

Lender's existing practices and procedures must be appropriate and generally accepted, proven and prudent credit evaluation processes and procedures, which may include credit scoring, and must ensure that there is reasonable assurance of repayment. In disbursing the IDAP loan, the IDAP Lender must use the same disbursement procedures and documentation as it uses for its similarly sized non-SBA guaranteed commercial loans. An IDAP Lender is also responsible for confirming that all IDAP loan processing, closing, servicing and liquidation decisions are correct and that all IDAP Loan Program Requirements have been followed.

(c) *IDAP Lender reporting.* An IDAP Lender must report on its IDAP loans in accordance with requirements established by SBA from time to time.

(d) *Servicing.* Each IDAP Lender must service all of its IDAP loans in accordance with the existing practices and procedures that the IDAP Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with IDAP Loan Program Requirements. SBA's prior written consent is required for servicing actions that may have significant exposure implications for SBA. SBA may require written notice of other servicing actions it considers necessary for portfolio management purposes.

(e) *Liquidations.* Each IDAP Lender must be responsible for liquidating its defaulted IDAP loans. IDAP loans will be liquidated in accordance with the existing practices and procedures that the IDAP Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with IDAP Loan Program Requirements. IDAP loans with *de minimis* value may, at the IDAP Lender's request and with SBA's approval, be liquidated by SBA or its agent(s). Significant liquidation actions taken on IDAP loans must be documented. The reimbursement of IDAP Lender liquidation expenses is

limited to the amount of the recovery on the IDAP loan.

(f) *Purchase requests.* An IDAP Lender may request SBA to purchase the guaranteed portion of an IDAP loan when there has been an uncured payment default exceeding 60 days or when the IDAP Borrower has declared bankruptcy. IDAP loans are subject to the 7(a) loan program requirements of §§120.520 (Purchase of 7(a) loan guarantees), 120.521 (What interest rate applies after SBA purchases its guaranteed portion?), 120.522 (Payment of accrued interest to the Lender or Registered Holder when SBA purchases the guaranteed portion), 120.523 (What is the "earliest uncured payment default"?), 120.524 (When is SBA released from liability on its guarantee?), 120.542 (Payment by SBA of legal fees and other expenses) and 120.546 (Loan asset sales) of this chapter.

(g) *Prohibition on secondary market sales, securitizations, loan participations and loan sales.* An IDAP Lender may not sell the guaranteed portion of an IDAP loan in the secondary market, securitize the unguaranteed portion of an IDAP loan, participate any portion of an IDAP loan with another lender, or sell all of its interest in an IDAP loan.

(h) *Loan pledges.* An IDAP Lender may pledge an IDAP loan subject to the 7(a) loan program requirements of §§120.434 and 120.435 of this chapter.

(i) *Oversight.* All IDAP Lenders are subject to the supervision and enforcement provisions applicable to 7(a) Lenders in part 120, subpart I of this chapter (§§120.1000 through 120.1600). In addition, an IDAP Lender that is an SBA Supervised Lender (as defined in §120.10) is subject to the requirements of §§120.460 through 120.490, as applicable.

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

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AUTHORITY: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

SOURCE: 63 FR 35739, June 30, 1998, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 124 appear at 72 FR 50040, Aug. 30, 2007, and 76 FR 8253, Feb. 11, 2011.

Subpart A—8(a) Business Development

PROVISIONS OF GENERAL APPLICABILITY

§ 124.1 What is the purpose of the 8(a) Business Development program?

Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or “8(a) BD” program for purposes of the regulations in this part). The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.

§ 124.2 What length of time may a business participate in the 8(a) BD program?

A Participant receives a program term of nine years from the date of SBA’s approval letter certifying the concern’s admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal as provided for in this subpart.

[76 FR 8253, Feb. 11, 2011]

§ 124.3 What definitions are important in the 8(a) BD program?

Alaska Native, as defined by the Alaska Native Claims Settlement Act (43 U.S.C. 1602), means a citizen of the

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United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation or ANC means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*)

Bona fide place of business, for purposes of 8(a) construction procurements, means a location where a Participant regularly maintains an office which employs at least one full-time individual within the appropriate geographical boundary. The term does not include construction trailers or other temporary construction sites.

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.*

Concern is defined in part 121 of this title.

Days means calendar days unless otherwise specified.

Day-to-day operations of a firm means the marketing, production, sales, and administrative functions of the firm.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. *See* definition of “tribally-owned concern.”

NAICS code means North American Industry Classification System code.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Negative control is defined in part 121 of this title.

Non-disadvantaged individual means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose disadvantaged status an applicant or Participant does not rely in qualifying for 8(a) BD program participation.

Participant means a small business concern admitted to participate in the 8(a) BD program.

Primary industry classification means the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The NAICS code designations are described in the North American Industry Classification System book published by the U.S. Office of Management and Budget. SBA utilizes §121.107 of this chapter in determining a firm’s primary industry classification. A Participant may change its primary industry classification where it can demonstrate to SBA by clear evidence that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

Principal place of business means the business location where the individuals who manage the concern’s day-to-day operations spend most working hours and where top management’s business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

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Program year means a 12-month period of an 8(a) BD Participant's program participation. The first program year begins on the date that the concern is certified to participate in the 8(a) BD program and ends one year later. Each subsequent program year begins on the Participant's anniversary of program certification and runs for one 12-month period.

Regularly maintains an office means conducting business activities as an on-going business concern from a fixed location on a daily basis. The best evidence of the regular maintenance of an office is documentation that shows that third parties routinely transact business with a Participant at a location within a particular geographical area. Such evidence includes lease agreements, payroll records, advertisements, bills, correspondence, and evidence that the Participant has complied with all local requirements concerning registering, licensing, or filing with the State or County where the place of business is located. Although a firm would generally be required to have a license to do business in a particular location in order to "regularly maintain an office" there, the firm would not be required to have an additional construction license or other specific type of license in order to regularly maintain an office.

Same or similar line of business means business activities within the same four-digit "Industry Group" of the NAICS Manual as the primary industry classification of the applicant or Participant. The phrase "same business area" is synonymous with this definition.

Self-marketing of a requirement occurs when a Participant identifies a requirement that has not been committed to the 8(a) BD program and, through its marketing efforts, causes the procuring activity to offer that specific requirement to the 8(a) BD program on the Participant's behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) BD program as an open requirement or on behalf of another Participant has not "self-marketed" the requirement within the meaning of this part.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8253, Feb. 11, 2011; 77 FR 28237, May 14, 2012]

§ 124.4 What restrictions apply to fees for applicant and Participant representatives?

(a) The compensation received by any packager, agent or representative of an 8(a) applicant or Participant for assisting the applicant in obtaining 8(a) certification or for assisting the Participant in obtaining 8(a) contracts, or any other assistance to support program participation, must be reasonable in light of the service(s) performed by the packager, agent or representative.

(b) In assisting a Participant obtain one or more 8(a) contracts, a packager, agent or representative cannot receive a fee that is a percentage of the gross contract value.

(c) For good cause, the AA/BD may initiate proceedings to suspend or revoke a packager's, agent's or representative's privilege to assist applicants obtain 8(a) certification, assist Participants obtain 8(a) contracts, or any other assistance to support program participation. Good cause is defined in § 103.4 of these regulations.

(1) The AA/BD may send a show cause letter requesting the agent or representative to demonstrate why the agent or representative should not be suspended or proposed for revocation, or may immediately send a written notice suspending or proposing revocation, depending upon the evidence in the administrative record. The notice

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will include a discussion of the relevant facts and the reason(s) why the AA/BD believes that good cause exists.

(2) Unless the AA/BD specifies a different time in the notice, the agent or representative must respond to the notice within 30 days of the date of the notice with any facts or arguments showing why good cause does not exist. The agent or representative may request additional time to respond, which the AA/BD may grant in his or her discretion.

(3) After considering the agent's or representative's response, the AA/BD will issue a final determination, setting forth the reasons for this decision and, if a suspension continues to be effective or a revocation is implemented, the term of the suspension or revocation.

(d) The AA/BD may refer a packager, agent, or other representative to SBA's Suspension and Debarment Official for possible Government-wide suspension or debarment where appropriate, including where it appears that the packager, agent or representative assisted an applicant to or Participant in the 8(a) BD program submit information to SBA that the packager, agent or representative knew was false or materially misleading.

[76 FR 8253, Feb. 11, 2011]

ELIGIBILITY REQUIREMENTS FOR PARTICIPATION IN THE 8(a) BUSINESS DEVELOPMENT PROGRAM

§ 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?

Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.

[76 FR 8254, Feb. 11, 2011]

§ 124.102 What size business is eligible to participate in the 8(a) BD program?

(a)(1) An applicant concern must qualify as a small business concern as

defined in part 121 of this title. The applicable size standard is the one for its primary industry classification. The rules for calculating the size of a tribally-owned concern, a concern owned by an Alaska Native Corporation, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation are additionally affected by §§124.109, 124.110, and 124.111, respectively.

(2) In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years, unless the firm demonstrates that through its growth and development its primary industry is changing, pursuant to the criteria described in 13 CFR 121.107, to a related secondary NAICS code that is contained in its most recently approved business plan. The firm's business plan must contain specific targets, objectives, and goals for its continued growth and development under its new primary industry.

(b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may request a formal size determination under part 121 of this title.

(c) A concern whose application is denied due to size by 8(a) BD program officials may request a formal size determination under part 121 of this title. A favorable determination will enable the firm to immediately submit a new 8(a) BD application without waiting one year.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011]

§ 124.103 Who is socially disadvantaged?

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social

disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(d) *Socially disadvantaged group inclusion*—(1) *General.* Representatives of an

identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the FEDERAL REGISTER that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the FEDERAL REGISTER. If appropriate, SBA

will amend paragraph (b)(1) of this section to include a new group.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8254, Feb. 11, 2011]

§ 124.104 Who is economically disadvantaged?

(a) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(b) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (*e.g.*, an officer, employee or director) or has lent money to, provided credit support to, or guaranteed a loan of the business. SBA does not take into consideration community property laws when determining economic disadvantage.

(c) *Factors to be considered.* In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including income for the past three years (including bonuses and the value of company stock received in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. An individual who exceeds any one of the thresholds set forth in this paragraph for personal income, net worth or total assets will generally be deemed to have access to credit and capital and not economically disadvantaged.

(1) *Transfers within two years.* (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA will attribute to

an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(ii) SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) *Net worth.* For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than \$750,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(i) A contingent liability does not reduce an individual's net worth.

(ii) Funds invested in an Individual Retirement Account (IRA) or other official retirement account that are unavailable to an individual until retirement age without a significant penalty will not be considered in determining an individual's net worth. In order to

properly assess whether funds invested in a retirement account may be excluded from an individual's net worth, the individual must provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

(iii) Income received from an applicant or Participant that is an S corporation, limited liability company (LLC) or partnership will be excluded from an individual's net worth where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. Losses from the S corporation, LLC or partnership, however, are losses to the company only, not losses to the individual, and cannot be used to reduce an individual's net worth.

(iv) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(3) *Personal income for the past three years.* (i) If an individual's adjusted gross income averaged over the three years preceding submission of the 8(a) application exceeds \$250,000, SBA will presume that such individual is not economically disadvantaged. For continued 8(a) BD eligibility, SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds \$350,000. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to

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the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.

(ii) Income received from an applicant or Participant that is an S corporation, LLC or partnership will be excluded from an individual's income where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. Losses from the S corporation, LLC or partnership, however, are losses to the company only, not losses to the individual, and cannot be used to reduce an individual's personal income.

(4) *Fair market value of all assets.* An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds \$4 million for an applicant concern and \$6 million for continued 8(a) BD eligibility. The only assets excluded from this determination are funds excluded under paragraph (c)(2)(ii) of this section as being invested in a qualified IRA account.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011]

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

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). See §124.3 for definition of unconditional ownership; and §§124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

(a) *Ownership must be direct.* Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock

ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a disadvantaged individual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-disadvantaged individuals will be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.

(f) *Dividends and distributions.* One or more disadvantaged individuals must be entitled to receive:

(1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

(g) *Ownership of another Participant in the same or similar line of business.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program. The AA/BD may waive this prohibition if the two concerns have no connections, either in the form of ownership, control or contractual relationships, and provided the individual seeking to qualify the second concern has management and technical experience in the industry. Where the concern seeking a waiver is in the same or similar line of business as the current or former 8(a) concern, there is a presumption against granting the waiver. The applicant must provide clear and compelling evidence that no connection exists between the two firms.

(2) If the AA/BD grants a waiver under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm for which a waiver was granted from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD when the waiver was granted or that came into existence after the waiver was granted. SBA may also initiate termination proceedings if the firm begins to operate in the same or similar line of business as the current or former 8(a) concern of the immediate family member and the firm did not operate in the same or similar line of business at the time the waiver was granted.

(h) *Ownership restrictions for non-disadvantaged individuals and concerns.* (1) A non-disadvantaged individual (in the aggregate with all immediate family

members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.

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

(i) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the AA/BD. The decision of the AA/BD is the final decision of the Agency. The AA/BD will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.

