the particular industry and not the Environmental Remediation Services Industry.

(2) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore a contaminated environment and also the procurement must be composed of activities in three or more separate industries with separate SIC codes or, in some instances (e.g., engineering), smaller sub-components of SIC codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Special Trade Construction; Engineering Services; Architectural Services; Management Services; Refuse Systems; Sanitary Services, Not Elsewhere Classified; Local Trucking Without Storage; Testing Laboratories; and Commercial, Physical and Biological Research. If any activity in the procurement can be identified with a separate SIC code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

[61 FR 3286, Jan. 31, 1996; 61 FR 6412, Feb. 20, 1996; 61 FR 7306, Feb. 27, 1996; 61 FR 7986, Mar. 1, 1996; 61 FR 43119, Aug. 20, 1996]

SIZE ELIGIBILITY REQUIREMENTS FOR SBA FINANCIAL ASSISTANCE

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans and Disaster Loans (other than physical disaster loans), an applicant must not exceed the size standard for the industry in which:

(1) The applicant combined with its affiliates is primarily engaged; and

(2) The applicant alone is primarily engaged.

(b) For Development Company programs, an applicant must meet one of the following standards:

(1) Including its affiliates, tangible net worth not in excess of \$6 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$2 million; or

(2) The same standards applicable under paragraph (a) of this section.

(c) For the Small Business Investment Company (SBIC) program, an applicant must meet one of the following standards:

(1) Including its affiliates, tangible net worth not in excess of \$18 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding 2 completed fiscal years not in excess of \$6 million; or

(2) The same standards applicable under paragraph (a) of this section.

(d) For Surety Bond Guarantee assistance—

(1) Any construction (general or special trade) concern or concern performing a contract for services is small if its average annual receipts do not exceed \$5.0 million.

(2) Any concern not specified in paragraph (d)(1) of this section must meet the size standard for the primary industry in which it, combined with its affiliates, is engaged.

(e) The applicable size standards for the purpose of all SBA financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25 percent whenever the applicant agrees to use the assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication called "Area Trends."

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size of an applicant for SBA financial assistance is determined as of the date the application for such financial assistance is accepted for processing by SBA, except for the Disaster Loan and Preferred Lenders programs.

(b) For the Preferred Lenders program, size is determined as of the date of approval of the loan by the Preferred Lender.

(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration.

(d) Changes in size subsequent to the applicable date when size is determined will not disqualify an applicant for assistance.

§ 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.

(e) There are no time limitations for making a formal size determination for purposes of financial assistance. The official making the formal size determination must provide a copy of the determination to the applicant, to the requesting SBA official, and to other interested SBA program officials.

§ 121.304 What are the size requirements for refinancing an existing SBA loan?

(a) A concern that applies to refinance an existing SBA loan or guarantee will be considered small for the refinancing even though its size has increased since the date of the original financing to exceed its applicable size standard, provided that:

(1) The increase in size is due to natural growth (as distinguished from merger, acquisition or similar management action); and

(2) SBA determines that refinancing is necessary to protect the Government's financial interest.

(b) If a concern's size has increased other than by natural growth, the concern and its affiliates must be small at the time the application for refinancing is accepted for processing by SBA.

§ 121.305 What size eligibility requirements exist for obtaining business loans relating to particular procurements?

A concern qualified as small for a particular procurement, including an 8(a) subcontract, is small for financial assistance directly and primarily relating to the performance of the particular procurement.

SIZE ELIGIBILITY REQUIREMENTS FOR GOVERNMENT PROCUREMENT

§ 121.401 What procurement programs are subject to size determinations?

The requirements set forth in §§ 121.401 through 121.412 cover all procurement programs for which status as a small business is required, including the small business set-aside program, SBA's Certificate of Competency Program, SBA's Minority Enterprise Development program, the Small Business Subcontracting program authorized under section 8(d) of the Small Business Act, and Federal Small Disadvantaged Business programs.

