

(g) The appeal will be decided by the DADA/GC&MED, within 5 working days of its receipt, if practicable.

(h) The appeal decision will be based only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested concern, consistent with law.

(i) The decision of the DADA/GC&MED, is the final decision of the SBA, and cannot be further appealed to OHA.

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

- 125.1 Programs included.
- 125.2 Prime contracting assistance.
- 125.3 Subcontracting assistance.
- 125.4 Government property sales assistance.
- 125.5 Certificate of Competency Program.
- 125.6 Prime contractor performance requirements (limitations on subcontracting).
- 125.7 What is the Very Small Business program?

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

SOURCE: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

### § 125.1 Programs included.

The regulations in this part relate to the Government contracting assistance programs of SBA. There are four main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; and the Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

### § 125.2 Prime contracting assistance.

(a) *General.* Small business concerns must receive any award or contract, or any contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity;
- (2) War or national defense programs;

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

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

(b) *Responsibilities in the acquisition planning process.* (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs are responsible for reviewing all acquisitions not set-aside for small businesses to determine whether a set-aside is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement.

(2) As early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation, the procuring activity must coordinate with the procuring activity's Small Business Specialist (SBS) when the acquisition strategy contemplates an acquisition meeting the dollar amounts in paragraph (b)(2)(i) of this section, unless the contract or order is entirely reserved or set-aside for small business concerns as authorized under the Small Business Act. The SBS must notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) if the strategy or plan includes bundled requirements that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS shall assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(i) The procuring activity must coordinate the acquisition strategy with the cognizant SBS in accordance with paragraph (b)(2) of this section if the estimated acquisition, contract or order value is:

- (A) \$7 million or more for the Department of Defense;

## Small Business Administration

## § 125.2

(B) \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(C) \$2 million or more for all other agencies.

(ii) If the strategy contemplates multiple award contracts or multiple award orders under the Federal Supply Schedule or a task or delivery order contract awarded by another agency, the thresholds in paragraph (b)(2)(i) of this section apply to the cumulative estimated value of the multiple award contracts or orders, including options.

(3) A procuring activity must provide a copy of a proposed acquisition strategy (e.g., Department of Defense Form 2579, or equivalent) to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance whenever a proposed acquisition strategy:

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

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

(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.

(4) Whenever any of the circumstances identified in paragraph (b)(2) of this section exist, the procuring activity must also submit to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) a written statement explaining why:

(i) If the proposed acquisition strategy involves a bundled requirement, the procuring activity believes that the bundled requirement is necessary and justified under the analysis required by paragraph (d)(3)(iii) of this section; or

(ii) If the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity

or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

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

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

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

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

(5) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs will identify small businesses that are capable of performing particular requirements, including teams of small business concerns for larger or bundled requirements (see §121.103(f)(3) of this chapter).

(6)(i) If a PCR believes that a proposed procurement will render small business prime contract participation unlikely, or if a PCR does not believe a bundled requirement to be necessary and justified, the PCR shall recommend to the procurement activity alternative procurement methods which would increase small business prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements;

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

(C) Reserving one or more awards for small companies when issuing multiple awards under task order contracts.

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

(iii) The PCR will also work to ensure that small business participation is maximized through teaming arrangements and subcontracting opportunities. This may include:

## § 125.2

## 13 CFR Ch. I (1–1–04 Edition)

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

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

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

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

(7) In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, whether or not the acquisition is a bundled or substantially bundled requirement within the meaning of paragraph (d) of this section, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the secretary of the department or head of the agency. The time limits for such appeals are set forth in 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(8) PCRs will work with the cognizant SBS and agency OSDBU as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams, as prime contractors. If small business participation as prime contractors appears unlikely, the SBS and PCR will facilitate small business participation as subcontractors or suppliers.

(c) *BPCR responsibilities.* (1) SBA is required by section 403 of Public Law 98–

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

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures set forth in §19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the FAR and Section 15(l) of the Act (15 U.S.C. 644(l)).

