Proposed Rules

Federal Register
Vol. 83, No. 233
Tuesday, December 4, 2018

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

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, and 129

RIN 3245–AG86

National Defense Authorization Acts of 2016 and 2017, Recovery Improvements for Small Entities After Disaster Act of 2015, and Other Small Business Government Contracting

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is proposing to amend its regulations to implement several provisions of the National Defense Authorization Acts (NDAA) of 2016 and 2017 and the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), as well as implementing other clarifying amendments. The proposed rule would clarify that contracting officers have the authority to request information in connection with a contractor's compliance with applicable limitations on subcontracting clauses; provide exclusions for purposes of compliance with the limitations on subcontracting for certain contracts performed outside of the United States, environmental remediation contracts, and information technology service acquisitions that require substantial cloud computing; require a prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals; establish that failure to provide timely subcontracting reports may constitute a material breach of the contract; clarify the requirements for size and status recertification; and limit the scope of Procurement Center Representative reviews of Department of Defense acquisitions performed outside of the United States and its territories. The proposed rule would also authorize agencies to receive double credit for small business goaling achievements as announced in SBA's scorecard for local area small business set asides in connection with a disaster. Finally, SBA is proposing to remove the kit assembler exception to the non-manufacturer rule.

DATES: Comments must be received on or before February 4, 2019.

ADDRESSES: You may submit comments, identified by RIN 3245–AG86, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *For mail, paper, disk, or CD–ROM submissions:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.
- *Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to *brenda.fernandez@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205–7337; *brenda.fernandez@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. National Defense Authorization Act for Fiscal Year 2016, Public Law 114–92, 129 Stat. 726, November 25, 2015 (NDAA of 2016)

Posting Notice of Substantial Bundling

Section 863 of the NDAA of 2016 amended section 15(e)(3) of the Small Business Act (15 U.S.C. 644(e)(3)) to provide that if the head of a contracting agency determines that an acquisition plan involves a substantial bundling of contract requirements, the head of the contracting agency shall publish a notice of such determination on a public website within 7 days of making such determination. Section 863 also amended section 44(c)(2) of the Small Business Act (15 U.S.C. 657q(c)(2)) to provide that upon determining that a consolidation of contract requirements is necessary and justified, the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO) shall publish a notice on a public website that such determination has been made. An agency may not issue the solicitation any earlier than 7 days after publication of the notice. The SPE or CAO must also publish the justification along with the solicitation. The requirement may be delegated. SBA proposes to amend § 125.2(d) by adding new paragraphs (d)(1)(v) and (d)(7) to implement these changes.

II. National Defense Authorization Act for Fiscal Year 2017, Public Law 114–328, 130 Stat. 2000, December 23, 2016 (NDAA of 2017)

Procurement Center Representative Reviews

Section 1811 of the NDAA of 2017 amended section 15(l) of the Small Business Act (15 U.S.C. 644(l)) to provide that Procurement Center Representatives (PCRs) may review any acquisition, even those where the acquisition is set aside, partially set aside or reserved for small business. SBA's current rules provide that PCRs will review all acquisitions that are not set aside or reserved for small business. These rules were intended to focus limited resources on acquisitions that were not already going to small business, but were not intended to prohibit a PCR from reviewing any acquisition as part of the PCR's role as an advocate for small business. SBA proposes to amend § 125.2(b)(1)(i) to provide that PCRs may review any acquisition regardless of whether it is set aside, partially set aside, or reserved for small business or other socioeconomic categories. SBA believes that this change will enable PCRs to advocate for total set asides, or partial set asides, when appropriate and necessary.

Section 1811 of the NDAA of 2017 also amended section 15(l) of the Small Business Act to limit the scope of PCR review of solicitations for contracts or orders by or for the Department of

Defense if the acquisition is conducted pursuant to the Arms Control Export Act (22 U.S.C. 2762), is a humanitarian operation as defined in 10 U.S.C. 401(e), is for a contingency operation as defined in 10 U.S.C. 101(a)(13), is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed, or where both the place of award and place of performance are outside of the United States and its territories. SBA is proposing to amend § 125.2(b)(1)(i) to implement these amendments. PCRs may still review acquisitions awarded in the United States and its territories but performed outside of the United States and its territories, or awarded outside of the United States and its territories for performance in the United States or its territories, if the acquisition is not a foreign military sales, or in connection with a contingency operation, humanitarian operation or status of forces agreement. SBA considers performance to be outside of the United States and its territories if the acquisition is awarded and performed or delivered outside of the United States and its territories. If the acquisition is awarded in the United States and its territories or some performance or delivery occurs in the United States and its territories, SBA considers that to be performed in the United States and its territories.

