



Federal Register

**Wednesday,
May 5, 2004**

Part IV

Small Business Administration

**13 CFR Parts 121, 125, and 134
Small Business Size Regulations;
Government Contracting Programs; Final
Rule**

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 125 and 134**

RIN 3245-AF16

**Small Business Size Regulations;
Government Contracting Programs**

AGENCY: Small Business Administration.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements that section of the recently enacted Veterans Benefits Act of 2003 (VBA), which addresses procurement programs for small business concerns (SBCs) owned and controlled by service-disabled veterans. According to the interim final rule, a contracting officer may restrict competition for a requirement to service-disabled veteran-owned (SDVO) SBCs. The interim final rule defines the term service-disabled veterans, explains when competition may be restricted to SDVO SBCs, and establishes procedures for protesting the status of an SDVO SBC.

DATES: This rule is effective May 5, 2004. Comments must be received on or before July 6, 2004.

ADDRESSES: You may submit comments, identified by the RIN number, by any of the following methods: through the Federal rulemaking portal at <http://www.regulations.gov> (follow the instructions for submitting comments); through e-mail at SDVOSBCProgram@sba.gov (include RIN number in the subject line of the message); or by mail to Dean Koppel, Assistant Administrator, Office of Policy and Research, 409 3rd Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research at (202) 205-7322 or at SDVOSBCProgram@sba.gov.

SUPPLEMENTARY INFORMATION: On December 16, 2003, the VBA was enacted, Public Law 108-183. Section 308 of that law amended the Small Business Act to establish a procurement program for SBCs owned and controlled by service-disabled veterans. This procurement program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met. The Veterans Benefits Act of 2003 also provides that the U.S. Small Business Administration (SBA) may verify the eligibility of any SDVO SBC.

The SBA is issuing regulations to implement this procurement program for service-disabled veterans. As discussed below, the SBA has

determined that it is necessary to issue the regulations as interim final and effective the same day it is published in the **Federal Register**. Although the SBA is issuing this rule as interim final with an immediate effective date, the Agency is seeking public comment concerning ways that the SBA can enhance this program for service-disabled veterans.

I. Justification for Publication as Interim Final Status Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. In this present case, the Agency notes that this procurement program for service-disabled veterans became effective upon enactment of the Veterans Benefits Act of 2003. Therefore, although contracting activities are required to abide by the set-aside requirements of this procurement program for service-disabled veterans, regulations are needed to implement the program and provide actual guidance. The SBA receives several telephone calls daily from contracting officials stating that they intend to set-aside requirements for service-disabled veterans and seeking guidance and clarification of this program. Consequently, the SBA believes it is necessary to implement this rule as quickly as possible.

In addition, the Federal Acquisition Regulations (FAR) currently provides a definition for service-disabled veteran-owned small business concern. As a result, there are many business concerns that are representing themselves as SDVO SBCs to COs. However, the FAR does not provide a mechanism to check the status of these representations. This has become a critical issue with the enactment of the VBA because COs may now award sole source and set-aside contracts to business concerns that represent themselves as SDVO SBCs.

The SBA's regulations provide for a mechanism to check SDVO SBC status through protests and appeals. Therefore, it is urgent that the SBA issue this regulation as interim final.

Finally, the purpose of this procurement program is to assist agencies in achieving the statutorily mandated 3% government-wide goal for procurement from service-disabled veteran-owned SBCs. When drafting the Veterans Benefits Act of 2003, Congress found that agencies were falling far short of reaching this goal. Consequently, the legislative history specifically states that Congress urges the SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement this program.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to establish procedures for determining when a business concern is a SDVO SBC, provide guidance to CO's on when and how to issue a sole source or set-aside to a SDVO SBC, and provide a mechanism to protect such status. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public interest, as it would delay the delivery of critical assistance to the Federal procurement community by a minimum of three to six months. Any such delay would be extremely prejudicial to SDVO SBCs. It is likely that CO's would not offer a procurement as a sole source or set-aside for SDVO SBCs despite the fact the statutory requirement is met, or that an SDVO SBC award would be made to a concern that is not qualified for the award, before a rule could be promulgated under standard notice and comment rulemaking procedures.

Although this rule is being published as an interim final rule, comments are hereby solicited from interested members of the public. SBA may then consider these comments in making any necessary revisions to these regulations.

II. Justification for Immediate Effective Date of Interim Final Rule

The APA requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. § 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the **Federal Register**.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule

takes effect. For the reasons set forth above in I, Justification of Publication of Interim Final Status Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA also believes, based on its contacts with interested members of the public, that there is strong interest in immediate implementation of this rule. SBA is aware of many procuring activities and business concerns that will be assisted by the immediate adoption of this rule.