(d) *Contract bundling—(1) Definitions—*

(i) *Bundled requirement or bundling.* The term *bundled requirement or bundling* refers to the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern due to:

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

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

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

(D) Any combination of the factors described in paragraphs (d)(1)(i) (A), (B), and (C) of this section.

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

(iii) Single contract, as used in this definition, includes:

(A) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources; and

## Small Business Administration

## § 125.2

(B) An order placed against an indefinite quantity contract under a Federal Supply Schedule contract or a task or delivery order contract awarded by another agency (*i.e.*, Government-wide acquisition contract or multi-agency contract).

(iv) Substantial bundling means any bundling that meets the dollar amounts specified in paragraph (b)(2)(i) of this section.

(2) *Requirement to foster small business participation.* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers in the contracting opportunities of the Government. To comply with this requirement, agency acquisition planners must:

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

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

(3) *Requirement for market research.* In addition to the requirements of paragraph (b)(2) of this section and before proceeding with an acquisition strategy that could lead to a contract containing bundled or substantially bundled requirements, an agency must conduct market research to determine whether bundling of the requirements is necessary and justified. During the market research phase, the acquisition team should consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(4) *Requirement to notify current small business contractors of intent to bundle.* The procuring activity must notify each small business which is per-

forming a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

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

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

(A) Benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$75 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$7.5 million, whichever is greater, where the contract or order value exceeds \$75 million.

(ii) Notwithstanding paragraph (d)(5)(i) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of

## § 125.2

## 13 CFR Ch. I (1-1-04 Edition)

Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis determine that a consolidated requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(5)(i) of this section but, in the aggregate, are critical to the agency's mission success; and

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

(iii) The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

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

(6) *OMB Circular A-76 Cost Comparison Analysis.* The substantial benefit analysis set forth in paragraph (d)(5)(i) of this section is not required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A-76 (See 5 CFR 1310.3 for availability).

(7) *Substantial bundling.* (i) Where a proposed procurement strategy involves a substantial bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(A) The analysis for bundled requirements set forth in paragraph (d)(5)(i) of this section;

(B) An assessment of the specific impediments to participation by small

business concerns as prime contractors that will result from the substantial bundling;

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

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

(E) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.*, consider the strategies under paragraphs (b)(6) (i) and (d) of this section).

(ii) At least 30 days prior to the solicitation release, the procuring activity shall provide the PCR and the agency OSDBU a copy of the proposed acquisition, including the analysis required by paragraph (d)(7) of this section, the acquisition plan, any bundling information required under paragraph (b)(3) of this section, and any other relevant information. The PCR and agency OSDBU or SBS, as applicable, shall work together to develop alternative acquisition strategies identified in paragraph (b)(6) of this section to enhance small business participation.

(8) *Significant subcontracting opportunity.* (i) Where a bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

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

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

(ii) Where the offeror for such a bundled contract qualifies as a small business concern, the procuring agency must give to the offeror the highest

## Small Business Administration

## § 125.4

score possible for the evaluation factors identified in paragraph (d)(5)(i) of this section.

(e) *OSDBU Oversight Functions.* The Agency OSDBU must:

(1) Conduct annual reviews to assess the:

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

(ii) Adequacy of the bundling documentation and justification; and

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

(2) Provide a copy of the assessment under paragraph (e)(1) of this section to the Agency Head and SBA Administrator.

[61 FR 3312, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 64 FR 57370, Oct. 25, 1999; 65 FR 45833, July 26, 2000; 68 FR 60012, Oct. 20, 2003]

### § 125.3 Subcontracting assistance.

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

(b) Upon determination of the successful subcontract offeror on a subcontract for which a small business, small disadvantaged business, and/or a HUBZone small business received a preference, but prior to award, the prime contractor must inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror and if the successful offeror was a small business, small disadvantaged business, or HUBZone business. This applies to all subcontracts over \$10,000.