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(1) Any Participant that was awarded one or more 8(a) contracts may substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of those contracts or a request for waiver under §124.515, as long as it receives SBA's approval prior to the change.

(2) Where the previous owner held less than a 10 percent interest in the concern, or the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, prior approval is not required, but the concern must notify SBA within 60 days.

(3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA will suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

(5) A change in ownership does not provide the new owner(s) with a new 8(a) BD program term. For example, if a concern has been in the 8(a) BD program for five years when a change in ownership occurs, the new owner will have four years remaining until program graduation.

(j) *Public offering.* A Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) BD program.

(k) *Community property laws given effect.* In determining ownership interests when an owner resides in any of

the community property states or territories of the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011]

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

Control is not the same as ownership, although both may reside in the same person. SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (See §§124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns.) Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

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(a)(1) An applicant or Participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.

(2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant and be physically located in the United States.

(3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the 8(a) firm, and not to firms in which the disadvantaged individual has an ownership interest.

(4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.

(5) Except as provided in paragraph (d)(1) of this section, a disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.

(b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.

(c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.

(d) One or more disadvantaged individuals must control the Board of Di-

rectors of a corporate applicant or Participant.

(1) SBA will deem disadvantaged individuals to control the Board of Directors where:

(i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern;

(ii) A single disadvantaged individual owns at least 51% of all voting stock of an applicant or Participant concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or

(iii) More than one disadvantaged shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the disadvantaged shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.

(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (d)(1) of this section, the disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors, directly or indirectly;

(ii) Any Executive Committee of Directors must be controlled by disadvantaged directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(3) An applicant must inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being admitted to the program, a Participant must inform SBA of changes regarding super majority voting requirements.

(4) Non-voting, advisory, or honorary Directors may be appointed without affecting disadvantaged individuals' control of the Board of Directors.

(5) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or Participant;

(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The

highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

(f) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm.

(g) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.

(2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.

(3) A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.

(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.

(h) Notwithstanding the provisions of this section requiring a disadvantaged owner to control the daily business operations and long-term strategic planning of an 8(a) BD Participant, where a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the Participant may elect to designate one or more individuals to control the Participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) Participant and no additional time will be added to its program term. Alternatively, the Participant may elect to suspend its 8(a) BD participation during the active duty call-up period pursuant to §§124.305(h)(1)(ii) and 124.305(h)(4).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011]

§ 124.107 What is potential for success?

The applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. To do so, it must be in business in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

(a) Income tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification.

(b)(1) SBA may waive the two years in business requirement if each of the following five conditions are met:

(i) The individual or individuals upon whom eligibility is based have substantial business management experience;

(ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likeli-

hood for success if admitted to the 8(a) BD program;

(iii) The applicant has adequate capital to sustain its operations and carry out its business plan as a Participant;

(iv) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category; and

(v) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts as a Participant.

(2) The concern seeking a waiver under paragraph (b) must provide information on governmental and nongovernmental contracts in progress and completed (including letters of reference) in order to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver. SBA considers an applicant's performance on both government and private sector contracts in determining whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, SBA will review its performance on those contracts alone to determine whether the applicant possesses a record of successful performance.

(c) In assessing potential for success, SBA considers the concern's access to credit and capital, including, but not limited to, access to long-term financing, access to working capital financing, equipment trade credit, access to raw materials and supplier trade credit, and bonding capability.

(d) In assessing potential for success, SBA will also consider the technical and managerial experience of the applicant concern's managers, the operating history of the concern, the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) BD certification, and its financial capacity. The applicant concern as a whole must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.

(e) The Participant or individuals employed by the Participant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accountancy, law, professional engineering).

(f) An applicant will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the concern unless:

(1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Participants providing the same or similar items or services.

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

(a) *Good character.* The applicant or Participant and all its principals must have good character.

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

(2) Violations of any of SBA's regulations may result in denial of participation in the 8(a) BD program. The AA/BD will consider the nature and severity of the violation in making an eligibility determination.

(3) Debarred or suspended concerns or concerns owned by debarred or suspended persons are ineligible for admission to the 8(a) BD program.

(4) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, part-

ner, limited liability member, director, officer, or holder of at least 10 percent of its stock, or another person (including key employees) with significant authority over the concern:

(i) Lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; or

(ii) Is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity.

(5) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after admission to the program, SBA discovers that false information has been knowingly submitted by a firm, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred to SBA's Office of Inspector General for review.

(b) *One-time eligibility.* Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.

(1) An individual who claims disadvantage and completes the appropriate SBA forms to qualify an applicant has participated in the 8(a) BD program if SBA approves the application.

(2) Use of eligibility will take effect on the date of the concern's approval for admission into the program.

(3) An individual who uses his or her one-time eligibility to qualify a concern for the 8(a) BD program will be considered a non-disadvantaged individual for ownership or control purposes of another applicant or Participant. The criteria restricting participation by non-disadvantaged individuals will apply to such an individual. See §§ 124.105 and 124.106.

(4) When at least 50% of the assets of a concern are the same as those of a former Participant, the concern will not be eligible for entry into the program.

(5) Participants which change their form of business organization and transfer their assets and liabilities to the new organization may do so without affecting the eligibility of the new organization provided the previous business is dissolved and all other eligibility criteria are met. In such a case, the new organization may complete the remaining program term of the previous organization. A request for a change in business form will be treated as a change of ownership under §124.105(i).

(c) *Wholesalers.* An applicant concern seeking admission to the 8(a) BD program as a wholesaler need not demonstrate that it is capable of meeting the requirements of the nonmanufacturer rule for its primary industry classification.

(d) *Brokers.* Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities.

(e) *Federal financial obligations.* Neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program.

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011]

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

(a) *Special rules for ANCs.* Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in §124.112 to the extent the criteria are not inconsistent with this section. ANC-owned concerns are subject to the same

conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:

(1) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(2) An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.

(3) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.

(4) The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage.

(5) Paragraphs (b)(3)(i), (ii) and (iv) of this section are not applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation.

(6) Paragraph (c)(1) of this section is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a “sue and be sued” clause.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian Tribe must establish its own economic disadvantaged

status under paragraph (b)(2) of this section. Once an Indian Tribe establishes that it is economically disadvantaged in connection with the application for one Tribally-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. An Indian Tribe may request to meet with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires for it to establish economic disadvantage. Each Tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe as defined in §124.3 is considered to be socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.
- (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

(3) *Forms and documents required to be submitted.* Except as otherwise provided in this section, the Indian tribe generally must submit the forms and docu-

ments required of 8(a) BD applicants as well as the following material:

(i) A copy of all governing documents such as the tribe's constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size.* (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern.

(ii) A tribally-owned Participant must certify to SBA that it is a small

business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(3) *Ownership.* (i) For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest.

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

(iii) The restrictions of § 124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

(4) *Control and management.* (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

(A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or

(B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.

(ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(5) *Individual eligibility limitation.* SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(6) *Potential for success.* A Tribally-owned applicant concern must possess reasonable prospects for success in

competing in the private sector if admitted to the 8(a) BD program. A Tribally-owned applicant may establish potential for success by demonstrating that:

(i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or

(ii) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(iii) The Tribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) *Other eligibility criteria.* (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.

(ii) Except for the tribe itself, the concern's officers, directors, and all shareholders owning an interest of 20% or more must demonstrate good character. *See* § 124.108(a).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011]

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

(a) Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in § 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(c) An NHO must establish that it is economically disadvantaged and that its business activities will principally benefit Native Hawaiians.

(1) To determine whether an NHO is economically disadvantaged, SBA considers the individual economic status of the NHO's members. The majority of an NHO's members must qualify as economically disadvantaged under § 124.104. For the first 8(a) applicant owned by a particular NHO, individual NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility. If the NHO has no members, then a majority of the members of the board of directors must qualify as economically disadvantaged. If

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there are members and a board of directors, only a majority of the members must be economically disadvantaged.

(2) An NHO should describe any activities that it has done to benefit Native Hawaiians at the time its NHO-owned firm applies to the 8(a) BD program. In addition, the NHO must include statements in its bylaws or operating agreements identifying the benefits Native Hawaiians will receive from the NHO. The NHO must have a detailed plan that shows how revenue earned by the NHO will principally benefit Native Hawaiians. As part of an annual review conducted for an NHO-owned Participant, SBA will review how the NHO is fulfilling its obligation to principally benefit Native Hawaiians.

(d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors. An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.

(e) A Native Hawaiian Organization cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Native Hawaiian Organization may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the Native Hawaiian Organization operates in the 8(a) BD program as its primary NAICS code. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Native Hawaiian Organization. For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

(f) SBA does not deem an individual involved in the management or daily business operations of a Participant owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of §124.108(b).

(g) An applicant concern owned by a NHO must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a NHO may establish potential for success by demonstrating that:

(1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or

(2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(3) The NHO has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8256, Feb. 11, 2011; 77 FR 28237, May 14, 2012]

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

(a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in §124.101 through §124.108 and §124.112 to the extent that they are not inconsistent with this section.

(b) A concern that is at least 51 percent owned by a CDC (or a wholly

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owned business entity of a CDC) is considered to be controlled by such CDC and eligible for participation in the 8(a) BD program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial experience of an extent and complexity needed to run the concern.

(c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the CDC or any other business enterprise owned by the CDC, unless the Administrator determines that one or more such concerns owned by the CDC have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

(e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(f) An applicant concern owned by a CDC must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a CDC may establish potential for success by demonstrating that:

(1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or

(2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(3) The CDC has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(g) A CDC-owned applicant and all of its principals must have good character as set forth in § 124.108(a).

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012]

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

(a) *Standards.* In order for a concern (except those owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs) to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in § 124.101 through § 124.108. For concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs to remain eligible, they must meet the criteria set forth in this § 124.112 to the extent that they are not inconsistent with § 124.109, § 124.110 and § 124.111, respectively. The concern must inform SBA in writing of any changes in circumstances which would adversely affect its program eligibility, especially economic disadvantage and ownership and control. Any concern

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that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§124.302 through 124.304, as appropriate.

(b) *Submissions supporting continued eligibility.* As part of an annual review, each Participant must annually submit to the servicing district office the following:

(1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in §124.101 through §124.108 and paragraph (a) of this section;

(2) A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility. If the Participant is unable to provide such certification, the Participant must inform SBA of any changes and provide relevant supporting documentation.

(3) Personal financial information for each disadvantaged owner;

(4) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.

(5) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the Participant to each of its owners, officers or directors, or to any person or entity affiliated with such individuals;

(6) If it is an approved protégé, a narrative report detailing the contracts it has had with its mentor and benefits it has received from the mentor/protégé relationship. See §124.520(b)(4) for additional annual requirements;

(7) A listing of any fees paid to agents or representatives to assist the Participant in obtaining or seeking to obtain a Federal contract;

(8) A report for each 8(a) contract performed during the year explaining how the performance of work require-

ments are being met for the contract, including any 8(a) contracts performed as a joint venture;

(9) IRS Form 4506, Request for Copy or Transcript of Tax Form; and

(10) Such other information as SBA may deem necessary. For other required annual submissions, see §§124.601 through 124.603.

(c) *Eligibility reviews.* (1) Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility, SBA will review the concern's eligibility for continued participation in the program.

(2) Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include, but are not limited to, excessive withdrawals of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. SBA may also consider access by the Participant firm to a significant new source of capital or loans since the financial condition of the Participant is considered in evaluating the disadvantaged individual's economic status.

(d) *Excessive withdrawals.* (1) The term withdrawal includes, but is not limited to, the following: Cash dividends; distributions in excess of amounts needed to pay S Corporation, LLC or partnership taxes; cash and property withdrawals; payments to immediate family members not employed by the Participant; bonuses to officers; and investments on behalf of an owner. Although officers' salaries are generally not considered withdrawals for purposes of this paragraph, SBA will count those salaries as withdrawals where SBA believes that a firm is attempting to circumvent the excessive withdrawal limitations through the payment of officers' salaries. SBA will look at the totality of the circumstances in determining whether to include any specific amount as a withdrawal under this paragraph.

(2) If SBA determines that funds or assets have been excessively withdrawn from the Participant for the personal benefit of one or more owners or managers, or any person or entity affiliated

with such owners or managers, and such withdrawal was detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, SBA may:

(i) Initiate termination proceedings under §§124.303 and 124.304 where the withdrawals detrimentally affect the achievement of the Participant's targets, objectives and goals set forth in its business plan, or its overall business development;

(ii) Initiate early graduation proceedings under §§124.302 and 124.303 where the withdrawals do not adversely affect the Participant's business development; or

(iii) Require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility.

(3) Withdrawals are excessive if in the aggregate during any fiscal year of the Participant they exceed (i) \$250,000 for firms with sales up to \$1,000,000; (ii) \$300,000 for firms with sales between \$1,000,000 and \$2,000,000; and (iii) \$400,000 for firms with sales exceeding \$2,000,000.

(4) The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. For example, a \$1,000,000 payout to a non-disadvantaged manager would be deemed an excessive withdrawal.