Section-by-Section Analysis

In § 121.401, SBA is amending the size regulations to state that the Service-Disabled Veteran-Owned Small Business Concern Program (SDVO Program) is subject to size determinations. SBA is also amending the size regulations, at § 121.1001, to provide that the following may protest the size of a SBC in connection with a particular SDVO Program procurement: any offeror on an SDVO Program set-aside; the CO; the SBA Government Contracting Area Director; and the Associate Administrator for Government Contracting.

The SBA is also amending § 125.6 to provide that SDVO SBCs awarded a contract as a result of a set-aside must meet certain limitations on subcontracting requirements. These subcontracting limitations are required for all SBCs awarded a contract as a result of their SBC status. For purposes of the SDVO SBC Program, the regulation allows the SDVO SBC prime contractor to utilize other SDVO SBCs to help it meet these subcontracting limitations.

SBA has added a new subsection 125.8 to address the SDVO Program. Section 125.8 sets forth the definitions important to the program, including several that were defined by statute. For example, the Veterans Benefits Act of 2003 defines the term "contracting officer" while the Small Business Act defines the terms "veteran," "service-disabled veteran" and "small business owned and controlled by service-disabled veterans." For those terms, SBA merely reiterated the definition set forth in statute.

The Small Business Act defines the term veteran by referencing 38 U.S.C. 101, and therefore these regulations reference that statute as well. Section 101 of Title 38 defines the term "veteran" to mean a person who served in the active military, naval, or air service, and who was discharged or released under conditions other than dishonorable. The Small Business Act

also defines the term "service-disabled veteran" as one with a disability that is service-connected, as defined by 38 U.S.C. 101. Section 101 of Title 38 defines the term "service-connected disability" as a disability that was incurred or aggravated in line of duty in the active military, naval, or air service.

The Small Business Act further defines the term "owned and controlled by service-disabled veterans" to mean: (1) A SBC that is not less than 51% owned by one or more service-disabled veterans; and (2) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such a veteran. Neither the Small Business Act nor the Veterans Benefits Act of 2003 defined the terms referenced in that definition, such as "permanent and severe disability," "spouse," or "permanent caregiver." When possible, such as for the definition of "spouse," SBA utilized the definition set forth in 38 U.S.C. 101, which sets forth definitions necessary for statutory programs for Veteran's Benefits.

For the term "permanent and severe disability," SBA referred to the regulations promulgated by the U.S. Department of Veteran's Affairs (VA) for guidance. The VA makes determination on permanent and "total" disability for purposes of determining pension benefits and other compensation for veterans. When discussing "total" disability, the VA's regulations often refer to a severe disability. Accordingly, SBA believes that it should rely on these determinations of permanent and total disability by the VA to determine whether a veteran is permanently and severely disabled for purposes of this procurement program.

With respect to the definition of the term "permanent caregiver," SBA reviewed several definitions for caregiver or a similar term set forth in the VA's regulations and state sources. In addition, the SBA reviewed the purpose and intent of this reference in the Veterans Benefits Act of 2003. For purposes of a SDVO SBC, a permanent caregiver will be the person managing the business concern for the service-disabled veterans with a permanent and severe disability. Therefore, the SBA believes that a permanent caregiver can be the spouse, or an individual 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran. Although the permanent care-giver may reside in the same household as the

service-disabled veteran, he or she is not required to do so. In the case of a service-disabled veteran lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody.

SBA has also set forth guidance on the ownership criteria of a service-disabled veteran-owned SBC. In § 125.9, SBA explains that ownership must be direct and that stock options are given present effect when they are held by non-service disabled veterans. This is consistent with SBA's other programs, including the 8(a) Business Development Program.

In § 125.10, the SBA sets forth the criteria for determining who controls a service-disabled veteran-owned SBC. The regulation provides that the management and daily business operations of the concern must be controlled by a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver). This means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver). SBA utilizes the same criteria for its 8(a) BD Program and SBA believes that this definition has worked well in determining who controls a business concern for purposes of eligibility into the 8(a) BD Program. In addition, SBA and its Office of Hearings and Appeals (OHA) has established policy on this criteria that will be helpful for this program.

SBA has added § 125.12 to address whether an SDVO SBC may have affiliates and § 125.13 to address whether participants in SBA's other programs (such as the HUBZone or 8(a) BD Programs) may be SDVO SBCs. SBA has received several inquiries from the general public on these topics and therefore feels it is necessary to address them in the regulation. With § 125.12, SBA explains that a concern may have affiliates so long as the aggregate size of the concern and all its affiliates is small as defined in part 121. With § 125.13, SBA explains that participants in SBA's other programs may qualify as SDVO SBCs if they meet the eligibility requirements set forth in this regulation.