§ 121.402 What size standards are applicable to procurement assistance programs?

(a) A concern must meet the size standard for the SIC code specified in the solicitation.

(b) The procuring agency contracting officer, or authorized representative, designates the proper SIC code and size standard in a solicitation, selecting the SIC code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the SIC Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of

the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

(c) The SIC code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns a SIC code or size standard as provided in paragraph (d) of this section.

(d) An unclear, incomplete or missing SIC code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by a SIC code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.

§ 121.403 Are SBA size determinations and SIC code designations binding on parties?

Formal size determinations and SIC code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.

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

Generally, SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price. The following are two exceptions to this rule:

(a) The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(b) Size status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(f)(3) is determined as of the date of the best and final offer.

§ 121.405 May a business concern self-certify its small business size status?

(a) A concern must self-certify it is small under the size standard specified in the solicitation, or as clarified, completed or supplied by SBA pursuant to § 121.402(d).

(b) A contracting officer may accept a concern's self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.

(c) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or MED procurements?

(a) *General.* In order to qualify as a small business concern for a small business set-aside or 8(a) contract to provide manufactured products, an offeror must either:

(1) Be the manufacturer of the end item being procured (and the end item must be manufactured or produced in the United States); or

(2) Comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.

(b) *Nonmanufacturers.* (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the wholesale or retail trade and normally sells the items being supplied to the general public; and

(iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

(2) For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(i) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit; and

(ii) The importance of the elements added by the concern to the function of the end item, regardless of their relative value.

(3) The Administrator or designee may waive the requirement set forth in paragraph (b)(1)(iii) of this section under the following two circumstances:

(i) The contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation and SBA reviews and accepts that determination; or

(ii) SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.

(4) The two waiver possibilities identified in paragraph (b)(3) of this section are called "individual" and "class"

waivers respectively, and the procedures for them are contained in § 121.1204 .

(5) Any SBA waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act.

(c) *Kit assemblers.* (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees, and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the SIC codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.

(2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

(d) *Simplified Acquisition Procedures.* Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

[61 FR 3286, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996]

§ 121.407 What are the size procedures for multiple item procurements?

If a procurement calls for two or more specific end items or types of services with different size standards and the offeror may submit an offer on any or all end items or types of services, the offeror must meet the size standard for each end item or service item for which it submits an offer. If the procurement calls for more than one specific end item or type of service and an offeror is required to submit an

offer on all items, the offeror may qualify as a small business for the procurement if it meets the size standard of the item which accounts for the greatest percentage of the total contract value.

§ 121.408 What are the size procedures for SBA's Certificate of Competency Program?

(a) A firm which applies for a COC must file an "Application for Small Business Size Determination" (SBA Form 355). If the initial review of SBA Form 355 indicates the applicant, including its affiliates, is small for purposes of the COC program, SBA will process the application for COC. If the review indicates the applicant, including its affiliates, is other than small, SBA will initiate a formal size determination as set forth in §121.1009. In such a case, SBA will not further process the COC application until a formal size determination is made.

(b) A concern is ineligible for a COC if a formal SBA size determination finds the concern other than small.

§ 121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?

For the purpose of receiving a Certificate of Competency in an unrestricted procurement, the applicable size standard is that corresponding to the SIC code set forth in the solicitation. For a manufactured product, a concern must also furnish a domestically produced or manufactured product, regardless of the size status of the product manufacturer. The offeror need not be the manufacturer of any of the items acquired.

§ 121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?

For subcontracting purposes pursuant to section 8(d) of the Small Business Act, a concern is small:

(a) For subcontracts of \$10,000 or less which relate to Government procurements, if its number of employees (including its affiliates) does not exceed 500 employees. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and

Military Weapons under SIC code 8711;

(b) For subcontracts exceeding \$10,000 which relate to Government procurements, if its number of employees or average annual receipts (including its affiliates) does not exceed the size standard for the product or service it is providing on the subcontract; and

(c) For subcontracts for financial services, if the concern (including its affiliates) is a commercial bank or savings and loan association whose assets do not exceed \$100 million.