(e) *Change in primary industry classification.* A Participant may request that the primary industry classification contained in its business plan be changed by filing such a request with its servicing SBA district office. SBA will grant such a request where the Participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

(f) *Graduation determination.* As part of the final annual review performed by SBA prior to the expiration of a Participant's nine-year program term, SBA will determine if the Participant has met the targets, objectives and goals set forth in its business plan and, thus, whether the Participant will be considered to have graduated from the 8(a) BD program at the expiration of its program term. A firm that has not met the targets, objectives and goals set forth in its business plan at the end of its nine-year term in the 8(a) BD program will not be considered to have graduated from the 8(a) BD program, but rather to have merely completed its program term.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012]

APPLYING TO THE 8(a) BD PROGRAM

§ 124.201 May any business submit an application?

Any concern or any individual on behalf of a business has the right to apply for 8(a) BD program participation whether or not there is an appearance of eligibility.

§ 124.202 How must an application be filed?

An application for 8(a) BD program admission must generally be filed in an electronic format. An electronic application can be found by going to the 8(a) BD page of SBA's Web site (<http://www.sba.gov>). An applicant concern that does not have access to the electronic format or does not wish to file an electronic application may request in writing a hard copy application from the AA/BD. The SBA district office will

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provide an applicant concern with information regarding the 8(a) BD program.

[76 FR 8257, Feb. 11, 2011]

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

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, copies of signed Federal personal and business tax returns, individual and business bank statements, and personal history statements. An applicant must also submit a signed IRS Form 4506T, Request for Copy or Transcript of Tax Form, to SBA. In all cases, the applicant must provide a wet signature from each individual claiming social and economic disadvantage status.

[76 FR 8257, Feb. 11, 2011]

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) The AA/BD is authorized to approve or decline applications for admission to the 8(a) BD program. The DPCE will receive, review and evaluate all 8(a) BD applications. SBA will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the DPCE. Incomplete packages will not be processed.

(b) SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it sub-

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mits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the firm or would demonstrate lack of eligibility in the area to which the information relates.

(d) An applicant must be eligible as of the date the AA/BD issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification made pursuant to paragraph (b) of this section, and any changed circumstances since the date of application.

(e) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program (particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.

(f) The decision of the AA/BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(g) If the AA/BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011]

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

(a) An applicant may request the AA/BD to reconsider his or her initial decline decision by filing a request for reconsideration with SBA. The applicant may submit a revised electronic application or submit its request for reconsideration to the SBA DPCE unit that originally processed its application by

personal delivery, first class mail, express mail, facsimile transmission followed by first class mail, or commercial delivery service. The applicant must submit its request for reconsideration within 45 days of its receipt of written notice that its application was declined. If the date of actual receipt of such written notice cannot be determined, SBA will presume receipt to have occurred ten calendar days after the date the notice was sent to the applicant. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances.

(b) The AA/BD will issue a written decision within 45 days of SBA's receipt of the applicant's request. The AA/BD may either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/BD will explain why the applicant is not eligible for admission to the 8(a) BD program and give specific reasons for the decline.

(c) If the AA/BD declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011]

§ 124.206 What appeal rights are available to an applicant that has been denied admission?

(a) An applicant may appeal a denial of program admission to SBA's Office of Hearings and Appeals (OHA), if it is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. A denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final decision of SBA.

(b) The applicant may appeal an initial decision of the AA/BD without requesting reconsideration, or may appeal the decision of the AA/BD on reconsideration.

(c) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the applicant receives the Agency decision.

(d) If an appeal is filed with OHA, the written decision of the Administrative Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/BD is the final Agency decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009]

§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program admission may submit a new application for admission to the program 12 months after the date of the final Agency decision to decline.

EXITING THE 8(a) BD PROGRAM

§ 124.301 What are the ways a business may leave the 8(a) BD program?

A concern participating in the 8(a) BD program may leave the program by any of the following means:

- (a) Expiration of the program term established pursuant to § 124.2;
- (b) Voluntary withdrawal or voluntary early graduation;
- (c) Graduation pursuant to § 124.302;
- (d) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or
- (e) Termination pursuant to the provisions of §§ 124.303 and 124.304.

[76 FR 8258, Feb. 11, 2011]

§ 124.302 What is graduation and what is early graduation?

(a) *General.* SBA may graduate a firm from the 8(a) BD program at the expiration of its program term (graduation) or prior to the expiration of its program term (early graduation) where SBA determines that:

- (1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or

(2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

(b) *Criteria for determining whether a Participant has met its goals and objectives.* In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors:

- (1) Degree of sustained profitability;
- (2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry;
- (3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital;
- (4) Current ability to obtain bonding;
- (5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant;
- (6) Strength of management experience, capability, and expertise; and
- (7) Ability to operate successfully without 8(a) contracts.

(c) *Exceeding the size standard corresponding to the primary NAICS code.* SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted during the program, for three successive program years unless the firm is able to demonstrate that it has taken steps to change its industry focus to another NAICS code that is contained in the goals, targets and objectives of its business plan.

(d) *Excessive withdrawals.* SBA may graduate a Participant prior to the expiration of its program term where excessive funds or other assets have been withdrawn from the Participant (see §124.112(d)(3)), causing SBA to determine that the Participant has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011]

§ 124.303 What is termination?

(a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.

(2) Failure by the concern to maintain its eligibility for program participation, including failure by an individual owner or manager to continue to meet the requirements for economic disadvantage set forth in §124.104 where such status is needed for eligibility.

(3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.

(4) Failure by the concern to obtain prior written approval from SBA for any changes in ownership or business structure, management or control pursuant to §§ 124.105 and 124.106.

(5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.

(6) Failure by the concern or one or more of the concern's principals to maintain good character.

(7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(8) Cessation of business operations by the concern.

(9) Failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.

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(10) A pattern of inadequate performance by the concern of awarded section 8(a) contracts.

(11) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(13) Excessive withdrawals that are detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, including transfers of funds or other business assets from the concern for the personal benefit of any of its owners or managers, or any person or entity affiliated with the owners or managers (see §124.112(d)).

(14) Unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement.

(15) Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under §124.507 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under §124.204 and §124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false.

(16) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 2 CFR parts 180 and 2700 or FAR subpart 9.4 (48 CFR part 9, subpart 9.4). * * *

(17) Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case.

(18) Willful failure by the Participant business concern to comply with applicable labor standards and obligations.

(19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.

(20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

(b) The examples of good cause listed in paragraph (a) of this section are intended to be illustrative only. Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011]

§ 124.304 What are the procedures for early graduation and termination?

(a) *General.* The same procedures apply to both early graduation and termination of Participants from the 8(a) BD program.

(b) *Letter of Intent to Terminate or Graduate Early.* When SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings, and will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation.

(c) *Recommendation and decision.* Following the 30-day response period, the Assistant Administrator for DPCE (AA/DPCE) or designee will consider the proposed early graduation or termination and any information submitted in response by the concern. Upon determining that early graduation or termination is not warranted, the AA/DPCE or designee will notify the Participant in writing. If early graduation or termination appears warranted, the AA/DPCE will make such a recommendation to the AA/BD, who will then make a decision whether to early graduate or terminate the concern. SBA will act in a timely manner in processing early graduation and termination actions.

(d) *Notice requirements.* Upon deciding that early graduation or termination is warranted, the AA/BD will issue a Notice of Early Graduation or Termination. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may appeal the decision in accordance with the provisions of part 134 of this title.

(e) *Appeal to OHA.* Procedures governing appeals of early graduation or termination to SBA's OHA are set forth in part 134. If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days after the Participant receives the Notification, the decision of the AA/BD is the final agency decision effective on the date the appeal right expired.

(f) *Effect of early graduation or termination.* (1) After the effective date of early graduation or termination, a Participant is no longer eligible to receive any 8(a) BD program assistance. However, such concern is obligated to complete previously awarded 8(a) contracts, including any priced options which may be exercised.

(2) When SBA early graduates or terminates a firm from the 8(a) BD program, the firm will generally not qualify as an SDB for future procurement actions. If the firm believes that it does qualify as an SDB and seeks to certify itself as an SDB, as part of its SDB certification the firm must identify:

(i) That it has been early graduated or terminated;

(ii) The statutory or regulatory authority that qualifies the firm for SDB status; and

(iii) Where applicable, the circumstances that have changed since the early graduation or termination or that do not prevent it from qualifying as an SDB.

(3) Where a concern certifies that it qualifies as an SDB pursuant to paragraph (f)(2) of the section, the procuring activity contracting officer may protest the SDB status of the firm to SBA pursuant to §124.1010 where questions regarding the firm's SDB status remain.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011]

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

(a) Except as set forth in paragraph (h) of this section, at any time after SBA issues a Letter of Intent to Terminate an 8(a) Participant pursuant to §124.304, the AA/BD may suspend 8(a) contract support and all other forms of

8(a) BD program assistance to that Participant until the issue of the Participant's termination from the program is finally determined. The AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

(b) SBA will issue a Notice of Suspension to the Participant's last known address by certified mail, return receipt requested. Suspension is effective as of the date of the issuance of the Notice. The Notice will provide the following information:

(1) The basis for the suspension;

(2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;

(3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been "self-marketed" by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;

(4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;

(5) A statement that the suspension is effective nationally throughout SBA;

(6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.

(7) A statement that the firm's participation in the program is suspended effective on the date the Notice is served, and that the program term will resume only if the suspension is lifted or the firm is not terminated.

(c) The Participant may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the concern receives the Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension before OHA or the AA/BD makes a final determination regarding the termination action.

(1) The term "adequate evidence" means information contained in the record before the AA/BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.

(2) SBA need not demonstrate that an act or omission actually occurred in order for OHA to uphold a suspension. SBA's burden in a suspension proceeding is limited to demonstrating that it had a reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.

(3) Unless the Administrative Law Judge consolidates the suspension and termination proceedings, OHA's review is limited to determining whether the Government's interests need to be protected, and will not consider the merits of the termination action.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final SBA decision. If there is not a timely appeal, the decision of the AA/BD is the final Agency decision.

(f) Upon the request of SBA, OHA may consolidate suspension and termination proceedings when the issues presented are identical.

(g) Any program suspension which occurs under this section is effective until such time as SBA lifts the suspension or the Participant's participation in the program is fully termi-

nated. If the concern is ultimately not terminated from the 8(a) BD program, the suspension will be lifted and the length of the suspension will be added to the concern's program term.

(h)(1) SBA will suspend a Participant from receiving further 8(a) BD program benefits when termination proceedings have not been commenced pursuant to § 124.304 where:

(i) A Participant requests a change of ownership and/or control and SBA discovers that a change of ownership or control has in fact occurred prior to SBA's approval; or

(ii) A disadvantaged individual who is involved in the ownership and/or control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period pursuant to § 124.106(h).

(2) A suspension initiated under paragraph (h) of this section will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a suspension issued under paragraph (h) is not appealable.

(3) Where a Participant is suspended pursuant to paragraph (h)(1)(i) of this section and SBA approves the change of ownership and/or control, the length of the suspension will be added to the firm's program term only where the change in ownership or control results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited at least 60 days for SBA approval before making the change.

(4) Where a Participant is suspended pursuant to paragraph (h)(1)(ii) of this section, the Participant must notify SBA when the disadvantaged individual returns to control the firm so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.

(5) *Effect of suspension.* Once a suspension is issued pursuant to this section,

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a Participant cannot receive any additional 8(a) BD program assistance, including new 8(a) contract awards, for as long as the Participant is suspended. This includes any procurement requirements that the firm has self-marketed and those that have been accepted into the 8(a) BD program on behalf of the suspended concern. However, the suspended Participant must complete any previously awarded 8(a) contracts.

(i) SBA does not recognize the concept of de facto suspension. Adding time to the end of a Participant's program term equal to the length of a suspension will occur only where a concern's program participation has been formally suspended in accordance with the procedures set forth in this section.

(j) A suspension from 8(a) BD participation under this section has no effect on a concern's eligibility for non-8(a) Federal Government contracts. However, a debarment or suspension under the Federal Acquisition Regulation (48 CFR, chapter 1) will disqualify a concern from receiving all Federal Government contracts, including 8(a) contracts.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011]

BUSINESS DEVELOPMENT

§ 124.401 Which SBA field office services a Participant?

The SBA district office which serves the geographical territory where a Participant's principal place of business is located normally will service the concern during its participation in the 8(a) BD program.

§ 124.402 How does a Participant develop a business plan?

(a) *General.* In order to assist the SBA servicing office in determining the business development needs of its portfolio Participants, each Participant must develop a comprehensive business plan setting forth its business targets, objectives, and goals.

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. The Participant will not be eligible for 8(a) BD program benefits, in-

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cluding 8(a) contracts, until SBA approves its business plan.

(c) *Contents of business plan.* The business plan must contain at least the following:

(1) A detailed description of any products currently being produced and any services currently being performed by the concern, as well as any future plans to enter into one or more new markets;

(2) The applicant's designation of its primary industry classification, as defined in §124.3;

(3) An analysis of market potential, competitive environment, and the concern's prospects for profitable operations during and after its participation in the 8(a) BD program;

(4) An analysis of the concern's strengths and weaknesses, with particular attention on ways to correct any financial, managerial, technical, or work force conditions which could impede the concern from receiving and performing non-8(a) contracts;

(5) Specific targets, objectives, and goals for the business development of the concern during the next two years;

(6) Estimates of both 8(a) and non-8(a) contract awards that will be needed to meet its targets, objectives and goals; and

(7) Such other information as SBA may require.