These regulations also address contracting with SDVO SBCs. In § 125.14, SBC explains that service-disabled veteran-owned contracts are those awarded to an SDVO SBC via a sole source award or a set-aside based on competition restricted to SDVO SBCs. To be eligible to receive one of these contracts, § 125.15 explains that a

business concern must be small pursuant to the NAICS code assigned to the procurement and be an SDVO SBC.

In addition, the regulations allow SDVO SBCs to joint venture with other SBCs for an SDVO contract so long as certain conditions are met. First, the venture partners must meet certain size requirements, similar to those for other programs and similar to those set forth in 13 CFR 121.103(f), which sets forth exclusions from affiliation for certain joint ventures. In addition, SBA requires the joint venture to have a written agreement that specifically names the SDVO SBC as the managing venturer, states that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC and specifies the responsibilities of each party with respect to the contract. These requirements ensure that the contract benefits will go to the SDVO SBC, since this is the purpose of the program.

Section 125.15 also explains that an SDVO SBC that is a nonmanufacturer may submit an offer on a sole source or set-aside service-disabled veteran-owned contract if it meets the requirements of the non-manufacturer rule set forth in 13 CFR § 121.406(b)(1). Section 121.406(b)(1) outlines the requirements all SBCs must meet to bid as a nonmanufacturer for a contract in which it receives some type of preference for its status as a SBC. These requirements are: (1) The SBC (together with its affiliates) cannot exceed 500 employees; (2) it is primarily engaged in the wholesale or retail trade and normally sells the items being supplied to the general public; and (3) it will supply the end items of a small business manufacturer or processor made in the United States or obtains a waiver of such requirements.

Section 125.16 explains that status as an SDVO SBC does not guarantee receipt of a contract. The regulation states that SDVO SBCs must market their capabilities to appropriate procuring agencies in order to increase their prospects of having a procurement set-aside for SDVO SBCs. Likewise, § 125.17 states that the contracting officer for the contracting activity makes the decision as to whether a contract opportunity should be set-aside for SDVO SBCs.

The Veterans Benefits Act of 2003 specifically states that a contracting activity may not make a requirement available for an SDVO SBC if the activity would otherwise fulfill that requirement through award to Federal Prison Industries, Inc. or through the Javits-Wagner-O'Day Act. Section 125.18 states the same as the statute.

Section 125.19 addresses when a CO may set-aside a requirement for SDVO SBCs. This regulation provides that the CO should look at the 8(a), HUBZone, and SDVO Program before considering setting-aside the requirement for SBCs. If the CO does decide to set-aside the requirement for SDVO SBCs, he must have a reasonable expectation that at least two responsible SDVO SBCs will submit offers and that award can be made at fair market price.

Section 125.20 addresses when a CO may award a sole source contract to an SDVO SBC. The regulations, like the Veterans Benefits Act of 2003, provides that a CO may award a sole source contract to an SDVO SBC when: (1) The anticipated award price of the contract, including options, will not exceed \$5,000,000 for a requirement within the NAICS codes for manufacturing or \$3,000,000 for a requirement within all other NAICS codes; (2) two or more SDVO SBCs are not likely to submit offers; (3) an SDVO SBC is a responsible contractor able to perform the contract; and (4) contract award can be made at a fair and reasonable price.

The regulations provide, at § 125.20, that CO's may set aside requirements at or below the simplified acquisition threshold for consideration among SDVO SBCs, using simplified acquisition procedures.

The regulations also address protests for this program. Because SDVO SBCs will be attesting to their eligibility at the time of offer, and not through a certification process established by the SBA, it is important to have some mechanism to check eligibility for receipt of a contract issued as a sole source or set-aside for SDVO SBCs.

Section 125.22 addresses who may protest the status of an SDVO SBC. This regulation, similar to those promulgated for SBA's certification programs, provides that for sole source procurements, SBA or the CO may protest the proposed awardee's status. For competitive set-asides, any interested party (any offeror, the SBA, or CO) may protest the apparent successful offeror's SDVO SBC status.

Section 125.23 explains how one files an SDVO status protest. Protests relating to the concern's size must still be processed pursuant to 13 CFR part 121. Protests relating to the status of an SDVO will be processed by SBA's Associate Administrator for Government Contracting (AA/GC). The protest must be in writing, and set forth specific grounds for a protest. For negotiated acquisitions, the protest must be submitted by the close of business on the fifth business day after notification by the CO of the apparent successful

offeror. For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening.

The regulations also require a referral letter from the CO, when submitting a protest to SBA. The referral letter will describe the procurement so that SBA has enough facts to determine whether the protest was submitted on time and by an interested party.