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in SBA's Procurement Automated Source System (PASS), or equivalent data base maintained or sanctioned by SBA, as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. Even though a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor.

(b) Upon determination of the successful subcontract offeror for a competitive subcontract, 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.

(c) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

§ 121.412 What are the size procedures for partial small business set-asides?

A firm is required to meet size standard requirements only for the small business set-aside portion of a procurement, and is not required to qualify as a small business for the unrestricted portion.

SIZE ELIGIBILITY REQUIREMENTS FOR SALES OR LEASE OF GOVERNMENT PROPERTY

§ 121.501 What programs for sales or leases of Government property are subject to size determinations?

Sections 121.501 through 121.512 apply to small business size determinations for the purpose of the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and the sale of Government petroleum, coal and uranium.

§ 121.502 What size standards are applicable to programs for sales or leases of Government property?

(a) Unless otherwise specified in this part—

(1) A concern primarily engaged in manufacturing is small for sales or leases of Government property if it does not exceed 500 employees;

(2) A concern not primarily engaged in manufacturing is small for sales or leases of Government property if it has annual receipts not exceeding \$2 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

§ 121.503 Are SBA size determinations binding on parties?

Formal size determinations based upon a specific Government sale or lease, or made in response to a request from another Government agency under § 121.901, are binding upon the parties. Other SBA opinions provided to contracting officers or others are only advisory, and are not binding or appealable.

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

SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the Government as part of its initial offer including price where there is a specific sale or lease at issue, or as set forth in § 121.903 if made in response to a request of another Government agency.

§ 121.505 What is the effect of a self-certification?

(a) A contracting officer may accept a concern's self-certification as true for the particular sale or lease involved, in the absence of a written protest by other offerors or other credible information which would cause the contracting officer or SBA to question the size of the concern.

(b) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Forest product industry* means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials.

(b) *Logging of timber* means felling and bucking, yarding, and/or loading. It does not mean hauling.

(c) *Manufacture of logs* means, at a minimum, breaking down logs into rough cuts of the finished product.

(d) *Sell* means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber.

(e) *Significant logging of timber* means that a concern uses its own employees to perform at least two of the following: felling and bucking, yarding, and loading.

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

(a) To be small for purposes of the sale of Government-owned timber (other than Special Salvage Timber) a concern must:

- (1) Be primarily engaged in the logging or forest products industry;
- (2) Not exceed 500 employees, taking into account its affiliates; and

(3) If it does not intend at the time of the offer to resell the timber—

(i) Agree that it will manufacture the logs with its own facilities or those of another business which meets the requirements of paragraphs (a)(1) and (a)(2) of this section;

(ii) Agree that if it eventually resells the timber, it will resell no more than 30% of the sawtimber volume to other businesses which do not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(iii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume to businesses which do meet the requirements of paragraphs (a)(1) and (a)(2) of this section; or

(4) If it intends at the time of offer to resell the timber—

(i) Agree that it will not sell more than 30% of such timber (50% of such timber if the concern is an Alaskan business) to a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(ii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume (or at least 50% of the sawtimber volume, if it is an Alaskan business) to businesses which meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(b) For a period of three years following the date upon which a concern purchases timber under a small business set-aside (other than through the Special Salvage Timber Sale program), it must maintain a record of:

(1) The name, address and size status of every concern to which it sells the timber or sawlogs; and

(2) The species, grades and volumes of sawlogs sold.

(c) For a period of three years following the date upon which a concern pur-

chases timber, it must by contract require all small business repurchasers of the sawlogs or timber it purchased under the small business set-aside to maintain the records described in paragraph (b) of this section.

§ 121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?