§ 124.403 How is a business plan updated and modified?

(a) *Annual review.* Each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS), and modify the plan as appropriate. The Participant must submit a modified plan and updated information to its BOS within thirty (30) days after the close of each program year. It also must submit a capability statement describing its current contract performance capabilities as part of its updated business plan.

(b) *Contract forecast.* As part of the annual review of its business plan, each Participant must annually forecast in writing its needs for contract awards for the next program year. The forecast must include:

(1) The aggregate dollar value of 8(a) contracts to be sought, broken down by sole source and competitive opportunities where possible;

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(2) The aggregate dollar value of non-8(a) contracts to be sought;

(3) The types of contract opportunities to be sought, identified by product or service; and

(4) Such other information as SBA may request to aid in providing effective business development assistance to the Participant.

(c) *Transition management strategy.* Beginning in the first year of the transitional stage of program participation, each Participant must annually submit a transition management strategy to be incorporated into its business plan. The transition management strategy must describe:

(1) How the Participant intends to meet the applicable non-8(a) business activity target imposed by § 124.507 during the transitional stage of participation; and

(2) The specific steps the Participant intends to take to continue its business growth and promote profitable business operations after the expiration of its program term.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011]

§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

(a) *General.* Participation in the 8(a) BD program is divided into two stages, a developmental stage and a transitional stage. The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term.

(b) *Developmental stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:

(1) Sole source and competitive 8(a) contract support;

(2) Financial assistance pursuant to § 120.375 of this title;

(3) The transfer of technology or surplus property owned by the United States pursuant to § 124.405; and

(4) Training to aid in developing business principles and strategies to enhance their ability to compete success-

fully for both 8(a) and non-8(a) contracts.

(c) *Transitional stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:

(1) The same assistance as that provided to Participants in the developmental stage;

(2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and

(3) Training and technical assistance in transitional business planning.

§ 124.405 How does a Participant obtain Federal Government surplus property?

(a) *General.* (1) Pursuant to 15 U.S.C. 636(j)(13)(F), eligible Participants may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR Part 101-44 and this section will be used to transfer surplus property to eligible Participants.

(2) The property which may be transferred to SASPs for further transfer to eligible Participants includes all personal property which has been determined to be "donable" as defined in 41 CFR 101-44.001-3.

(b) *Eligibility to receive Federal surplus property.* To be eligible to receive Federal surplus property, on the date of transfer a concern must:

(1) Be in the 8(a) BD program;

(2) Be in compliance with all program requirements, including any reporting requirements;

(3) Not be debarred, suspended, or declared ineligible under part 9, subpart 9.4 of the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations;

(4) Not be under a pending 8(a) BD program suspension, termination or early graduation proceeding; and

(5) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus property.* (1) Eligible Participants may acquire surplus Federal property from any SASP located in any state, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus property is to be and that this use is consistent with the objectives of the concern's 8(a) business plan;

(ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government during its term of participation in the 8(a) program and for one year after it leaves the program;

(iv) That, at its own expense, it will return the property to a SASP or transfer it to another Participant if directed to do so by SBA because it has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give SBA access to inspect the property and all records pertaining to it.

(2) A firm receiving surplus property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(3) If the property is not placed in use for the purposes for which it was intended within one year of its receipt, SBA may direct the concern to deliver the property to another Participant or to the SASP from which it was acquired.

(4) Failure to comply with any of the commitments made under paragraph (c)(1) of this section constitutes a basis for termination from the 8(a) program.

(d) *Procedures for acquiring Federal Government surplus property.* (1) Partici-

pants may participate in the surplus property distribution program administered by the SASPs to the same extent, but with no special priority over, other authorized transferees. *See* 41 CFR subpart 101–44.2.

(2) Each Participant seeking to acquire Federal Government surplus property from a SASP must:

(i) Certify in writing to the SASP that it is eligible to receive the property pursuant to paragraph (b) of this section;

(ii) Make the written representations and agreement required by paragraph (c)(1) of this section; and

(iii) Identify to the SASP its servicing SBA field office.

(3) Upon receipt of the required certification, representations, agreement, and information set forth in paragraph (d)(2) of this section, the SASP must contact the appropriate SBA field office and obtain SBA's verification that the concern seeking to acquire the surplus property is eligible, and that the identified use of the property is consistent with the concern's business activities. SASPs may not release property to a Participant without this verification.

(4) The SASP and the Participant must agree on and record the fair market value of the surplus property at the time of the transfer to the Participant. The SASP must provide to SBA a written record, including the agreed upon fair market value, of each transaction to a Participant when any property has been transferred.

(e) *Costs.* Participants acquiring surplus property from a SASP must pay a service fee to the SASP which is equal to the SASP's direct costs of locating, inspecting, and transporting the surplus property. If a Participant elects to incur the responsibility and the expense for transporting the acquired property, the concern may do so and no transportation costs will be charged by the SASP. In addition, the SASP may charge a reasonable fee to cover its costs of administering the program. In no instance will any SASP charge a Participant more for any service than their established fees charged to other transferees.

(f) *Title.* The title to surplus property acquired from a SASP will pass to the

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Participant when the Participant executes the applicable SASP distribution documents and takes possession of the property.

(g) *Compliance.* (1) SBA will periodically review whether Participants that have received surplus property have used and maintained the property as agreed. This review may include site visits to visually inspect the property to ensure that it is being used in a manner consistent with the terms of its transfer.

(2) Participants must provide SBA with access to all relevant records upon request.

(3) Where SBA receives credible information that transferred surplus property may have been disposed of or otherwise used in a manner that is not consistent with the terms of the transfer, SBA may investigate such claim to determine its validity.

(4) SBA may take any action to correct any noncompliance involving the use of transferred property still in possession of the Participant or to enforce any terms, conditions, reservations, or restrictions imposed on the property by the distribution document. Actions to enforce compliance, or which may be taken as a result of noncompliance, include the following:

(i) Requiring that the property be placed in proper use within a specified time;

(ii) Requiring that the property be transferred to another Participant having a need and use for the property, returned to the SASP serving the area where the property is located for distribution to another eligible transferee or to another SASP, or transferred through GSA to another Federal agency;

(iii) Recovery of the fair rental value of the property from the date of its receipt by the Participant; and

(iv) Initiation of proceedings to terminate the Participant from the 8(a) BD program.

(5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater.

However, a Participant need not repay any amount where it can demonstrate to SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives SBA's prior consent.

(6) Any funds received by SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

CONTRACTUAL ASSISTANCE

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

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. This includes set-asides, partial set-asides and reserves of Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. Where practicable, simplified acquisition procedures should be used for 8(a) contracts at or below the simplified acquisition threshold. Where appropriate, SBA will delegate the contract execution function to procuring activities. In order to receive and retain a delegation of SBA's contract execution and review functions, a procuring activity must report all 8(a) contract awards, modifications, and options to SBA.

(b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants.

(c) Admission into the 8(a) BD program does not guarantee that a Participant will receive 8(a) contracts.

(d) A requirement for possible award may be identified by SBA, a particular Participant or the procuring activity itself. SBA will submit the capability statements provided to SBA annually under § 124.403 to appropriate procuring

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activities for the purpose of matching requirements with Participants.

(e) Participants should market their capabilities to appropriate procuring activities to increase their prospects of receiving sole source 8(a) contracts.

(f) An 8(a) participant that identifies a requirement that appears suitable for award through the 8(a) BD program may request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) BD program.

(g) A concern must be a current Participant in the 8(a) BD program at the time of award, except as provided in §124.507(d).

(h) A Participant must certify that it qualifies as a small business under the size standard corresponding to the NAICS code assigned to each 8(a) contract. 8(a) BD program personnel will verify size prior to award of an 8(a) contract. If the Participant is not verified as small, it may request a formal size determination from the appropriate General Contracting Area Office under part 121 of this title.

(i) Any person or entity that misrepresents its status as a “small business concern owned and controlled by socially and economically disadvantaged individuals” in order to obtain any 8(a) contracting opportunity will be subject to possible criminal, civil and administrative penalties, including those imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d).

[63 FR 35739, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011; 78 FR 61132, Oct. 2, 2013]

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

(a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA. The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.

(b) Contracting officers must submit offering letters to the following locations:

(1) For competitive 8(a) requirements and those sole source requirements for which no specific Participant is nominated (i.e., open requirements) other than construction requirements, to the SBA district office serving the geographical area in which the procuring activity is located;

(2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed or, in the case of such contracts to be performed overseas, to the Office of 8(a) BD located in SBA Headquarters;

(3) For sole source requirements offered on behalf of a specific Participant, to the SBA district office servicing that concern.

(c) An offering letter must contain the following information:

(1) A description of the work to be performed;

(2) The estimated period of performance;

(3) The NAICS code that applies to the principal nature of the acquisition;

(4) The anticipated dollar value of the requirement, including options, if any;

(5) Any special restrictions or geographical limitations on the requirement;

(6) The location of the work to be performed for construction procurements;

(7) Any special capabilities or disciplines needed for contract performance;

(8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;

(9) The acquisition history, if any, of the requirement;

(10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;

(11) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business set-aside, or as a small disadvantaged business set-aside if applicable, and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the procuring activity's clear

intent to use any of these means of procurement;

(12) Identification of any specific Participant that the procuring activity contracting officer nominates for award of a sole source 8(a) contract, if appropriate, including a brief justification for the nomination, such as one of the following:

(i) The Participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) BD program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(13) Bonding requirements, if applicable;

(14) Identification of all Participants which have expressed an interest in being considered for the acquisition;

(15) Identification of all SBA field offices which have requested that the requirement be awarded through the 8(a) BD program;

(16) A request, if appropriate, that a requirement whose estimated contract value is under the applicable competitive threshold be awarded as an 8(a) competitive contract; and

(17) Any other information that the procuring activity deems relevant or which SBA requests.

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

(a) *Acceptance of the requirement.* Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to the procuring activity in writing within 10 working days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two days of receipt of the offering letter if the contract is valued at or below the simplified acquisition threshold, unless SBA requests, and the procuring activity grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procure-

ment, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant.

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer on behalf of the 8(a) BD program.

(3) Where SBA has delegated its contract execution functions to a procuring activity, the procuring activity may assume that SBA accepts its offer for the 8(a) program if the procuring activity does not receive a reply to its offer within five days.

(4) In the case of procurement requirements valued at or below the Simplified Acquisition Procedures threshold:

(i) Where a procuring activity makes an offer to the 8(a) program on behalf of a specific Program Participant and does not receive a reply to its offer within two days, the procuring activity may assume the offer is accepted and proceed with award of an 8(a) contract;

(ii) Where SBA has delegated its 8(a) contract execution functions to an agency, SBA may authorize the procuring activity to award an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) program. In such a case, the procuring activity must notify SBA of all 8(a) awards made under this authority.

(5) Where SBA does not respond to an offering letter within the normal 10-day time period, the procuring activity may seek SBA's acceptance through the AA/BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/BD within 5 days of his or her receipt of the procuring activity request.

(b) *Verification of NAICS code.* As part of the acceptance process, SBA will verify the appropriateness of the NAICS code designation assigned to the requirement by the procuring activity contracting officer.

(1) SBA will accept the NAICS code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other NAICS codes may also be reasonable.

(2) If SBA and the procuring activity are unable to agree as to the proper

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NAICS code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to §124.505, or appeal the NAICS code designation to OHA under part 134 of this title.

(c) *Sole source award where procuring activity nominates a specific Participant.* SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award.

(1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant complies with its applicable non-8(a) business activity target imposed by §124.509(d);

(iii) The Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer; and

(iv) The Participant has submitted required financial statements to SBA.

(2) If an appropriate match exists, SBA will advise the procuring activity whether SBA will participate in contract negotiations or whether SBA will authorize the procuring activity to negotiate directly with the identified Participant. Where SBA has delegated its contract execution functions to a procuring activity, SBA will also identify that delegation in its acceptance letter.

(3) If an appropriate match does not exist, SBA will notify the Participant and the procuring activity, and may then nominate an alternate Participant.

(d) *Open requirements.* When a procuring activity does not nominate a particular concern for performance of a sole source 8(a) contract (open requirement), the following additional procedures will apply:

(1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the

SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.

(2) If the procurement is not a construction requirement, SBA may select any eligible, responsible Participant nationally to perform the contract.

(3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts.

(e) *Formal technical evaluations.* Except for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity:

(1) Must request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive threshold amount; and

(2) May conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.

(f) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award. This enables SBA to determine:

(1) Whether the requirement should be a competitive 8(a) award;

(2) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(3) The affect that contract award would have on the equitable distribution of 8(a) contracts; and

(4) Whether the requirement should continue under the 8(a) BD program.

(g) *Basic Ordering Agreements (BOAs)*. A Basic Ordering Agreement (BOA) is not a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under the BOA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself.

(1) SBA will not accept for award on a sole source basis any task order under a BOA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold amount set forth in §124.506(a).