When reviewing an SDVO protest, in cases where the protest is based on a service-connected disability or veteran status, the AA/GC will only consider a protest alleging that the owner or owners cannot provide documentation from the VA to show that they meet the definition of service-disabled veteran. When determining a protest related to an issue of ownership and control, the AA/GC will consider a protest only if the protestor presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protestor must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran or that the veteran does not have a permanent and severe disability.

Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it. SBA will dismiss all protests that are determined to be premature, untimely, nonspecific, or based on non-protestable allegations. The protestor will have the right to appeal the dismissal to the SBA's OHA in accordance with 13 CFR part 134.

The regulations further provide that if SBA determines the protest is timely, sufficiently specific and is based upon protestable allegations, it will notify the protested concern of the protest and of its right to submit information responding to the protest within five business days from the date of the notice, and forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available. The SBA will determine the SDVO SBC status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant SBA. However, if SBA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

SBA will notify the contracting officer, the protestor, and the protested

concern in writing of its determination. SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, the concern may not submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (e.g., it meets the size standard under a different NAICS code or changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

Finally, the regulations, at § 125.29, address criminal and civil penalties for false representations with respect to SDVO status and eligibility for an SDVO contract. Compliance with Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

This action meets applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

This regulation will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, the SBA determines that this rule has no federalism implications warranting preparation of a federalism assessment.

Because this rule has been issued as interim final, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act analysis.

OMB determined that this rule constitutes a "significant regulatory action" under Executive Order 12866. The SBA's Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

A. General Considerations

1. Is There a Need for the Regulatory Actions?

Yes. The SBA is statutorily authorized to administer the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program. The SDVO SBC Program is established pursuant to Public Law 108–183, the Veterans Benefits Act of 2003. Section 308 of that law amended the Small Business Act to establish a procurement program for

SBCs owned and controlled by service-disabled veterans. This procurement program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met. The VBA also provides that the SBA may verify the eligibility of any SDVO SBC.

The SBA is issuing regulations to implement this procurement program for service-disabled veterans. The Agency notes that this procurement program for service-disabled veterans became effective upon enactment of the VBA. Therefore, although contracting activities are required to abide by the set aside requirements of this procurement program for service-disabled veterans, regulations are needed to implement the program and provide further guidance. The SBA receives several telephone calls daily from contracting officials seeking guidance and clarification for this program, stating that they intend to set aside requirements for service-disabled veterans. Consequently, the SBA believes that this regulation is necessary and that it must be implemented as quickly as possible.

In addition, the purpose of this procurement program is to assist agencies in achieving the statutorily mandated 3% government-wide goal for procurement from SDVO SBCs. Congress found that agencies were falling far short of reaching this goal. Consequently, the legislative history specifically states that Congress urges the SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement this program. Thus, the SBA must issue regulations implementing this program and must do so with an interim final rule.

2. Alternatives

The SBA must implement this program through regulations. There are no practical alternatives to the implementation of this rule. Issuance of policy directives, for example, which are not generally published material like regulations, would hinder a SBC's access to this needed information.

One alternative the SBA did consider for SDVO SBCs was proposing a certification program, similar to its 8(a) Business Development and HUBZone Programs. The statute implementing those programs discusses certain certification and program procedures. The SBA did not believe such a certification program was necessary to implement the VBA or was required by the VBA. Rather, the SDVO SBC will be able to self-represent its status to the contracting activity as part of its offer. The contracting officer, the SBA, or

other SDVO SBCs may protest this representation. If the protest is specific, the SBA will review the protested firm to determine whether it meets the program's requirements. A similar protest procedure is used for small business set-asides.

B. Potential Benefits and Costs of This Regulation

SDVO SBCs will be the primary beneficiaries of this rule. Specifically, 15 U.S.C. 664(g), (502(b)), Public Law 106–50, August 17, 1999), established a 3 percent prime contracting and subcontracting goal for SDVO SBCs for Federal contracting. This statutory provision did not, however, establish a procurement mechanism to encourage contracting activities to award contracts to SDVO SBCs. On December 16, 2003, Public Law 108–183, the VBA, was signed into law by the President. Section 308 of the VBA revised the Small Business Act to add new section 36 (15 U.S.C. 657f, a procurement program for SDVO SBCs. This program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met.

The SBA cannot accurately determine how many concerns will be competing for SDVO SBC contract awards because there is insufficient data on SDVO SBCs ready and able to perform on a government contract to support a reasonable estimate. However, a review of the data available from several different sources evidences the following.