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

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

[61 FR 3312, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 63 FR 31908, June 11, 1998]

### § 125.4 Government property sales assistance.

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

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and

(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

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

(1) Obtaining small business set-asides when necessary to insure that a fair share of Government property sales are made to small businesses; and

(2) Providing advice and assistance to small businesses on all matters pertaining to sale or lease of Government property.

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

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

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

## § 125.5

## 13 CFR Ch. I (1-1-04 Edition)

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

(5) Sales of surplus real and personal property.

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

### § 125.5 Certificate of Competency Program.

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

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

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

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

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

eligibility as of the date described in § 121.404 of this chapter.

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

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

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

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

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

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

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

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

## Small Business Administration

## § 125.5

responsibility will be determined in accordance with paragraph (f)(2) of this section.

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

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

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

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

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's

negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

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

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

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

(f) *Reviewing an application.* (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

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

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

(ii) Within three years before the application for a COC, the concern or any

§ 125.5

13 CFR Ch. I (1–1–04 Edition)

of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

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

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

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

- (1) Accept the Director’s decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or
- (2) Ask the Director to suspend the case for one of the following purposes:
  - (i) To forward a detailed rationale for the decision to the contracting officer for review within a specified period of time;
  - (ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file;
  - (iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or
  - (iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.
    - (i) *Appeals of Area Director determinations.* For COC actions with a value exceeding \$100,000, contracting agencies

may appeal a Director’s decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

- (1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.
- (2) SBA Headquarters will furnish written notice to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level of the procuring agency (with a copy to the contracting officer), that the case file has been received and that an appeal decision may be requested by an authorized official at that level. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by

## Small Business Administration

## § 125.6

both agencies) after SBA receives the request for a formal appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[61 FR 3312, Jan. 31, 1996; 61 FR 7987, Mar. 1, 1996]

### § 125.6 Prime contractor performance requirements (limitations on sub-contracting).

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

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the

## § 125.6

## 13 CFR Ch. I (1-1-04 Edition)

cost of the contract incurred for personnel with its own employees.

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

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

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

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

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

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

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

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

practices within the industry are also included.

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

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

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

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

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

(e) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining

## Small Business Administration

## § 125.7

whether the concern will perform the required percentage of work.

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

(g) Where an offeror is exempt from affiliation under §121.103(f)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.

[61 FR 3312, Jan. 31, 1996; 61 FR 39305, July 20, 1996; as amended at 64 FR 57372, Oct. 25, 1999; 65 FR 45835, July 26, 2000]

### § 125.7 What is the Very Small Business program?

(a) The Very Small Business (VSB) program is an extension of the small business set-aside program, administered by SBA as a pilot to increase opportunities for VSB concerns. Procurement requirements, including construction requirements, estimated to be between \$2,500 and \$50,000 must be reserved for eligible VSB concerns if the criteria in paragraph (c) of this section are met.

(b) *Definitions.* (1) The term *designated SBA district* means the geographic area served by any of the following SBA district offices:

(i) Albuquerque, NM, serving New Mexico;

(ii) Los Angeles, CA, serving the following counties in California: Los Angeles, Santa Barbara, and Ventura;

(iii) Boston, MA, serving Massachusetts;

(iv) Louisville, KY, serving Kentucky;

(v) Columbus, OH, serving the following counties in Ohio: Adams, Allen, Ashland, Athens, Auglaize, Belmont, Brown, Butler, Champaign, Clark, Clermont, Clinton, Coshocton, Crawford, Darke, Delaware, Fairfield, Fayette, Franklin, Gallia, Greene, Guernsey, Hamilton, Hancock, Hardin, Highland, Hocking, Holmes, Jackson, Knox, Lawrence, Licking, Logan, Madison, Marion, Meigs, Mercer, Miami, Monroe, Montgomery, Morgan, Mor-

row, Muskingum, Noble, Paulding, Perry, Pickaway, Pike, Preble, Putnam, Richland, Ross, Scioto, Shelby, Union, Van Wert, Vinton, Warren, Washington, and Wyandot;

(vi) New Orleans, LA, serving Louisiana;

(vii) Detroit, MI, serving Michigan;

(viii) Philadelphia, PA, serving the State of Delaware and the following counties in Pennsylvania: Adams, Berks, Bradford, Bucks, Carbon, Chester, Clinton, Columbia, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntington, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Philadelphia, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York;

(ix) El Paso, TX, serving the following counties in Texas: Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Pecos, Presidio, Reeves, and Terrell; and

(x) Santa Ana, CA, serving the following counties in California: Orange, Riverside, and San Bernadino.