(2) Where a procuring activity believes that task orders to be issued under a proposed BOA will exceed the applicable competitive threshold amount set forth in §124.506(a), the procuring activity must offer the requirement to the program to be competed among eligible Participants.

(3) Once a concern's program term expires, the concern otherwise exits the 8(a) BD program, or becomes other than small for the NAICS code assigned under the BOA, new orders will not be accepted for the concern.

(h) *Task or Delivery Order Contracts, including Multiple Award Contracts—(1) Contracts set-aside for exclusive competition among 8(a) Participants.* (i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures. This includes an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, compliance with the performance of work requirements set forth in §124.510, and compliance with the nonmanufacturer rule (see §121.406(b)), if applicable.

(ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants, and the individual order is to be competed among all 8(a) contract holders.

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take credit toward their prime contracting goals for orders awarded to 8(a) Participants. However, agencies may not take SDB or small business credit for an order where the concern has been asked by the procuring agency to recertify its size, 8(a) or SDB status and is unable to do so (see §121.404(g)), or where ownership or control of the concern has changed and SBA has granted a waiver to allow performance to continue (see §124.515).

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met. Where an agency seeks to award an order on a sole source basis (i.e., to one particular 8(a) contract holder without competition among all 8(a) contract holders), the agency must offer and SBA must accept the order into the 8(a) program on behalf of the identified 8(a) contract holder.

(2) *Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.* In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a)

award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met:

- (i) The order must be offered to and accepted into the 8(a) BD program;
- (ii) The order must be competed exclusively among 8(a) concerns;
- (iii) The order must require the concern comply with applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule, if applicable, (*see* §121.406(b)) in the performance of the individual order; and
- (iv) SBA must verify that a concern is an eligible 8(a) concern prior to award of the order in accordance with §124.507.

(3) *Reserves.* A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a) Participants (*i.e.*, an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) Participants under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since any such award to 8(a) Participants would not be considered an 8(a) contract award.

(i) Requirements where SBA has delegated contract execution authority. Except as provided in paragraph (a)(4)(i) of this section, where SBA has delegated its 8(a) contract execution authority to the procuring activity, the procuring activity must still offer and SBA must still accept all requirements intended to be awarded as 8(a) contracts.

(j) *Contracting Among Small Business Programs—(1) Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will

be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's System for Award Management (SAM) (or any successor system) certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

[63 FR 35739, June 30, 1998, as amended at 70 FR 51248, Aug. 30, 2005; 71 FR 66444, Nov. 15, 2006; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 76 FR 8259, Feb. 11, 2011; 77 FR 1860, Jan. 12, 2012; 78 FR 61133, Oct. 2, 2013]

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. However, the AA/BD may permit the acceptance of the requirement under extraordinary circumstances.

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance of the requirement.

(1) Any competition conducted without first obtaining SBA's formal acceptance of the procurement for the 8(a) BD program will not be considered an 8(a) competitive requirement.

(2) SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring activity agrees to resolicit the requirement using appropriate competitive 8(a) procedures.

(c) *Adverse impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions. SBA will not consider adverse impact with respect to any requirement offered to the 8(a) program under Simplified Acquisition Procedures.

(1) In determining whether the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.

(i) In connection with a specific small business, SBA presumes adverse impact to exist where:

(A) The small business concern has performed the specific requirement for at least 24 months;

(B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and

(C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates). For a multi-year requirement, the dollar value of the last 12 months of the requirement will be used to determine whether a small business would be adversely affected by SBA's acceptance.

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is one which has not been previously procured by the relevant procuring activity.

(A) Where a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.

(B) Construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements.

(C) The expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

(D) SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.

(2) In determining whether the acceptance of a requirement would have an adverse impact on a group of small

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businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a “new” requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

(3) In determining whether the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry in the 8(a) BD program as compared with other small business programs.

(d) *Release for non-8(a) competition.* (1) Except as set forth in (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. If a procuring agency would like to fulfill a follow-on or renewable acquisition outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

- (i) Whether the agency has achieved its SDB goal;
- (ii) Where the agency is in achieving its HUBZone, SDVO, WOSB, or small business goal, as appropriate; and
- (iii) Whether the requirement is critical to the business development of the 8(a) Participant that is currently performing it.

(2) SBA may decline to accept the offer of a follow-on or renewable 8(a) acquisition in order to give a concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside of the 8(a) BD program.

(i) SBA will consider release under paragraph (2) only where:

(A) The procurement awarded through the 8(a) BD program is being or was performed by either a Participant whose program term will expire

prior to contract completion, or by a former Participant whose program term expired within one year of the date of the offering letter;

(B) The concern requests in writing that SBA decline to accept the offer prior to SBA’s acceptance of the requirement for award as an 8(a) contract; and

(C) The concern qualifies as a small business for the requirement now offered to the 8(a) BD program.

(ii) In considering release under paragraph (2), SBA will balance the importance of the requirement to the concern’s business development needs against the business development needs of other Participants that are qualified to perform the requirement. This determination will include consideration of whether rejection of the requirement would seriously reduce the pool of similar types of contracts available for award as 8(a) contracts. SBA will also seek the views of the procuring agency.

(3) SBA will release a requirement under this paragraph only where the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside.

(4) The requirement that a follow-on procurement must be released from the 8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply to orders offered to and accepted for the 8(a) BD program pursuant to §124.503(h).

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013]

§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?

(a) *What SBA may appeal.* The Administrator of SBA may appeal the following matters to the head of the procuring agency:

(1) A contracting officer’s decision not to make a particular procurement available for award as an 8(a) contract;

(2) A contracting officer’s decision to reject a specific Participant for award of an 8(a) contract after SBA’s acceptance of the requirement for the 8(a) BD program; and

(3) The terms and conditions of a proposed 8(a) contract, including the procuring activity's NAICS code designation and estimate of the fair market price.

(b) *Procedures for appeal.* (1) SBA must notify the contracting officer of the SBA Administrator's intent to appeal an adverse decision within 5 working days of SBA's receipt of the decision.

(2) Upon receipt of the notice of intent to appeal, the procuring activity must suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a consideration of the appeal.

(3) The SBA Administrator must send a written appeal of the adverse decision to the head of the procuring agency within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.

(4) By statute (15 U.S.C. 637(a)(1)(A)), the procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

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

(a) *Competitive thresholds.* (1) The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 124, Subpart A, 8(a) Business Development, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the FEDERAL REGISTER.

The adjusted dollar thresholds shall take effect on the date of publication.

(2) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

(i) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;

(ii) The anticipated award price of the contract, including options, will exceed \$6,500,000 for contracts assigned manufacturing NAICS codes and \$4,000,000 for all other contracts; and

(iii) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.

(3) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options.

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be \$3.8 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$4.2 million.

(4) Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount.

(5) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

(b) *Exemption from competitive thresholds for Participants owned by Indian Tribes, ANCs and NHOs.* (1) A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract

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where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

(2) A Participant concern owned and controlled by an NHO may be awarded a sole source Department of Defense (DoD) 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

(3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a Tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts, but a procurement may not be removed from competition to award it to a Tribally-owned, ANC-owned or NHO-owned concern on a sole source basis.

(4) A joint venture between one or more eligible Tribally-owned, ANC-owned or NHO-owned Participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that it meets the requirements of §124.513.

(c) *Competition below thresholds.* The AA/BD, on a nondelegable basis, may approve a request from a procuring activity to compete a requirement that is below the applicable competitive threshold amount among eligible Participants.

(1) This authority will be used primarily when technical competitions are appropriate or when a large number of potential awardees exist.

(2) The AA/BD may consider whether the procuring activity has made and will continue to make available a significant number of its contracts to the 8(a) BD program on a noncompetitive basis.

(3) The AA/BD may deny a request if the procuring activity previously offered the requirement to the 8(a) BD program on a noncompetitive basis and the request is made following the inability of the procuring activity and the potential sole source awardee to

reach an agreement on price or some other material term or condition.

(d) *Sole source above thresholds.* Where a contract opportunity exceeds the applicable threshold amount and there is not a reasonable expectation that at least two eligible 8(a) Participants will submit offers at a fair price, the AA/BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 74 FR 46887, Sept. 14, 2009; 76 FR 8260, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013]

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

(a) *FAR procedures.* Procuring activities will conduct competitions among and evaluate offers received from Participants in accordance with the Federal Acquisition Regulation (48 CFR, chapter 1).

(b) *Eligibility determination by SBA.* In either a negotiated or sealed bid competitive 8(a) acquisition, the procuring activity will request that the SBA district office servicing the apparent successful offeror determine that firm's eligibility for award.

(1) Within 5 working days after receipt of a procuring activity's request for an eligibility determination, SBA will determine whether the firm identified by the procuring activity is eligible for award.

(2) Eligibility is based on 8(a) BD program criteria, including whether the Participant is:

(i) A small business under the NAICS code assigned to the requirement;

(ii) In compliance with any applicable competitive business mix target established or remedial measure imposed by §124.509 that does not include the denial of future 8(a) contracts;

(iii) In compliance with the continued eligibility reporting requirements set forth in §124.112(b);

(iv) In the developmental stage of program participation if the solicitation restricts offerors to the developmental stage of participation; and

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(v) A concern with a bona fide place of business in the applicable geographic area if the procurement is for construction.

(3) If SBA determines that the apparent successful offeror is ineligible, SBA will notify the procuring activity. The procuring activity will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(4) Except to the extent set forth in paragraph (d) of this section, SBA determines whether a Participant is eligible for a specific 8(a) competitive requirement as of the date that the Participant submitted its initial offer which includes price.

(5) If the procuring activity contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to SBA for a possible Certificate of Competency in accord with § 125.5 of this title.

(c) *Restricted competition*—(1) *Competition within stages of program participation*. SBA may accept a competitive 8(a) requirement that is limited to Participants in the developmental stage of program participation, or may accept a requirement to be competed among firms both in the developmental and transitional stages of program participation.

(2) *Construction competitions*. Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

(i) A Participant may have bona fide places of business in more than one location.

(ii) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must de-

termine if that location in fact qualifies as a bona fide place of business under SBA's requirements.

(A) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it.

(B) The servicing district office will forward the request to the SBA district office serving the geographic area of the particular location for processing.

(iii) The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(iv) In order for a Participant to be eligible to submit an offer for a 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(3) *Competition for all non-construction requirements*. Except for construction requirements, all eligible Participants regardless of location may submit offers in response to competitive 8(a) solicitations. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, are any imposed by the solicitations themselves.

(d) *Award to firms whose program terms have expired*. A concern that has completed its term of participation in the 8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.

(1) Amendments to the solicitation extending the date for submissions of offers will be disregarded.

Example to paragraph (d)(1). The program term for 8(a) Participant X is scheduled to expire on December 19. A solicitation for a competitive 8(a) procurement specifies that initial offers are due on December 15. The procuring activity amends the solicitation to extend the date for the receipt of offers to January 5. X submits its offer on January 5 and is selected as the apparent successful offeror. X is eligible for award because it was an eligible 8(a) Participant on the initial

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date set forth in the solicitation for the receipt of offers.

(2) For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8260, Feb. 11, 2011]

§ 124.508 How is an 8(a) contract executed?

(a) An 8(a) contract can be awarded in the following ways:

(1) As a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. There may be separate prime and subcontract documents (i.e., a prime contract between the procuring activity and SBA and a subcontract between SBA and the selected 8(a) concern) or a combined contract document representing both the prime and subcontract relationships; or

(2) Where SBA has delegated contract execution authority to the procuring activity, directly by the procuring activity through a contract between the procuring activity and the Participant.

(b) Where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt.

(c) In order to be eligible to receive a sole source 8(a) contract, a firm must be a current Participant on the date of award. (See §124.507(d) for competitive 8(a) awards.)

§ 124.509 What are non-8(a) business activity targets?

(a) *General.* (1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make maximum efforts to obtain business outside the 8(a) BD program. Work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders

under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.

(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make substantial and sustained efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the firm for economic viability when program benefits are no longer available.

(b) *Required non-8(a) business activity targets during transitional stage—(1) General.* During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non-8(a) revenue over time.

(2) *Non-8(a) business activity targets.* During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	35
4	45
5	55

(3) *Compliance with non-8(a) business activity targets.* SBA will measure the Participant's compliance with the applicable non-8(a) business activity target at the end of each program year in the transitional stage based on the Participant's latest fiscal year-end total revenue. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non-8(a) revenue

to its total revenue during that first year. If appropriate, SBA will require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non-8(a) business activity target in year one of the transitional stage would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) *Certification of compliance.* A Participant must certify as part of its offer that it complies with the applicable non-8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) *Reporting and verification of business activity.* (1) Once admitted to the 8(a) BD program, a Participant must provide to SBA as part of its annual review:

(i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with §124.602; and

(ii) An annual report within 30 days from the end of the program year of all non-8(a) contracts, options, and modifications affecting price executed during the program year.

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues received during the year, including those from options and modifications, to all non-8(a) revenues received during the year.