(a) In order to purchase Government-owned Special Salvage Timber from the United States Forest Service or the Bureau of Land Management as a small business, a concern must:

(1) Be primarily engaged in the logging or forest product industry;

(2) Have, together with its affiliates, no more than twenty-five employees during any pay period for the last twelve months; and

(3) If it does not intend at the time of offer to resell the timber—

(i) Agree that it will manufacture a significant portion of the logs with its own employees; and

(ii) Agree that it will log the timber only with its own employees or with employees of another business which is eligible for award of a Special Salvage Timber sales contract; or

(4) If it intends at the time of offer to resell the timber, agree that it will perform a significant portion of timber logging with its own employees and that it will subcontract the remainder of the timber logging to a concern which is eligible for award of a Special Salvage Timber sales contract.

§ 121.509 What is the size standard for leasing of Government land for coal mining?

A concern is small for this purpose if it:

(a) Together with its affiliates, does not have more than 250 employees;

(b) Maintains management and control of the actual mining operations of the tract; and

(c) Agrees that if it subleases the Government land, it will be to another small business, and that it will require its sublessors to agree to the same.

§ 121.510 What is the size standard for leasing of Government land for uranium mining?

A concern is small for this purpose if it, together with its affiliates, does not have more than 100 employees.

§ 121.511 What is the size standard for buying Government-owned petroleum?

A concern is small for this purpose if it is primarily engaged in petroleum refining and meets the size standard for a petroleum refining business.

§ 121.512 What is the size standard for stockpile purchases?

A concern is small for this purpose if:

- (a) It is primarily engaged in the purchase of materials which are not domestic products; and
- (b) Its annual receipts, together with its affiliates, do not exceed \$42 million.

SIZE ELIGIBILITY REQUIREMENTS FOR THE MINORITY ENTERPRISE DEVELOPMENT (MED) PROGRAM

§ 121.601 What is a small business for purposes of admission to SBA's Minority Enterprise Development (MED) program?

An applicant must be small under the size standard corresponding to its primary industry classification in order to be admitted to SBA's Minority Enterprise Development (MED) program.

§ 121.602 At what point in time must a MED applicant be small?

A MED applicant must be small for its primary industry at the time SBA certifies it for admission into the program.

§ 121.603 How does SBA determine whether a Participant is small for a particular MED subcontract?

(a) *Self certification by Participant.* A MED Participant must certify that it qualifies as a small business under the SIC code assigned to a particular MED subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency. See § 121.404 for the time at

which size is determined for, and § 121.406 for the applicability of the nonmanufacturer rule to, MED procurements.

(b) *Verification of size by SBA.* Within 30 days of its receipt of a Participant's size self-certification for a particular MED subcontract, the SBA district office serving the geographic area in which the Participant's principal office is located will review the Participant's self-certification and determine if it is small for purposes of that subcontract. The SBA district office will review the Participant's most recent financial statements and other relevant data and then notify the Participant of its decision.

(c) *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not affect the firm's size status for that procurement.

(2) Where a Participant has merged with or been acquired by another business concern between the date of its self-certification and the date of award, the concern must recertify its size status, and SBA must verify the new certification before award can occur.

(d) *Finding Participant to be other than small.* (1) A Participant may request a formal size determination (pursuant to §§ 121.1001 through 121.1009) with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the Participant is located within 5 working days of its receipt of notice from the SBA district office that it is not small for a particular MED subcontract.

(2) Where the Participant does not timely request a formal size determination, SBA may accept the procurement in support of another Participant, or may rescind its acceptance of the offer for the MED program, as appropriate.

§ 121.604 Are MED Participants considered small for purposes of other SBA assistance?

A concern which SBA determines to be a small business for the award of a

MED subcontract will be considered to have met applicable size eligibility requirements of other SBA programs where that assistance directly and primarily relates to the performance of the MED subcontract in question.