According to the Department of Veterans Affairs (DVA), there were 2.5 million veterans with a service connected disability. (See <http://www.va.gov/vetdata/demographics/index.htm>). This does not mean that each of those veterans own a SBC or own a business concern that would qualify for the program. Thus, the SBA looked at data available from the state of California, the only state that has a similar SDVO SBC Program. (See <http://www.ca.gov>). In Fiscal Year (FY) 2001, California awarded contracts to 832 Disabled Veteran Business Enterprises (DVBEs). In FY 2002, California awarded 2.8% of all State contract actions to 973 DVBEs. The dollar value of contract awards for 2001 and 2002 was not readily available. In FY 2003, California awarded \$142,670,222, or 2.7% of all State contract actions to DVBEs. California requires DVBE Program participants to be a disabled veteran. SBA could not determine how many DVBEs were small business concerns. The SBA welcomes comments

discussing other State-level DVBE Programs.

In addition, the SBA reviewed the 1992 Economic Census data reported under "Characteristics of Business Owners." (See <http://www.census.gov>.) This data revealed that disabled veterans represented 1.8% of all businesses, or approximately 310,557 businesses. The U.S. Bureau of the Census did not distinguish between small and large businesses or whether the veteran's disability status was based on a "service-connected" disability as defined in 38 U.S.C. 101.

Therefore, the SBA also reviewed information contained in the U.S. Department of Defense's Central Contractor Registration (CCR) database. There are 4,825 SDVO SBCs registered in CCR. This represents a small portion, 15.9% of the 30,434 veteran-owned businesses registered in CCR. Again, it is not known what percentage of the service-disabled veterans based their representation on the "service-connected" disability as defined by 38 U.S.C. 101.

Finally, the SBA reviewed data from the Federal Procurement Data System. In FY 2001, there were 9,142 contract actions awarded to SDVO SBCs in the amount of \$554,167,000. This represented .25% of all Federal contracts awarded. In FY 2002, 7,131 contract actions were awarded to SDVO SBCs in the amount of \$298,901,000. This represented .13% of all Federal contracts awarded.

Although there are over 2 million service-disabled veterans, only a small portion own small businesses. However, it is assumed that the establishment of a sole source and set-aside procurement vehicle for SDVO SBCs will attract more of these entities to the Federal procurement arena. In addition, according to the data set forth above, few contracts were awarded to SDVO SBCs in the Federal and State arenas. This number could increase as a result of the implementation of the VBA through this regulation. Nonetheless, based on the relatively small percentage of SDVO SBCs (2.4%) registered in the CCR (4,852), as compared to the total number of SBCs (201,742), the SBA believes that this rule will not have a major impact on SBCs in the Federal procurement arena.

The SBA welcomes comments discussing the potential number of concerns that could become eligible under this rule. The SBA also specifically requests comments on the rule's impact on current small business participants.

With respect to who will benefit from this regulation, the SBA notes that it

believes currently eligible SDVO SBCs will benefit immediately since they are ready and able to tender an offer for a Federal procurement. In addition, Federal government agencies will also benefit because they will be able to tap the resources of SDVO SBCs using a sole source or set-aside mechanism and therefore have more opportunities to achieve their SDVO SBC goals. This rule will assist agencies in meeting their federally-mandated goal to award contracts to SDVO SBCs.

SBA estimates that the Federal government will require no additional appropriations for agencies to implement this program. The awards would come from existing appropriated funds and current agency procurement needs and therefore there would be no increase in the cost to the Government. Further, while some agencies have actively sought SDVO SBCs, the SBA expects an increase in contract awards made to SDVO SBCs due to the enactment of Public Law 108-183 and the corresponding increase of contract opportunities made available through this contracting mechanism.

SBA estimates that implementation of this regulation for SDVO SBCs will require no additional proposal costs under this program as compared to submitting proposals under any other small business set-aside program. In addition, SDVO SBCs currently represent their status for purposes of data collecting in small business goaling in accordance with 15 U.S.C. 644(g).

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

13 CFR Part 125

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

13 CFR Part 134

Administrative practice and procedure, Organization and functions (government agencies).

■ For the reasons set forth in the preamble, amend parts 121, 125, and 134 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for 13 CFR part 121 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c) 662(5), and 657f; Sec. 304, Pub.

L. 103-403, 108 Stat. 4175, 4188; Pub. L. 106-24, 113 Stat. 39.

§ 121.401 [Amended]

■ 2. Amend § 121.401 by adding the phrase "the Service-Disabled Veteran-Owned Small Business Concern program" after the phrase "the HUBZone Program."

■ 3. Amend § 121.1001 by adding paragraph (a)(8) to read as follows:

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

(a)* * *

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

- (i) Any concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;
- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director; and
- (iv) The Associate Administrator for Government Contracting, or designee.