(d) *Consequences of not meeting competitive business mix targets.* (1) Except as set forth in paragraph (e) of this section, beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year will be ineligible for sole source 8(a) contracts in the current program year, unless and until the Participant corrects the situation as described in paragraph (d)(2) of this section.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA may increase its monitoring of the Participant's contracting activity during the ensuing program year. SBA will also notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(2)(i) and (d)(2)(ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (d)(2)(ii)(B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (i.e., at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (i.e., at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity

target as of that point in the current program year.

Example 1 to paragraph (d)(2). Firm A had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of \$8.5 million and non-8(a) revenues of \$1.5 million (15 percent). Based on total revenues of \$10 million, Firm A should have had at least \$2.5 million in non-8(a) revenues. Thus, Firm A missed its target by \$1 million (its target (\$2.5 million) minus its actual non-8(a) revenues (\$1.5 million)). Because Firm A did not achieve its non-8(a) business activity target, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling \$1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(2). Firm B had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which \$8.5 million were 8(a) revenues and \$1.5 million were non-8(a) revenues. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least \$1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(3) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(4) As a condition of eligibility for new 8(a) contracts, SBA may also impose other requirements on a Participant that fails to achieve the non-8(a) business activity targets. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation.

(5) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) *Waiver of sole source prohibition.* (1) The AA/BD, or his or her designee, may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target. A firm receiving a waiver will be able to self market its capabilities and receive one or more sole source 8(a) contracts during the next program year. At its next annual review, SBA will reevaluate the firm's circumstances and determine whether the waiver should be extended an additional program year. The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(2) The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009; 76 FR 8261, Feb. 11, 2011]

§ 124.510 What percentage of work must a Participant perform on an 8(a) contract?

(a) To assist the business development of Participants in the 8(a) BD program, an 8(a) contractor must perform certain percentages of work with its own employees. These percentages and the requirements relating to them are the same as those established for small business set-aside prime contractors, and are set forth in § 125.6 of this title.

(b) A Participant must certify in its offer that it will meet the applicable performance of work requirement. Compliance with the requirement will be determined as of the date of contract award, so that a Participant may revise its initial offer to clarify or otherwise come into compliance with the performance of work requirements. The procuring agency contracting officer must be satisfied that the Participant will meet the applicable performance of work requirement at time of award.

(c) *Indefinite delivery and indefinite quantity contracts.* (1) *Total Set-Aside Contracts.* The Participant must perform the required percentage of work and comply with the nonmanufacturer rule for each performance period of the contract—i.e., during the base term and then during each option period thereafter. However, the contracting officer, in his or her discretion, may require the Participant to perform the applicable amount of work or comply with the nonmanufacturer rule for each order.

(2) *Partial Set-Aside Contracts.* For orders awarded under a partial small business set-aside, the concern must perform the required percentage of work and comply with the nonmanufacturer rule for each performance period of the contract—i.e., during the base term and then during each option period thereafter. However, the contracting officer, in his or her discretion, may require the Participant to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under a partial set aside contract. For orders awarded under the non-set-aside portion, the concern need not comply with any limitations on subcontracting or nonmanufacturer rule requirements

(3) *Orders.* For orders that are set aside under full and open contracts or reserves, the Participant must perform the applicable amount of work or comply with the nonmanufacturer rule for each order.

(4) The applicable SBA District Director may waive the provisions in paragraphs (c)(1) and (c)(2) of this section requiring a Participant to meet the applicable performance of work requirement for each period of performance or for each order. Instead, the District Director may permit the Participant to subcontract in excess of the limitations on subcontracting where the District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance. However, the 8(a) Participant and procuring activity's contracting officer must provide written assurances that the Participant will ultimately comply with the requirements of this section prior to contract completion. The procuring activity's contracting officer does not have the authority to waive the provisions of this section requiring a Participant to meet the applicable performance of work requirements, even if the agency has a Partnership Agreement with SBA.

(5) Where the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant. Further, the contracting officer must document an 8(a) Participant's performance of work requirements as part of its performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104-6.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8261, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013]

§ 124.511 How is fair market price determined for an 8(a) contract?

(a) The procuring activity determines what constitutes a "fair market price" for an 8(a) contract.

(1) The procuring activity must derive the estimate of a current fair market price for a new requirement, or a

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requirement that does not have a satisfactory procurement history, from a price or cost analysis. This analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. The analysis must also consider any cost or pricing data that is timely submitted by SBA.

(2) The procuring activity must base the estimate of a current fair market price for a requirement that has a satisfactory procurement history on recent award prices adjusted to ensure comparability. Adjustments will take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be appropriate.

(b) Upon the request of SBA, a procuring activity will provide to SBA a written statement detailing the method it has used to estimate the current fair market price for the 8(a) requirement. This statement must be submitted within 10 working days of SBA's request. The procuring activity must identify the information, studies, analyses, and other data it used in making its estimate.

(c) The procuring activity's estimate of fair market price and any supporting data may not be disclosed by SBA to any Participant or potential contractor.

(d) The concern selected to perform an 8(a) contract may request SBA to protest the procuring activity's estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

§ 124.512 Delegation of contract administration to procuring agencies.

(a) SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25). Tracking compliance with the performance of work requirements set forth in § 124.510

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is included within the functions performed by the procuring activity as part of contract administration.

(b) This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, submit copies to the SBA servicing district office of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.

(c) SBA may conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8261, Feb. 11, 2011]

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

(a) *General.* (1) If approved by SBA, a Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

(2) A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture arrangement.

(b) *Size of concerns to an 8(a) joint venture.* (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(i) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the NAICS code assigned to the contract; and

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(ii)(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(B) For a procurement having an employee-based size standard, the procurement exceeds \$10 million;

(2) For sole source and competitive 8(a) procurements that do not exceed the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the NAICS code assigned to the 8(a) contract.

(3) Notwithstanding the provisions of paragraphs (b)(1) and (b)(2) of this section, a joint venture between a protégé firm and its approved mentor (*see* § 124.520) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and has not reached the dollar limit set forth in § 124.519.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

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

(2) Designating an 8(a) Participant as the managing venturer of the joint venture. In an unpopulated joint venture or a joint venture populated only with administrative personnel, the joint venture must designate an employee of the 8(a) managing venturer as the project manager responsible for performance of the contract. In a joint venture populated with individuals intended to perform any contracts awarded to the joint venture, the joint venture must otherwise demonstrate that performance of the contract is controlled by the 8(a) managing venturer;

(3) Stating that with respect to a separate legal entity joint venture the 8(a)

Participant(s) must own at least 51% of the joint venture entity;

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or in the case of a populated separate legal entity joint venture commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.

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

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the 8(a) Participant managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring the final original records be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;

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

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

(d) *Performance of work.* (1) For any 8(a) contract, including those between mentors and protégés authorized by §124.520, the joint venture must perform the applicable percentage of work required by §124.510. For an unpopulated joint venture or a joint venture populated only with one or more administrative personnel, the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture. The work performed by 8(a) partners to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience. For a joint venture populated with individuals intended to perform contracts awarded to the joint venture, each 8(a) Participant to the joint venture must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development.

(2)(i) In an unpopulated joint venture, where both the 8(a) and non-8(a) partners are technically subcontractors, the amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(ii) In a populated joint venture, a non-8(a) joint venture partner, or any of its affiliates, may not act as a subcontractor to the joint venture award-ee, or to any other subcontractor of the joint venture, unless the AA/BD determines that other potential subcontractors are not available, or the joint venture is populated only with administrative personnel.

(A) If a non-8(a) joint venture partner seeks to do more work, the additional work must generally be done through the joint venture, which would require the 8(a) partner(s) to the joint venture to also do additional work to meet the 40% requirement set forth in paragraph (d)(1) of this section.

(B) If a joint venture is populated only with administrative personnel, the joint venture may subcontract performance to a non-8(a) joint venture partner provided it also subcontracts work to the 8(a) partner(s) in an amount sufficient to meet the 40% requirement. The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Prior approval by SBA.* (1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

(2) Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award.

(i) After approving the structure of the joint venture in connection with the first contract, SBA will review only the addendums relating to performance of work on successive contracts.

(ii) SBA must approve the addendums prior to the award of any successive 8(a) contract to the joint venture.

(f) *Contract execution.* Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity.

(g) *Amendments to joint venture agreement.* All amendments to the joint venture agreement must be approved by SBA.

(h) *Inspection of records.* SBA may inspect the records of the joint venture without notice at any time deemed necessary.

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

(1) As part of its annual review, the 8(a) Participant(s) to the joint venture must explain for each 8(a) contract performed during the year how the performance of work requirements are being met for the contract.

(2) At the completion of every 8(a) contract awarded to a joint venture, the 8(a) Participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.

[63 FR 35739, June 30, 1998, as amended at 69 FR 29208, May 21, 2004; 76 FR 8261, Feb. 11, 2011; 77 FR 28238, May 14, 2012]

§ 124.514 Exercise of 8(a) options and modifications.

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* The procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is

no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring activity contracting officer may exercise a modification within the scope of the initial 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

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

(a) An 8(a) contract must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

(1) An 8(a) contract, whether in the base or an option year, must be terminated for the convenience of the Government if:

(i) One or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals; or

(ii) The contract is transferred or novated for any reason to another firm.

(2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.

(b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:

(1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would

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otherwise be eligible to receive the award directly as an 8(a) contract;

(3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;

(4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or

(5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if—

(i) The concern has graduated from the 8(a) BD program;

(ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owners will maintain control of the daily business operations of the concern.

(c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 days after such occurrence. The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver, and must demonstrate that the proposed transaction would meet such grounds.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in §124.507(b)(2) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is a responsible and eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring firm must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought.

(e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph

(b)(4) of this section, must also certify delegated authority to make the certification.

(f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:

(1) Voluntarily graduates from the 8(a) BD program; and

(2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.

(g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this chapter within 45 days after the contractor receives the Administrator's decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002]

§124.516 Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?

For purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring activity. A dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity, and appeals may be taken by the 8(a) contractor without SBA involvement.

§124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by

another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

(b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to §121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.

(c) A Participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in §124.501(h) to request a formal size determination where SBA cannot verify it to be small.

(d)(1) The NAICS code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/BD may appeal a NAICS code designation with respect to a sole source 8(a) requirement.

(2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a NAICS code designation may appeal the designation to SBA's OHA pursuant to §121.1103 of this title.

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under §124.112(c).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009]

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default can be made by the procuring activity contracting officer after consulting with SBA. The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the con-

tracting officer of this effort. Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default, in accordance with the Federal Acquisition Regulations (48 CFR chapter 1). SBA will have no liability for termination costs or reprocurement costs.

(b) *Termination for convenience.* After consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any disadvantaged owner of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to §124.515.

(c) *Substitution of one 8(a) contractor for another.* Where a procuring activity contracting officer demonstrates to SBA that an 8(a) contract will otherwise be terminated for default, SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of the contract without invoking the termination for convenience or waiver provisions of §124.515.

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian Tribe, ANC or NHO) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program.

(1) For a firm having a receipts-based primary NAICS code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code which is determined as of the date of SBA's acceptance of the requirement for the 8(a) BD program or \$100,000,000, whichever is less.

(2) For a firm having an employee-based primary NAICS code at time of

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program entry, the limit above which it can no longer receive sole source 8(a) contracts is \$100,000,000.

(3) SBA will not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the limit identified in paragraphs (a)(1) and (a)(2) of this section.

(b) Once the limit is reached, a firm may not receive any more 8(a) sole source contracts, but may remain eligible for competitive 8(a) awards.

(c) SBA includes the dollar value of 8(a) options and modifications in determining whether a Participant has reached the limit identified in paragraph (a) of this section. If an option is not exercised or the contract value is reduced by modification, SBA will deduct those values.

(d) A Participant's eligibility for a sole source award in terms of whether it has exceeded the dollar limit for 8(a) contracts is measured as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.

(e) The AA/BD may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring activity represents that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8262, Feb. 11, 2011; 77 FR 28238, May 14, 2012]

§ 124.520 What are the rules governing SBA's Mentor/Protégé program?

(a) *General.* The mentor/protégé program is designed to encourage approved mentors to provide various forms of business development assistance to protégé firms. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of non-8(a) contracts so that

protégé firms may more fully develop their capabilities. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé, assist the protégé with meeting the goals established in its SBA-approved business plan, and to improve its ability to successfully compete for contracts.

(b) *Mentors.* Any concern or non-profit entity that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section. This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses.

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

(i) Possesses favorable financial health;

(ii) Possesses good character;

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

(iv) Can impart value to a protégé firm due to lessons learned and practical experience gained because of the 8(a) BD program, or through its knowledge of general business operations and government contracting.

(2) Generally a mentor will have no more than one protégé at a time. However, the AA/BD may authorize a concern or non-profit entity to mentor more than one protégé at a time where it can demonstrate that the additional mentor/protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés at one time.

(3) In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit to SBA for review copies of the Federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns the filings required by the Securities and Exchange Commission for the past three years.

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

(c) *Protégés.* (1) In order to initially qualify as a protégé firm, a Participant must:

(i) Be in the developmental stage of program participation; or

(ii) Have never received an 8(a) contract; or

(iii) Have a size that is less than half the size standard corresponding to its primary NAICS code.

(2) Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination or suspension proceedings against them, and are up to date with all reporting requirements) may qualify as a protégé.