SIZE ELIGIBILITY REQUIREMENTS FOR THE SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM

§ 121.701 What SBIR programs are subject to size determinations?

(a) These sections apply to size status for award of a funding agreement pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97-219, 15 U.S.C. 638(e) through (k)).

(b) *Funding agreement officer* means a contracting officer, a grants officer, or a cooperative agreement officer.

(c) *Funding agreement* means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work includes:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) A systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

§ 121.702 What size standards are applicable to the SBIR program?

To be eligible to compete for award of funding agreements in SBA's Small Business Innovation Research (SBIR) program, a business concern must:

(a) Be at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States; and

(b) Not have more than 500 employees, including its affiliates.

§ 121.703 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions based upon a specific funding agreement, and are binding upon the parties. Other SBA opinions provided to funding agreement officers or others, are only advisory, and are not binding or appealable.

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

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards.

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify it is small in its SBIR funding proposal.

(b) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest by other offerors or other credible information which would cause the funding agreement officer or SBA to question the size of the concern.

(c) Procedures for protesting an offeror's self-certification are set forth in §§ 121.1001 through 121.1009.

SIZE ELIGIBILITY REQUIREMENTS FOR PAYING REDUCED PATENT FEES

§ 121.801 May patent fees be reduced if a concern is small?

These sections apply to size status for the purpose of paying reduced patent fees authorized by Pub. L. 97-247, 96 Stat. 317. The eligibility requirements for independent inventors and non-profit organizations for the purpose of paying reduced patent fees are set forth in regulations of the Patent and Trademark Office of the Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.802 What size standards are applicable to reduced patent fees programs?

A concern eligible for reduced patent fees is one:

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(a) Whose number of employees, including affiliates, does not exceed 500 persons; and

(b) Which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this section.

§ 121.803 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties. Other SBA opinions provided to patent applicants or others are only advisory, and are not binding or appealable.

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

Size status is determined as of the date of the patent applicant's written verification of size.

§ 121.805 May a business concern self-certify its size status?

(a) A concern verifies its size status with its submission of its patent application.

(b) Any attempt to establish small size status improperly (fraudulently, through gross negligence, or otherwise) may result in remedial action by the Patent and Trademark Office.

(c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business as true.

(d) Questions concerning the size verification are resolved initially by the Patent and Trademark Office. If not verified as small, the applicant may request a formal SBA size determination.

SIZE ELIGIBILITY REQUIREMENTS FOR COMPLIANCE WITH PROGRAMS OF OTHER AGENCIES

§ 121.901 Can other Government agencies obtain SBA size determinations?

Upon request by another Government agency, SBA will provide a size determination, under SBA rules, standards and procedures, for its use in determining compliance with small business requirements of its statutes, regulations or programs.

§ 121.902 What size standards are applicable to programs of other agencies?

(a) *SBA size standards.* The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless otherwise agreed by the agency and SBA.

(b) *Special size standards.* (1) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not appropriate, then agency heads may establish a small business definition for the exclusive use of such program which is more appropriate, but only when:

(i) The size standard is first proposed for public comment pursuant to the Administrative Procedure Act, 4 U.S.C. 553;

(ii) The proposed size standard provides for determining size measured by average number of employees over 12 months for manufacturing concerns, average annual revenues over three years for concerns providing services, and data over a period of not less than three years for all other concerns (unless approved by SBA, "annual receipts" and "number of employees" must be determined in accordance with §§ 121.104 and 121.106, respectively); and

(iii) The proposed size standard is approved by SBA's Administrator.