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 4. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637, 744, and 657f; 31 U.S.C. 9701, 9702.

■ 5. Amend § 125.1 by revising the second sentence to read as follows:

§ 125.1 Programs included.

* * * There are five main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; the Certificate of Competency program; and Service-Disabled Veteran-Owned Small Business Concern contracting assistance.* * *

■ 6. In § 125.6, redesignate paragraphs (b), (c), (d), (e), (f), and (g) as paragraphs (c), (d), (e), (f), (g), and (h), respectively, and add new paragraph (b) to read as follows:

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

* * * * *

(b) An SDVO SBC prime contractor can subcontract part of an SDVO contract (as defined in § 125.15) provided:

- (1) In the case of a contract for services (except construction), the SDVO SBC spends at least 50% of the cost of the contract performance incurred for personnel on the concern's

employees or on the employees of other SDVO SBCs;

(2) In the case of a contract for general construction, the SDVO SBC spends at least 15% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other SDVO SBCs;

(3) In the case of a contract for construction by special trade contractors, the SDVO SBC spends at least 25% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other SDVO SBCs; and

(4) In the case of a contract for procurement of supplies or products (other than procurement from a non-manufacturer in such supplies or products), at least 50% of the cost of manufacturing the supplies or products (not including the costs of materials), will be performed by the SDVO SBC prime contractor or other SDVO SBCs.

* * * * *

■ 7. Add Subpart A, consisting of § 125.8, to read as follows:

Subpart A—Definitions for the Service-Disabled Veteran-Owned Small Business Concern Program

§ 125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

(a) *Contracting Officer* has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)).

(b) *Interested Party* means the contracting activity's contracting officer, the SBA or any concern that submits an offer for a specific SDVO contract.

(c) *Permanent caregiver* is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran. In the case of a service-disabled veteran lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one "permanent caregiver" per service-disabled veteran.

(d) *Service-Disabled Veteran with a Permanent and Severe Disability* means a veteran with a service-connected disability that has been determined by the U.S. Department of Veterans Affairs to have a permanent and total disability for purposes of receiving disability compensation or a disability pension.

(e) *Service-Connected* has the meaning given that term in section 101(16) of Title 38, United States Code.

(f) *Service-disabled veteran* is a veteran with a disability that is service-connected.

(g) *SBC owned and controlled by service-disabled veterans* (also known as a Service-Disabled Veteran-Owned SBC) is a concern—

(1) Not less than 51% of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more service-disabled veterans;

(2) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran; and

(3) That is small as defined by § 125.11.

(h) *Spouse* has the meaning given the term in section 101(16) of Title 38, United States Code.

(i) *Veteran* has the meaning given the term in section 101(2) of Title 38, United States Code.

■ 8. Add subpart B, consisting of §§ 125.9 through 125.13, to read as follows:

Subpart B—Eligibility Requirements for the SDVO SBC Program

Sec.

125.9 Who does SBA consider to own an SDVO SBC?

125.10 Who does SBA consider to control an SDVO SBC?

125.11 What size standards apply to SDVO SBCs?

125.12 May an SDVO SBC have affiliates?

125.13 May 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, Very Small Businesses, or Women-Owned Small Businesses qualify as SDVO SBCs?

§ 125.9 Who does SBA consider to own an SDVO SBC?

A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

(a) *Ownership must be direct.* Ownership by one or more service disabled veterans must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement.

Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by service-disabled veterans where the trust is

revocable, and service-disabled veterans are the grantors, trustees, and the current beneficiaries of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51% of every class of partnership interest must be unconditionally owned by one or more service-disabled veterans. 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% of each class of member interest must be unconditionally owned by one or more service-disabled veterans.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more service-disabled veterans.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-service-disabled veterans 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) *Change of ownership.* A concern may change its ownership or business structure so long as one or more service-disabled veterans own and control it after the change.

§ 125.10 Who does SBA consider to control an SDVO SBC?

(a) *General.* To be an eligible SDVO SBC, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

(b) *Managerial position and experience.* A service-disabled veteran (or in the case of a service-disabled

veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

(c) *Control over a partnership.* In the case of a partnership, one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must serve as general partners, with control over all partnership decisions.

(d) *Control over a limited liability company.* In the case of a limited liability company, one or more service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as managing members, with control over all decisions of the limited liability company.

(e) *Control over a corporation.* One or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must control the Board of Directors of the concern. Service-disabled veterans are considered to control the Board of Directors when either:

(1) One or more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or

(2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

§ 125.11 What size standards apply to SDVO SBCs?

(a) At time of contract offer, an SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract.