(3) A protégé firm may generally have only one mentor at a time. The AA/BD may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the business development assistance set forth in the first mentor/protégé relationship and either:

(i) The second relationship pertains to a secondary NAICS code; or

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

(4) A protégé may not become a mentor and retain its protégé status. The protégé must terminate its mentor/protégé agreement with its mentor before it will be approved as a mentor to another 8(a) Participant.

(5) SBA will not approve a mentor/protégé relationship for an 8(a) Participant with less than six months remaining in its program term.

(d) *Benefits.* (1) A mentor and protégé may joint venture as a small business for any government prime contract or subcontract, including procurements with a dollar value less than half the size standard corresponding to the assigned NAICS code and 8(a) sole source contracts, provided the protégé qualifies as small for the procurement and, for purposes of 8(a) sole source requirements, the protégé has not reached the dollar limit set forth in §124.519.

(i) SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture

on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set forth in §124.513(c).

(iii) Once a protégé firm graduates from or otherwise leaves the 8(a) BD program, it will not be eligible for any further benefits from its mentor/protégé relationship (*i.e.*, the receipts and/or employees of the protégé and mentor will generally be aggregated in determining size for any joint venture between the mentor and protégé after the protégé leaves the 8(a) BD program). Leaving the 8(a) BD program, or terminating the mentor/protégé relationship while a protégé firm is still in the program, does not, however, affect contracts previously awarded to a joint venture between the protégé and its mentor. In such a case, the joint venture continues to qualify as small for previously awarded contracts and is obligated to continue performance on those contracts.

(2) Notwithstanding the requirements set forth in §§124.105(g) and (h), in order to raise capital for the protégé firm, the mentor may own an equity interest of up to 40% in the protégé firm.

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

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement.

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

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mentor). The mentor/protégé agreement must:

(i) Address how the assistance to be provided through the agreement will help the protégé firm meet the goals established in its SBA-approved business plan;

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

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

(2) The written agreement must be approved by the AA/BD. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive 8(a) contracts.

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

(4) SBA will review the mentor/protégé relationship annually to determine whether to approve its continuation for another year.

(5) SBA must approve all changes to a mentor/protégé agreement in advance.

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

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

deny it on other grounds. If denied, the AA/BD will explain why the mentor/protégé agreement does not meet the requirements of §124.520 and give specific reasons for the decline.

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

(4) If SBA's final decision is to decline a specific mentor/protégé agreement, the 8(a) firm seeking to be a protégé cannot attempt to enter another mentor/protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The 8(a) firm may, however, submit another proposed mentor/protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor/protégé relationship.* (1) In its annual business plan update required by §124.403(a,) the protégé must report to SBA for the protégé's preceding program year:

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

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

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

(iv) All federal contracts awarded to the mentor/protégé relationship as a joint venture (designating each as an 8(a), small business set aside, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

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

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

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

(4) SBA will review the protégé's report on the mentor/protégé relationship as part of its annual review of the

firm's business plan pursuant to §124.403. SBA may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protégé agreement or that the assistance has not resulted in any material benefits or developmental gains to the protégé.

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

- (i) SBA will terminate its mentor/protégé agreement;
- (ii) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor/protégé agreement; and
- (iii) SBA may recommend to the relevant procuring agency to issue a stop work order for each Federal contract for which the mentor and protégé are performing as a small business joint venture pursuant to paragraph (d)(1) of this section in order to encourage the mentor to comply with its mentor/protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may also authorize a substitution of the protégé firm for the joint venture.

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

complied with the terms of a public agreement under 2 CFR 180.800(b).

[63 FR 35739, June 30, 1998, as amended at 69 FR 29208, May 21, 2004; 74 FR 45754, Sept. 4, 2009; 76 FR 8262, Feb. 11, 2011; 77 FR 28238, May 14, 2012]

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to 8(a) Participants, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than an 8(a) Participant willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of 8(a) status:

(1) Submission of a bid or proposal for an 8(a) sole source or competitive contract.

(2) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small disadvantaged business (SDB).

(c) *Signature Requirement.* Each offer for an 8(a) contract shall contain a certification concerning the 8(a) status of a business concern seeking the contract. An authorized official must sign the certification on the same page containing the 8(a) status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a)-(c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of 8(a) status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. 3729, et

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seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' 8(a) status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing representation or certification as an eligible 8(a) Participant, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as an eligible 8(a) Participant without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

[78 FR 38818, June 28, 2013]

**MISCELLANEOUS REPORTING
REQUIREMENTS**

§ 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

(a) Each Participant must submit semi-annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such Participant in obtaining or seeking to obtain a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

(b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

§ 124.602 What kind of annual financial statement must a Participant submit to SBA?

(a) Except as set forth in paragraph (a)(1) of this section, Participants with gross annual receipts of more than \$10,000,000 must submit to SBA audited

annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.

(1) Participants with gross annual receipts of more than \$10,000,000 which are owned by a Tribe, ANC, NHO, or CDC may elect to submit unaudited financial statements within 120 days after the close of the concern's fiscal year, provided the following additional documents are submitted simultaneously:

(i) Audited annual financial statements for the parent company owner of the Participant, prepared by a licensed independent public accountant, for the equivalent fiscal year;

(ii) Certification from the Participant's Chief Executive Officer and Chief Financial Officer (or comparable positions) that each individual has read the unaudited financial statements, affirms that the statements do not contain any material misstatements, and certifying that the statements fairly represent the Participant's financial condition and result of operations.

(2) In the first year that a Participant's gross receipts exceed \$10,000,000, a Participant may provide an audited balance sheet, with the income and cash flow statements receiving the level of service required for the previous year (review or none, depending on sales the year before the audit is required).

(3) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(4) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(iii) The concern has been a Participant less than 12 months.

(b)(1) Participants with gross annual receipts between \$2,000,000 and

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\$10,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.

(2) The servicing SBA District Director may waive the requirement for reviewed financial statements for good cause shown by the Participant.

(c) Participants with gross annual receipts of less than \$2,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.

(d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.

(e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.

(f) Notwithstanding the amount of a Participant's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.

(g) Participants owned by Tribes, ANCs, NHOs and CDCs may submit consolidated financial statements prepared by the parent entity that include schedules for each 8(a) Participant instead of separate audited financial statements for each individual 8(a)

Participant. If one Participant must submit an audited financial statement, then the consolidated statement and the schedules for each 8(a) Participant must be audited.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

§ 124.603 What reports regarding the continued business operations of former Participants does SBA require?

Former Participants must provide such information as SBA may request concerning the former Participant's continued business operations, contracts, and financial condition for a period of three years following the date on which the concern graduates or is terminated from the program. Failure to provide such information when requested will constitute a violation of the regulations set forth in this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

§ 124.604 Report of benefits for firms owned by Tribes, ANCs, NHOs and CDCs.

As part of its annual review submission, each Participant owned by a Tribe, ANC, NHO or CDC must submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.

[76 FR 8264, Feb. 11, 2011]

MANAGEMENT AND TECHNICAL ASSISTANCE PROGRAM

§ 124.701 What is the purpose of the 7(j) management and technical assistance program?

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA

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to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

§ 124.702 What types of assistance are available through the 7(j) program?

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

(a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and

(b) The identification and development of new business opportunities.

§ 124.703 Who is eligible to receive 7(j) assistance?

The following businesses are eligible to receive assistance from SBA through its service providers:

(a) Businesses which qualify as small under part 121 of this title, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(b) Businesses eligible to receive 8(a) contracts.

§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?

In addition to the management and technical assistance available under §124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

(a) Assistance to develop comprehensive business plans with specific business targets, objectives, and goals;

(b) Other nonfinancial services necessary for a Participant's growth and

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development, including loan packaging; and

(c) Assistance in obtaining equity and debt financing.

Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs

SOURCE: 63 FR 35772, June 30, 1998, unless otherwise noted.

§ 124.1001 General applicability.

(a) This subpart defines a Small Disadvantaged Business (SDB). It also establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern's status as disadvantaged. Unless specifically stated otherwise, the phrase "socially and economically disadvantaged individuals" in this subpart includes, Indian tribes, ANCs, CDCs, and NHOs.

(b) In order for a concern to represent that it is an SDB in order to receive a benefit as a prime contractor on a Federal Government procurement, it must:

(1) Be a current Participant, as defined in §124.3 of this part, in SBA's 8(a) BD as described in §124.1 of this part, program;

(2) Have been certified by SBA as an SDB within three years of the date it seeks to certify as an SDB;

(3) Have received certification from the procuring agency that it qualifies as an SDB; or

(4) Have submitted an application for SDB certification to the procuring agency and must not have received a negative determination regarding that application.

(c) A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

[73 FR 57494, Oct. 3, 2008]

§ 124.1002 What is a Small Disadvantaged Business (SDB)?

(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an

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SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) *SDB eligibility criteria.* A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit North American Industry Classification System (NAICS) code.

(i) For purposes of SDB certification, the applicable NAICS code is that which relates to the primary business activity of the concern;

(ii) For purposes related to a specific Federal Government contract, the applicable NAICS code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in §124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) *Disadvantaged status.* In assessing the personal financial condition of an individual claiming economic dis-

advantage, his or her net worth must be less than \$750,000 after taking into account the exclusions set forth in §124.104(c)(2).

(d) *Additional eligibility criteria.* (1) Except for Tribes, ANCs, CDCs, and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(2) The other eligibility requirements set forth in §124.108 for 8(a) BD program participation do not apply to SDB eligibility.

(e) *Potential for success not required.* The potential for success requirement set forth in §124.107 does not apply as an eligibility requirement for an SDB.

(f) *Joint ventures.* Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides), provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant(s) to the joint venture must have:

(i) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103(h)(3), a concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be

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affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) *Ownership restrictions for non-disadvantaged individuals.* The ownership restrictions set forth in §124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.

(h) *Full-time requirement for SDB purposes.* An SDB is considered to be managed on a full-time basis by a disadvantaged individual if such individual works for the concern during all of the hours the concern operates. For example, if a concern operates 20 hours per week and the disadvantaged manager works for the firm during those twenty hours, that individual will be considered as working full time for the firm.

[63 FR 35772, June 30, 1998, as amended at 69 FR 29208, May 21, 2004; 76 FR 8264, Feb. 11, 2011]

§ 124.1003 How does a firm become certified as an SDB?

(a) All firms that are current Participants in SBA's 8(a) BD program are automatically deemed to be certified SDBs.

(b) Any firm seeking to be certified as an SDB in order to represent that it qualifies and is eligible to obtain a benefit on a federal prime contract as an SDB may apply to the procuring agency for such certification.

(c) A procuring agency may accept a certification from another entity (*e.g.*, a private certifying entity, or a state or local government) that a firm qualifies as an SDB if the agency deems it appropriate.

[73 FR 57494, Oct. 3, 2008]

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§ 124.1004 What is a misrepresentation of SDB status?

(a) Any person or entity that misrepresents a firm's status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" ("SDB status") in order to obtain an 8(d) or SDB contracting opportunity or preference will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(b)(1) A representation of SDB status on a federal prime contract will be deemed a misrepresentation of SDB status if the firm does not meet the requirements of §124.1001(b).

(2) A representation of SDB status on a subcontract to a federal prime contract will be deemed a misrepresentation of SDB status if the firm does not have a good faith belief that it is owned and controlled by one or more socially and economically disadvantaged individuals. Any certification by a firm that SBA found not to qualify as an SDB in connection with an SDB protest or otherwise will be deemed a misrepresentation of SDB status if the firm has not overcome the reason(s) for the negative determination.

(3) Any representation of SDB status by a firm that SBA has found not to qualify as an SDB in connection with a protest or SBA-initiated SDB determination will be deemed a misrepresentation of SDB status if the firm has not overcome the reason(s) set forth in SBA's written decision.

[73 FR 57494, Oct. 3, 2008]

§ 124.1005 How long does an SDB certification last?

(a) A firm that is certified to be an SDB will generally be certified for a period of three years from the date of the certification.

(b) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(1) In connection with a protest challenging the firm's SDB status (*see* §124.1013(h)(2));

(2) In connection with an SBA-initiated SDB determination (*see* §124.1006); or

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(3) As part of an 8(a) BD annual review.

(c) A firm that completes its nine-year program term in the 8(a) BD program will continue to be deemed a certified SDB firm for a period of three years from the date of its last 8(a) annual review.

[73 FR 57494, Oct. 3, 2008]

§ 124.1006 Can SBA initiate a review of the SDB status of a firm claiming to be an SDB?

SBA may initiate an SDB determination on any firm that has been certified to be an SDB by a procuring agency or that has represented itself to be an SDB on a subcontract to a federal prime contract whenever it receives credible information calling into question the SDB status of the firm. Upon its completion of an SDB determination, SBA will issue a written decision regarding the SDB status of the questioned firm. If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision.

[73 FR 57494, Oct. 3, 2008]

§ 124.1007 Who may protest the disadvantaged status of a concern?