Material Breach of Subcontracting Plan

Section 1821 of the NDAA of 2017 amended section 8(d)(9) of the Small Business Act (15 U.S.C. 637(d)(9)) to provide that it shall be a material breach of a contract or subcontract when the contractor or subcontractor with a subcontracting plan fails to comply in good faith with the requirement to provide assurances that the offeror shall submit such periodic reports or cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror with the subcontracting plan. Such a breach may be considered in any past performance evaluation of the contractor. SBA is proposing to revise § 125.3(d) to implement this provision.

Section 1821 also provides that SBA must provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Good faith effort considers a totality of the contractor's actions to provide the maximum practicable opportunity to small businesses to participate as subcontractors (including those in the socio-economic small business areas), consistent with the information and assurances provided in the subcontracting plan. A failure to exert good faith effort is first predicated upon evidence that an other-than-small-business (OTSB) federal prime contractor, required to have a subcontracting plan with negotiated Small Business Concern (SBC) goals approved by a federal contracting officer, has failed to attain these goals and this failure may be attributable to a lack of good faith effort by the OTSB prime contractor. The term SBC for purposes of this rule includes all categories of small business socio-economic concerns including small business, small disadvantaged businesses, veteran owned small businesses, service disabled veteran owned small businesses, women owned small businesses, small businesses in historically underutilized business zones, Historically Black Colleges and Universities (HBCU/Minority Institutions (MI)) (NASA only) and any successor small business designations. A failure to exert good faith efforts must take into account all actions, or lack thereof, the contractor made to promote subcontracting opportunity to small businesses to the extent agreed upon in the approved subcontracting plan. SBA is reorganizing this section to reflect these new examples in proposed § 125.3(d)(3)(ii). SBA is proposing to renumber current § 125.3(d)(3)(i) through (iii) as § 125.3(d)(3)(i)(A) through (C) to better organize this section for clarity and ease of understanding . This rule does not add a new requirement for supporting documentation for the subcontracting plan.

III. Recovery Improvements for Small Entities After Disaster Act of 2015, Public Law 114–88, 129 Stat. 686, November 25, 2015 (RISE Act)

Section 2108 of the RISE Act authorizes SBA to establish contracting preferences for small business concerns located in disaster areas, and provide agencies with double credit for awards to small business concerns located in disaster areas. In order to implement the changes made by section 2108 of the RISE Act, SBA is proposing to add a new part 129 to title 13 of the Code of Federal Regulations. SBA will implement section 2105 in a separate rulemaking.

Section 2108 of the RISE Act amends section 15 of the Small Business Act (15 U.S.C. 644) by adding a subsection (f), which authorizes procuring agencies to provide contracting preferences for small business concerns located in areas for which the President has declared a major disaster, during the period of the declaration. Section 2108 provides that this contracting preference shall be available for small business concerns located in disaster areas if the small business will perform the work required under the contract in the disaster area. Under § 6.208 of Federal Acquisition Regulation (FAR), title 48 of the Code of Federal Regulations, contracting officers may set aside solicitations to allow only offerors residing or doing business in the area affected by a major disaster. Under existing FAR 26.202–1, such local area set asides may be further set aside for small business concerns. SBA is proposing to use the existing FAR definitions to provide that an agency will receive credit for an ''emergency response contract'' awarded to a ''local firm'' that qualifies as a small business concern under the applicable size standard for a ''Major disaster or emergency area.'' FAR 26.201.

Section 2108 also provides that if an agency awards a contract to a small business located in a disaster area through a contracting preference, the value of the contract shall be doubled for purposes of determining compliance with the small business contracting goals described in section 15(g)(1)(A) of the Small Business Act. Proposed § 129.300 states that agencies shall receive double credit for awarding a contract through the use of a local small business or socioeconomic set aside authorized by proposed § 129.200, *i.e.,* a set-aside restricted to SBCs, 8(a) Business Development (BD) Program Participants, Women-Owned, Service-Disabled Veteran-Owned or HUBZone SBCs located in a disaster area. It is SBA's intent that agencies will enter accurate data into the Federal Procurement Data System (FPDS). SBA will provide the extra credit through the agency scorecard process. Local area set aside and small business contract designations already exist in FPDS, and implementation has already occurred in FY 2017.