(b) If the contracting officer is unable to verify that the SDVO SBC is small, the concern shall be referred to the responsible SBA Government Contracting Area Director for a formal

size determination in accordance with part 121 of this chapter.

§ 125.12 May an SDVO SBC have affiliates?

A concern may have affiliates provided that the aggregate size of the concern and all its affiliates is small as defined in part 121 of this chapter.

§ 125.13 May 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, Very Small Businesses, or Women-Owned Small Businesses qualify as SDVO SBCs?

Yes, 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, Very Small Businesses, and Women-Owned SBCs, may also qualify as SDVO SBCs if they meet the requirements in this subject.

■ 9. Add Subpart C, consisting of §§ 125.14 through 125.23, to read as follows:

Subpart C—Contracting with SDVO SBCs

Sec.

125.14 What are SDVO contracts?

125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

125.16 Does SDVO SBC status guarantee receipt of a contract?

125.17 Who decides if a contract opportunity for SDVO competition exists?

125.18 What requirements are not available for SDVO contracts?

125.19 When may a contracting officer set-aside a procurement for SDVO SBCs?

125.20 When may a contracting officer award sole source contracts to SDVO SBCs?

125.21 Are there SDVO contracting opportunities at or below the simplified acquisition threshold?

125.22 May SBA appeal a contracting officer's decision not to reserve a procurement for award as an SDVO contract?

125.23 What is the process for such an appeal?

§ 125.14 What are SDVO contracts?

SDVO contracts are contracts awarded to an SDVO SBC through a sole source award or a set-aside award based on competition restricted to SDVO SBCs.

§ 125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) *Representation of SDVO SBC status.* At the time an SDVO SBC submits its offer on a specific contract, it must represent to the contracting officer that:

- (1) It is an SDVO SBC;
- (2) It is small under the NAICS code assigned to the procurement;
- (3) It will meet the percentage of work requirements set forth in § 125.6;

(4) If applicable, it is an eligible joint venture; and

(5) If applicable, it is an eligible nonmanufacturer.

(b) *Joint ventures.* An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract.

(1) Size of concerns to an SDVO SBC joint venture.

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

(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;

(ii) For sole source and competitive SDVO SBC procurements that do not exceed the dollar levels identified in paragraphs (b)(1)(i)(A) and (B) of this section, an SDVO SBC 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 SDVO 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 SDVO contract.

(2) Contents of joint venture agreement. Every joint venture agreement to perform an SDVO contract must contain a provision:

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

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the SDVO contract;

(iii) Stating that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC(s);

(iv) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract;

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

(vi) Requiring the final original records be retained by the managing

venturer upon completion of the SDVO contract performed by the joint venture;

(3) Performance of work. For any SDVO contract, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(4) Contract execution. The procuring activity will execute an SDVO contract in the name of the joint venture entity or SDVO SBC.

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

(c) *Non-manufacturers.* An SDVO SBC which is a non-manufacturer may submit an offer on an SDVO contract for supplies if it meets the requirements of the non-manufacturer rule set forth at § 121.406(b)(1) of this chapter.

§ 125.16 Does SDVO SBC status guarantee receipt of a contract?

No, SDVO SBCs should market their capabilities to appropriate procuring agencies in order to increase their prospects of having a procurement set-aside for SDVO contract award.

§ 125.17 Who decides if a contract opportunity for SDVO competition exists?

The contracting officer for the contracting activity decides if a contract opportunity for SDVO competition exists.

§ 125.18 What requirements are not available for SDVO contracts?

A contracting activity may not make a requirement available for a SDVO contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 *et seq.*, as amended; or

(b) An 8(a) participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has consented to release of the requirement from the section 8(a) program.

§ 125.19 When may a contracting officer set-aside a procurement for SDVO SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to § 125.18.

(b) If the contracting officer determines that § 125.18 does not apply, the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the

requirement as a small business set-aside.

(c) If the CO decides to set-aside the requirement for competition restricted to SDVO SBCs, the CO must:

(1) Have a reasonable expectation that at least two responsible SDVO SBCs will submit offers; and

(2) Determine that award can be made at fair market price.

§ 125.20 When may a contracting officer award sole source contracts to SDVO SBCs?

A contracting officer may award a sole source contract to an SDVO SBC only when the contracting officer determines that:

(a) None of the provisions of §§ 125.18 or 125.19 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) \$5,000,000 for a requirement within the NAICS codes for manufacturing, or

(2) \$3,000,000 for a requirement within all other NAICS codes;

(c) A SDVO SBC is a responsible contractor able to perform the contract; and

(d) Contract award can be made at a fair and reasonable price.

§ 125.21 Are there SDVO contracting opportunities at or below the simplified acquisition threshold?