(2) In order to receive the approval of SBA's Administrator, the agency head must:

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(i) Request approval prior to publishing the proposed rule containing the size standard. The request must include: an explanation of the contemplated industry size standard, the reasons the SBA size standard is not appropriate, and the reasons the proposed size standard would be appropriate; and a certification that there will be compliance with the criteria set forth in paragraphs (b)(1)(i) and (b)(1)(ii) of this section; and

(ii) Agree to provide written notice to SBA's Administrator prior to publishing the contemplated size standard as a final rule. The notice must include: a copy of the intended final rule, including the preamble, or a separate written justification for the intended size standard followed by a copy of the intended final rule and preamble prior to its publication; copies of all public comments relating to the size standard received in response to the proposed rule; and any other supporting documentation relevant to the size standard and requested by SBA's Administrator.

(3) When approving any size standard established pursuant to subsection (b) of this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(4) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

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

For the purpose of compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

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PROCEDURES FOR SIZE PROTESTS AND REQUESTS FOR FORMAL SIZE DETERMINATIONS

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

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, the following entities may file a size protest in connection with a particular procurement or sale:

(i) Any offeror;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, or the Associate Administrator for Government Contracting; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For SBA's Subcontracting Program, the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and

(v) Other interested parties.

(3) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:

(i) A prospective offeror;

(ii) The funding agreement officer;

(iii) The responsible SBA Government Contracting Area Director or the Assistant Administrator for Technology; and

(iv) Other interested parties.

(4) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in

connection with a particular SDB procurement:

(i) Any offeror for the specific SDB requirement;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(5) For any unrestricted Government procurement in which status as a small business may be beneficial, including, but not limited to, the award of a contract to a small business where there are tie bids, the opportunity to seek a Certificate of Competency by a small business, and SDB price evaluation preferences, the following entities may protest in connection with a particular procurement:

(i) Any offeror;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

(i) The applicant for assistance; and

(ii) The SBA official with authority to take final action on the assistance requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by § 120.151 of this chapter.

(2) For SBA's MED program—

(i) Concerning initial MED eligibility, the following entities may request a formal size determination:

(A) The MED applicant concern; and

(B) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for MED.

(ii) Concerning individual 8(a) sub-contract awards, whether sole source or competitive, the following entities may request a formal size determination:

(A) The MED concern nominated by SBA for the particular sole source 8(a) award or the apparent successful offeror for the particular competitive 8(a) award;

(B) The SBA program official with authority to execute the 8(a) sub-contract; and

(C) The SBA District Director in the district serving the area in which the headquarters of the MED concern is located, regardless of the location of a parent company and affiliates, or the Associate Administrator for MED.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

§ 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster

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Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA.* (1) *Non-negotiated procurement or sale.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Multiple award schedule.* On a multiple award schedule procurement set aside for small business, protests will be considered timely if received by SBA at any time prior to the expiration of the contract period (including renewals).

(b) *Protests by contracting officers or SBA.* The time limitations in paragraph (a) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section.

(c) *Effect of contract award.* A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.

(d) *Untimely protests.* A protest received after the allotted time limits must still be forwarded to SBA. SBA will dismiss untimely protests.

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(e) *Premature protests.* A protest filed by any party, including the contracting officer, before bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature.

§ 121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, FAX, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in § 121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

§ 121.1006 When will a size protest be referred to an SBA Government Contracting Area Office?

(a) A contracting officer who receives a protest (other than from SBA) must forward the protest promptly to the SBA Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(b) A contracting officer's referral must contain the following information:

- (1) The protest and any accompanying materials;
- (2) A copy of the self-certification as to size;
- (3) Identification of the applicable size standard;
- (4) A copy of the solicitation;
- (5) Identification of the date of bid opening or notification provided to unsuccessful offerors;
- (6) The date on which the protest was received; and
- (7) A complete address and point of contact for the protested concern.

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

(a) *Particular procurement.* A protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in

the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA.

§ 121.1008 What happens after SBA receives a size protest or a request for a formal size determination?