(a) In connection with a requirement for which the apparent successful offeror has invoked an SDB evaluation adjustment or an SDB set-aside, the following entities may protest the disadvantaged status of the apparent successful offeror:

(1) Any other concern which submitted an offer for that requirement, unless the contracting officer has found the concern to be non-responsive or outside the competitive range, or SBA has previously found the protesting concern to be ineligible for the requirement at issue;

(2) The procuring activity contracting officer; or

(3) SBA.

(b) In connection with an 8(d) subcontract, or a requirement for which the apparent successful offeror received an evaluation adjustment for proposing one or more SDB subcontractors, the procuring activity contracting officer or SBA may protest the disadvantaged status of a proposed

subcontractor. Other interested parties may submit information to the contracting officer or SBA in an effort to persuade the contracting officer or SBA to initiate a protest.

(c) An interested party seeking to protest both the disadvantaged status and size of an apparent successful SDB offeror must submit two separate protests, one as to disadvantaged status pursuant to this subpart, and one as to size pursuant to part 121 of this title. An interested party seeking to protest only size of an apparent successful SDB offeror must submit a size protest to the contracting officer pursuant to part 121.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008]

§ 124.1008 When will SBA not decide an SDB protest?

(a) SBA will not decide a protest as to disadvantaged status of any concern other than the apparent successful offeror.

(b) SBA will not normally consider a post award protest. SBA may consider a post award protest in its discretion where it determines that a protest decision after award would have a practical effect (e.g., where the contracting officer agrees to terminate the contract if the protest is sustained).

(c) SBA will not decide an untimely protest (see § 124.1020(c)).

(d) SBA will not decide a non-specific protest or one that does not present credible evidence that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's SDB application contained false or misleading information (see § 124.1021).

(e) An interested party may appeal SBA's dismissal of a protest for lack of specificity, timeliness, or a basis upon which SBA will consider a protest to Associate Administrator for Government Contracting and Business Development (AA/GC&BD) pursuant to § 124.1024.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008; 74 FR 45754, Sept. 4, 2009; 74 FR 51229, Oct. 6, 2009]

§ 124.1009 Who decides disadvantaged status protests?

In response to a protest challenging the disadvantaged status of a concern, the SBA’s AA/BD, or designee, will determine whether the concern is disadvantaged.

[76 FR 8264, Feb. 11, 2011]

§ 124.1010 What procedures apply to disadvantaged status protests?

(a) *General.* The protest procedures described in this section are separate and distinct from those governing size protests and appeals. All protests relating to whether a concern is a “small” business for purposes of any Federal program, including SDB set-asides and SDB evaluation adjustments, must be filed and processed pursuant to part 121 of this title.

(b) *Filing.* (1) All protests challenging the disadvantaged status of a concern with respect to a particular Federal procurement requirement must be submitted in writing to the procuring activity contracting officer, except in cases where the contracting officer or SBA initiates a protest.

(2) Any contracting officer who initiates a protest must submit the protest in writing to SBA in accord with paragraph (c) of this section.

(3) In cases where SBA initiates a protest, the protest must be submitted in writing to the DC/SDBCE and notification provided in accord with § 124.1022(a).

(c) *Timeliness of protest—(1) SDB evaluation adjustment and set-aside protests—*
 (i) *General.* In order for a protest to be timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of the prospective awardee in negotiated acquisitions.

(ii) *Oral protests.* An oral protest relating to an SDB set-aside or SDB evaluation adjustment made to the contracting officer within the allotted 5-day period will be considered a timely protest only if the contracting officer receives a confirming letter post-marked, FAXed, or delivered no later

than one calendar day after the date of such oral protest.

(iii) *Protests of contracting officers or SBA.* The time limitations in paragraph (c)(1)(i) 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 (c)(3) of this section.

(iv) *Untimely protests.* A protest received after the time limits set forth in this paragraph (c)(1) will be dismissed by SBA.

(2) *Section 8(d) protests.* In connection with an 8(d) subcontract, the contracting officer or SBA must submit a protest to the DC/SDBCE prior to the completion of performance by the intended 8(d) subcontractor.

(3) *Premature protests.* A protest in connection with any procurement which is submitted by any person, including the contracting officer, before bid opening or notification of intended award, whichever applies, will be considered premature, and will be returned to the protestor without action. A contracting officer that receives a premature protest must return it to the protestor without submitting it to the SBA.

(d) *Referral to SBA.* (1) Any contracting officer who receives a protest that is not premature must promptly forward it to the SBA’s DC/SDBCE, 409 3rd Street, SW, Washington, DC 20416.

(2) A contracting officer’s referral of a protest to SBA must contain the following:

(i) The written protest and any accompanying materials;

(ii) The date on which the protest was received by the contracting officer;

(iii) A copy of the protested concern’s selfrepresentation as an SDB, and the date of such self-representation; and

(iv) The date of bid opening or the date on which notification of the apparent successful offeror was sent to all unsuccessful offerors, as applicable.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008]

§ 124.1011 What format, degree of specificity, and basis does SBA require to consider an SDB protest?

(a) *Format.* An SDB protest need not be in any specific format in order for SBA to consider it.

(b) *Specificity.* A protest must be sufficiently specific to provide reasonable notice as to all grounds upon which the protested concern's disadvantaged status is challenged.

(1) SBA will dismiss a protest that merely asserts that the protested concern is not disadvantaged, without setting forth specific facts or allegations.

(2) The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely.

(c) *Basis.* SBA will consider a protest challenging whether the apparent successful offeror is owned and controlled by one or more socially and economically disadvantaged individuals, including whether one or more of the individuals claiming disadvantaged status is in fact socially or economically disadvantaged, only if the protest presents credible evidence that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008]

§ 124.1012 What will SBA do when it receives an SDB protest?

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the DC/SDBCE, or designee, will immediately notify the protestor and the contracting officer of the date the protest was received and whether it will be processed or dismissed for lack of timeliness or specificity.

(b) In cases where the protest is timely and sufficiently specific, the DC/SDBCE, or designee, will also immediately advise the protested concern of the protest and forward a copy of it to the protested concern.

(1) The DC/SDBCE, or designee, is authorized to ask the protested concern to provide any or all of the following information and documentation, completed so as to show the circumstances existing on the date of self-representation: SBA Form 1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; SBA Form 1010B, "Statement of Business Eligibility;" SBA Form 413, "Per-

sonal Financial Statement," for each individual claiming disadvantaged status; information as to whether the protested concern, or any of its owners, officers or directors, have applied for admission to or participated in the SBA's 8(a) BD program and if so, the name of the company which applied or participated and the date of the application or entry into the program; business tax returns for the last two completed fiscal years prior to the date of self-representation; personal tax returns for the last two years prior to the date of self-representation for all individuals claiming disadvantaged status, all officers, all directors and for any individual owning at least 10% of the business entity; annual business financial statements for the last two completed fiscal years prior to the date of self-representation; a current monthly or quarterly business financial statement no older than 90 days; articles of incorporation; corporate by-laws; partnership agreements; limited liability company articles of organization; and any other relevant information as to whether the protested concern is disadvantaged.

(2) SBA's disadvantaged status determination need not be limited to consideration only of the issues raised in the protest. SBA may consider other applicable criteria.

(3) Unless the protest presents specific credible information which calls into question the veracity of application or other documents previously submitted to SBA by a current Participant in SBA's 8(a) BD program, SBA will allow the Participant to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit or declaration that circumstances concerning the ownership and control of the business and the disadvantaged status of its principals have not changed since its application or entry into the program or its most recent annual review, and a copy of its most recently completed annual review.

(i) If the ownership or control of the business or the disadvantaged status of any principals have changed, the protested concern must comply with paragraph (b)(1) of this section.

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(ii) An affidavit or declaration may be allowed only if SBA admitted the protested concern to the 8(a) BD program, or conducted an annual review of the protested concern, during the 12-month period preceding the date on which SBA receives the protest, and if proceedings to suspend, terminate or early graduate the concern from the 8(a) BD program are not pending.

(c) Within 10 working days of the date that notification of the protest was received from the DC/SDBCE or designee, the protested concern must submit to the DC/SDBCE or designee, by personal delivery, FAX, or mail, the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section. Materials submitted must be received by the close of business on the 10th working day.

(1) SBA will consider only materials submitted timely, and the late or non-submission of materials needed to make a disadvantaged status determination may result in sustaining the protest.

(2) The burden is on the protested concern to demonstrate its disadvantaged status, whether or not it is currently shown on the list of qualified SDBs.

(3) The protested concern must timely submit to SBA any information it deems relevant to a determination of its disadvantaged status.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008]

§ 124.1013 How does SBA make disadvantaged status determinations in considering an SDB protest?

(a) *General.* The DC/SDBCE, or designee, will determine a protested concern's disadvantaged status within 15 working days after receipt of a protest.

(b) *Award of contract.* (1) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (h) of this section apply to the procurement in question.

(2) If SBA does not issue its determination within 15 business days (or

request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (h) of this section apply to the procurement in question.

(c) *Withdrawal of protest.* If a protest is withdrawn, SBA will not complete a new disadvantaged status determination, and a previous SDB certification will stand.

(d) *Basis for determination.* (1) Except with respect to a concern which is a current Participant in SBA's 8(a) BD program and is authorized under § 124.1013(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protested concern, SBA or others.

(2) SBA may in its discretion make a part of the protest record information already in its files, and information submitted by the protestor, the protested concern, the contracting officer, or other persons contacted for additional specific information.

(e) *Disadvantaged status.* In evaluating the social and economic disadvantage of individuals claiming disadvantaged status, SBA will consider the same information and factors set forth in §§ 124.103 and 124.104. As provided in § 124.1002(c), individuals claiming disadvantaged status must have a net worth that is less than \$750,000, after taking into account the exclusions set forth in § 124.104(c)(2).

(f) *Disadvantaged status determination.* SBA will render a written determination including the basis for its findings and conclusions.

(g) *Notification of determination.* After making its disadvantaged status determination, the SBA will immediately notify the contracting officer, the protestor, and the protested concern of its determination. SBA will promptly provide by certified mail, return receipt requested, a copy of its written determination to the same entities, consistent with law.

(h) *Results of an SBA disadvantaged status determination.* A disadvantaged status determination becomes effective immediately.

(1) A contracting officer may award a contract to a protested concern after the DC/SDBCE has determined either that the protested concern is an eligible SDB or has dismissed all protests against it. If the AA/GCBD subsequently overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the DC/SDBCE has determined is not an eligible SDB for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If the AA/GCBD affirms the initial determination finding that the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency SDB decision (the decision of the AA/SDBCE if no appeal is filed or the decision of the AA/GCBD).

(4) A concern found to be ineligible is precluded from applying for SDB certification for 12 months from the date of the final agency decision (whether by the DC/SDBCE, without an appeal, or by the AA/GCBD on appeal). A concern found to be ineligible is also precluded from representing itself as an SDB for a subcontract unless it overcomes the reasons for the protest (*e.g.*, it changes its ownership to satisfy the definition of an SDB set forth in § 124.1002).

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008, as amended at 74 FR 45754, Sept. 4, 2009; 76 FR 5684, Feb. 2, 2011]

§ 124.1014 Appeals of disadvantaged status determinations.

(a) *Who may appeal.* Appeals of protest determinations may be filed with the SBA's AA/GC&BD by the protested concern, the protestor, or the contracting officer.

(b) *Timeliness of appeal.* An appeal must be in writing and must be received by the AA/GC&BD no later than 5 working days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day time period.

(c) *Notice of appeal.* Notice of the appeal must be provided by the party bringing an appeal to the procuring activity contracting officer and either the protested concern or original protestor, as appropriate.

(d) *Grounds for appeal.* SBA will reexamine a protest determination only if there was a clear and significant error in the processing of the protest, or if the DC/SDBCE, or designee, failed to consider a significant material fact contained within the information supplied by the protestor or the protested concern. SBA will not consider protest determination appeals based on additional information or changed circumstances which were not disclosed at the time of the decision of the DC/SDBCE or designee, or which are based on disagreement with the findings and conclusions contained in the determination.

(e) *Contents of appeal.* No specific format is required for the appeal. However, the appeal must identify the protest determination which is appealed, and set forth a full and specific statement as to why the determination is erroneous under paragraph (c) of this section.

(f) The appeal will be decided by the AA/GC&BD, within 5 working days of its receipt, if practicable.

(g) 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.

(h) The decision of the AA/GC&BD, is the final decision of the SBA, and cannot be further appealed to OHA.

[63 FR 35772, June 30, 1998. Redesignated at 73 FR 57495, Oct. 3, 2008, as amended at 76 FR 5684, Feb. 2, 2011]

§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to SDB concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a SDB willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of SDB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to SDBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a SDB.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a SDB.

(c) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the SDB status of a business

concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the SDB status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of SDB status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' SDB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing SDB status representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as a SDB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a SDB pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801–3812, and any other applicable laws.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDB status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons

or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.

[78 FR 38818, June 28, 2013]

§ 124.1016 What must a concern do in order to be identified as a SDB in any Federal procurement database?

(a) In order to be identified as a SDB in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its SDB status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as a SDB in SAM fails to certify its status within one year of a status certification, the firm will not be listed as a SDB in SAM, unless and until the firm recertifies its SDB status.

[78 FR 38819, June 28, 2013]

PART 125—GOVERNMENT CONTRACTING PROGRAMS

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