Yes, if the requirement is at or below the simplified acquisition threshold, the contracting officer may set-aside the requirement for consideration among SDVO SBCs using simplified acquisition procedures or may award a sole source contract to an SDVO SBC.

§ 125.22 May SBA appeal a contracting officer's decision not to reserve a procurement for award as an SDVO contract?

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVO sole source or a SDVO set-aside contract at or above the simplified acquisition threshold.

§ 125.23 What is the process for such an appeal?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVO contract, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

■ 10. Add Subpart D, consisting of §§ 125.24 through 125.28, to read as follows:

Subpart D—Protests Concerning SDVO SBCs

Sec.

125.24 Who may protest the status of an SDVO SBC?

125.25 How does one file a service disabled veteran-owned status protest?

125.26 What are the grounds for filing an SDVO SBC protest?

125.27 How will SBA process an SDVO protest?

125.28 What are the procedures for appealing an SDVO status protest?

§ 125.24 Who may protest the status of an SDVO SBC?

(a) *For Sole Source Procurements.* SBA or the contracting officer may protest the proposed awardee's service-disabled veteran status.

(b) *For Competitive Set-Asides.* Any interested party may protest the apparent successful offeror's SDVO SBC status.

§ 125.25 How does one file a service disabled veteran-owned status protest?

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether an eligible SDVO SBC is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the SDVO SBC and whether the concern meets the SDVO SBC requirements set forth in § 125.15, SBA will process each protest concurrently, under the procedures set forth in part 121 of this chapter and this

part. SBA does not review issues concerning the administration of an SDVO contract.

(b) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient.

(c) *Filing.* An interested party, other than the contracting officer or SBA, must deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer. The contracting officer or SBA must submit their written protest directly to the Associate Administrator for Government Contracting.

(d) *Timeliness.* (1) For negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(2) For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening.

(3) Any protest submitted after the time limits is untimely, unless it is from SBA or the CO.

(4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.

(e) *Referral to SBA.* The contracting officer must forward to SBA any nonpremature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send all protests, along with a referral letter, directly to the Associate Administrator for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or by fax to (202) 205-6390, marked Attn: Service-Disabled Veteran Status Protest. The CO's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the CO; whether the contract was sole source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the CO;

and whether a contract has been awarded.

§ 125.26 What are the grounds for filing an SDVO SBC protest?

(a) *Status.* In cases where the protest is based on a service-connected disability or veteran status, the Associate Administrator for Government Contracting will only consider a protest alleging that the owner(s) cannot provide documentation from the U.S. Department of Veterans Affairs or U.S. Department of Defense to show that they meet the definition of service-disabled veteran set forth in § 125.8; or

(b) *Ownership and control.* In cases where the protest is based on ownership and control, the Associate Administrator for Government Contracting will consider a protest only if the protestor presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protestor must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran or that the veteran does not have a permanent and severe disability.

§ 125.27 How will SBA process an SDVO protest?

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. The dismissal notice must also advise the protestor of his/her right to appeal the dismissal to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and of its right to submit information responding to the protest within five business days from date of the notice; and

(2) Forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available.

(d) *Time period for determination.* SBA will determine the SDVO SBC

status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant. SBA. If SBA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(e) *Notification of determination.* SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination.

(f) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, the concern may not submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (e.g., it meets the size standard under a different NAICS code or changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

§ 125.28 What are the procedures for appealing an SDVO status protest?

The protested concern, the protestor, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter.

■ 11. Add Subpart E, consisting of § 125.29, to read as follows:

Subpart E—Penalties and Retention of Records

§ 125.29 What penalties may be imposed under this part?

(a) *Suspension or debarment.* The Agency debaring official may suspend or debar a person or concern pursuant to the procedures set forth in part 145 of this chapter. The contracting agency debaring official may debar or suspend a person or concern under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4.

(b) *Civil penalties.* Persons or concerns are subject to severe civil 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.

(c) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDVO status of a SBC in connection with procurement programs pursuant to section 16 of the Small Business Act, 15 U.S.C. 645, as amended; 18 U.S.C. 1001; and 31 U.S.C. 3729–3733. Persons or concerns also 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.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 12. The authority citation for 13 CFR part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(1), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

■ 13. Amend § 134.102 by redesignating paragraphs (q) and (r) as paragraphs (r) and (s) respectively and inserting a new paragraph (q) to read as follows:

§ 134.102 Jurisdiction of OHA.
* * * * *

(g) Appeals from the Service-Disabled Veteran-owned SBC Program ownership and control status under part 125 of this chapter;

* * * * *

Dated: March 26, 2004.

Hector V. Barreto,
Administrator.

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