(a) When a size protest is received, the SBA Government Contracting Area Director, or designee, will promptly notify the contracting officer, the protested concern, and the protestor that a protest has been received. In the event the size protest pertains to a requirement involving SBA's SBIR Program, the Government Contracting Area Director will advise the Assistant Administrator for Technology of the receipt of the protest. SBA will provide a copy of the protest to the protested concern along with a blank SBA Application for Small Business Size Determination (SBA Form 355) by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to respond to the allegations of the protestor.

(b) When SBA receives a request for a formal size determination in accord with § 121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue.

(c) The protested concern or concern whose size is at issue must return the completed SBA Form 355 and all other requested information to SBA within 3 working days from the date of receipt of the blank form from SBA. SBA has discretion to grant an extension of time to file the form. The firm must attach to the completed SBA Form 355 its answers to the allegations contained in the protest, where applicable, together with any supporting material.

(d) If a concern does not submit a completed SBA Form 355, answers to the protest allegations, or other requested information within the allot-

ted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the form, any information missing from it, or other missing information would show or tend to show that the concern is other than a small business.

§ 121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

(b) *Basis for determination.* The size determination will be based primarily on information supplied by the protestor or the entity requesting the size determination and the subject concern. The determination, however, may also be based on other grounds not raised in the protest or request for size determination. SBA may utilize other information in its files and may make inquiries including requests to the protestor, the protested concern and any alleged affiliates, or other persons for additional specific information.

(c) *Burden of persuasion.* The concern whose size is under consideration has the burden of establishing its small business size.

(d) *Weight of evidence.* SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) *Formal size determination.* The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(f) *Notification of determination.* SBA will promptly notify the contracting officer, the protestor, and the protested offeror, as well as each affiliate or alleged affiliate, of the size determination. The notification will be by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt.

(g) *Results of an SBA size determination.* (1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA.

(2) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(3) A concern determined to be other than small for a particular size standard is ineligible for any procurement or assistance authorized by the Small Business Act or the Small Business Investment Act of 1958, requiring the same or a lower size standard, unless recertified as small pursuant to § 121.1010. Following an adverse size determination, a concern cannot again self-certify as small within the same or a lower size standard unless it is recertified as small by SBA. If it does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small on a pending procurement or on another assistance application, the concern must immediately inform the officials responsible for the pending procurement or other requested assistance of the adverse size determination.

(h) *Limited reopening of size determinations.* In cases where the size determination contains clear administrative error or a clear mistake of fact, SBA may, in its sole discretion, reopen the size determination to correct the error or mistake, provided the case has not been accepted for review by OHA.

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership,

management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only. While it is a formal size determination, notice of recertification is required to be given only to the applicant.

APPEALS OF SIZE DETERMINATIONS AND SIC CODE DESIGNATIONS

§ 121.1101 Are formal size determinations subject to appeal?

There is no right of appeal of a size determination. OHA, however, may, in its sole discretion, review a formal size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office. Unless OHA accepts a petition for review of a formal size determination, the size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office is the final decision of SBA. The procedures for requesting discretionary reviews by OHA of formal size determinations are set forth in part 134 of this chapter.

§ 121.1102 Are SIC code designations subject to appeal?

Appeals may be made to OHA, which has exclusive jurisdiction to determine appeals of SIC code designations pursuant to part 134 of this chapter.

§ 121.1103 What are the procedures for appealing a SIC code designation?

(a) Generally, any interested party who has been adversely affected by a SIC code designation may appeal the

designation to OHA. However, with respect to a particular MED contract, only the Associate Administrator for MED may appeal.

(b) Procedures for perfecting SIC code appeals with OHA are contained in §19.303 of the Federal Acquisition Regulations, 48 CFR 19.303.

Subpart B—Other Applicable Provisions

WAIVERS OF THE NONMANUFACTURER RULE FOR CLASSES OF PRODUCTS AND INDIVIDUAL CONTRACTS

§ 121.1201 What is the Nonmanufacturer Rule?

The Nonmanufacturer Rule is set forth in § 121.406(b).

§ 121.1202 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?