(2) The term *very small business* or *VSB* means a concern whose headquarters is located within the geographic area served by a designated SBA district and, together with its affiliates, has no more than 15 employees and has average annual receipts that do not exceed \$1 million. The terms *concerns*, *affiliates*, *average annual receipts*, and *employees* have the meaning given to them in §§121.105, 121.103, 121.104, and 121.106, respectively, of this chapter.

(c)(1) A contracting officer must set aside for VSB concerns each procurement that has an anticipated dollar value between \$2,500 and \$50,000 if:

(i) In the case of a procurement for manufactured or supply items:

(A) The buying activity is located within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms

of market prices, quality and delivery; or

(ii) In the case of a procurement for other than manufactured or supply items:

(A) The requirement will be performed within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms of market prices, quality and delivery.

(2) The geographic areas served by the SBA Los Angeles and Santa Ana District Offices will be treated as one designated SBA district for the purposes of this section.

(3) If the contracting officer determines that there is not a reasonable expectation of receiving at least two responsible offers from VSB concerns headquartered within the geographic area served by the applicable designated SBA district, he or she must include in the contract file the reason(s) for this determination, and solicit the procurement pursuant to the provisions of 48 CFR 19.502-2. SBA may appeal such determination using the same procedure described in 48 CFR 19.505.

(4) If the contracting officer receives only one acceptable offer from a responsible VSB concern in response to a VSB set-aside, the contracting officer will make an award to that firm. If the contracting officer receives no acceptable offers from responsible VSB concerns, he or she will withdraw the procurement and, if still valid, must resolicit it pursuant to the provisions of 48 CFR 19.502-2.

(d) Where a procurement is set aside for VSB concerns, only those VSB concerns whose headquarters are located within the geographic area served by the applicable designated SBA district are eligible to submit offers in response to the solicitation.

(e) Nothing in this section shall be construed to alter in any way the procedures by which procuring activities award contracts under the SBA's 8(a) Business Development program (see 13 CFR part 124).

(f) This pilot program terminates on September 30, 2000. Any award under this program must be made on or before this date.

[63 FR 46642, Sept. 2, 1998]

## PART 126—HUBZONE PROGRAM

### Subpart A—Provisions of General Applicability

Sec.

- 126.100 What is the purpose of the HUBZone program?  
 126.101 Which government departments or agencies are affected directly by the HUBZone program?  
 126.102 What is the effect of the HUBZone program on the section 8(d) subcontracting program?  
 126.103 What definitions are important in the HUBZone program?

### Subpart B—Requirements to be a Qualified HUBZone SBC

- 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?  
 126.201 For this purpose, who does SBA consider to own a HUBZone SBC?  
 126.202 Who does SBA consider to control a HUBZone SBC?  
 126.203 What size standards apply to HUBZone SBCs?  
 126.204 May a qualified HUBZone SBC have affiliates?  
 126.205 May WOBs, 8(a) participants or SDBs be qualified HUBZone SBCs?  
 126.206 May non-manufacturers be certified as qualified HUBZone SBCs?  
 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?

### Subpart C—Certification

- 126.300 How may a concern be certified as a qualified HUBZone SBC?  
 126.301 Is there any other way for a concern to obtain certification?  
 126.302 When may a concern apply for certification?  
 126.303 Where must a concern file its certification?  
 126.304 What must a concern submit to SBA?  
 126.305 What format must the certification to SBA take?  
 126.306 How will SBA process the certification?  
 126.307 Where will SBA maintain the List of qualified HUBZone SBCs?  
 126.308 What happens if SBA inadvertently omits a qualified HUBZone SBC from the List?