(a) A waiver for a class of products (class waiver) will be granted when there are no small business manufacturers or processors available to participate in the Federal market for that class of products.

(b) *Federal market* means acquisitions by the Federal Government from offerors located in the United States, or such smaller area as SBA designates if it concludes that the class of products is not supplied on a national basis.

(1) When considering the appropriate market area for a product, SBA presumes that the entire United States is the relevant Federal market, unless it is clearly demonstrated that a class of products cannot be procured on a national basis. This presumption may be particularly difficult to overcome in the case of manufactured products, since such items typically have a market area encompassing the entire United States.

(2) When considering geographic segmentation of a Federal market, SBA will not necessarily use market definitions dependent on airline radius, political, or SBA regional boundaries. Market areas typically follow established transportation routes rather than jurisdictional borders. SBA examines the following factors, among others, in cases where geographic seg-

mentation for a class of products is urged:

(i) Whether perishability affects the area in which the product can practically be sold;

(ii) Whether transportation costs are high as a proportion of the total value of the product so as to limit the economic distribution of the product;

(iii) Whether there are legal barriers to transportation of the item;

(iv) Whether a fixed, well-delineated boundary exists for the purported market area and whether this boundary has been stable over time; and

(v) Whether a small business, not currently selling in the defined market area, could potentially enter the market from another area and supply the market at a reasonable price.

(c) *Available to participate* in the context of the Federal market means that contractors exist that have been awarded or have performed a contract to supply a specific class of products to the Federal Government within 24 months from the date of the request for waiver, either directly or through a dealer, or who have submitted an offer on a solicitation for that class of products within that time frame.

(d) *Class of products* is an individual subdivision within a four-digit Industry Number as established by the Office of Management and Budget in the SIC Manual.

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

An individual waiver for a product in a specific solicitation will be approved when the SBA Associate Administrator for Government Contracting reviews and accepts a contracting officer's determination that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

§ 121.1204 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed or hand-carried to the Associate Administrator of Government Contracting, Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable SIC code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will:

(i) Publish notices in the Commerce Business Daily and the FEDERAL REGISTER seeking information on small business manufacturers or processors, announcing a notice of intent to waive the Nonmanufacturer Rule for that class of products and affording the public a 15-day comment period; and

(ii) If no small business sources are identified, publish a notice in the FEDERAL REGISTER stating that no small business sources were found and that a waiver of the Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Associate Administrator for Government Contracting that the procurement is proceeding under the authority of FAR §6.302-2 (48 CFR 6.302-2) for “unusual and compelling urgency,” or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and

then publish a notice in the FEDERAL REGISTER. The notice will state that a waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Associate Administrator for Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA’s receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Associate Administrator for Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA’s attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the FEDERAL REGISTER, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or processor in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the FEDERAL REGISTER.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer’s request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any particular form, but must, at a minimum, include:

(i) A definitive statement of the specific item to be waived and justification as to why the specific item is required;

(ii) The solicitation number, SIC code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that there are no known

small business manufacturers or processors for the requested items (the determination must contain a narrative statement of the contracting officer's efforts to search for small business manufacturers or processors of the item and the results of those efforts, and a statement by the contracting officer that there are no known small business manufacturers for the items and that no small business manufacturer or processor can reasonably be expected to offer the required items); and

(iv) For contracts expected to exceed \$500,000, a copy of the Statement of Work.

(2) Requests should be addressed to the Associate Administrator for Government Contracting, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(3) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request. If SBA's research verifies that no small business manufacturers or processors exist for the item, the Associate Administrator for Government Contracting will grant an individual, one-time waiver. If a small business manufacturer or processor is found for the product in question, the Associate Administrator will deny the request. Either decision represents a final decision by SBA.

§121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted will be maintained in SBA's Procurement Automated Source System (PASS). A list of such waivers may also be obtained by contacting the Office of Government Contracting at the Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or at the nearest SBA Government Contracting Area Office.

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