IV. Other Small Business Government Contracting Amendments

Clarification That the Non-Manufacturer 500 Employee Size Standard Does Not Apply to Information Technology Value Added Resellers

On September 10, 2014, SBA proposed to eliminate the information technology value added reseller (ITVAR) exception to NAICS 541519, which had a size standard of 150 employees. 79 FR 53646. In the proposed rule, SBA specifically noted that elimination of the exception would

result in these acquisitions, which are primarily for supplies, being subject to the non-manufacturer rule (NMR), which has a size standard of 500 employees. As a result of public comment, SBA altered the language in the ITVAR exception (13 CFR 121.201, footnote 18) to make it clear that the manufacturing performance or limitations on subcontracting requirements and the NMR apply to acquisitions under the ITVAR exception, but retained the 150 employee size standard. 81 FR 4436 (January 26, 2016). By definition, contractors under the ITVAR exception are non-manufacturers, and it would make no sense for SBA to retain a 150 employee size standard if concerns could also qualify under the NMR 500 employee size standard. In a size appeal before the SBA Office of Hearings and Appeals, a firm tried to argue that the size standard under the ITVAR exception was the 500 employee non-manufacturer size standard. *Size Appeal of York Telecom Corporation,* SBA No. SIZ–5742 (May 18, 2016). The appeal was denied, and this rule proposes to clarify in § 121.406(b)(1)(i) that the NMR size standard of 500 employees does not apply to acquisitions that have been assigned the ITVAR NAICS code 541519 exception, footnote 18. The size standard for any acquisition under 541519, footnote 18 is 150 employees for all offerors.

Setting Aside an Order Under a Multiple Award Set Aside Contract

In the final rule implementing 15 U.S.C. 644(r), SBA contemplated the set aside of orders for certain types of SBCs, such as HUBZone SBCs, 8(a) BD Program Participants, SDVO SBCs, or WOSBs. 78 FR 61114, 61124 (October 2, 2013). SBA noted that at the time, the small business programs had major differences with respect to application of the limitations on subcontracting (LOS) and NMR, and therefore it would be difficult for SBCs and agencies to determine the rules that applied to a particular order. SBA was also concerned about the possibility that SBCs could be deprived of an opportunity to compete for orders under a set aside contract if an agency repeatedly set aside orders for other socioeconomic categories. Since that time, SBA has attempted to harmonize the application of the LOS and NMR for each of the various types of small business contracts. The concerns identified in the SBA final rule have since been addressed to enable fair and proper implementation of order set asides. Specifically, the SBA final rule standardized the LOS and NMR across the socioeconomic programs. 81 FR 34243. In addition, some agencies have pursued the strategy of allowing order set asides against set aside multiple award contracts, including notification and incorporation of the clause at FAR 52.219–13, and agencies have reported that they have not encountered any industry concerns. SBA is requesting comment on whether SBA should allow agencies to set aside orders for a socioeconomic small business program (8(a), HUBZone, SDVO, WOSB) under a multiple award contract that was originally conducted as a total small business set-aside. Because SBA believes that a change is appropriate at this time, SBA is proposing to remove the term ''Full and Open'' from § 125.2(e)(6) to specifically afford discretion to an agency to set-aside one or more particular orders for HUBZone SBCs, 8(a) BD SBCs, SDVO SBCs or WOSBs, as appropriate, where the underlying multiple award contract was initially set-aside for small business. Set asides under multiple award set-aside contracts may be implemented by agencies in different ways, including: (1) Establishing set asides to socioeconomic programs at the order solicitation level under multiple award small business set-aside contracts, and (2) establishing socioeconomic set-aside pools at the master contract solicitation level for a multiple award small business set-aside contract. SBA is requesting comments on any burden or adverse impact associated with each of these two approaches. In addition, SBA is specifically interested in whether these two approaches impact the ability for all types of small businesses (*e.g.* 8(a), HUBZone, WOSB, SDVOSB) to compete and receive orders.

Recertification of Size and Status

SBA's rules require recertification of size and status for all long-term (over 5 years) contracts. This includes indefinite delivery contracts under which orders will be placed at a future date and contracts that had not been set-aside for small business, but were awarded to a small business. Thus, SBA is proposing to amend §§ 125.18(e), 126.601(h), and 127.503(h) to clarify that a concern must recertify its status on full and open contracts. In addition, SBA is adding a new paragraph to §§ 124.521 and 124.1015 to reflect the status recertification requirements for 8(a) participants and SDB concerns, which are already present in the SDVO, HUBZone, and WOSB regulations. This change provides greater consistency among the status recertification requirements for small business program contracts. One result of these proposed changes, is that a prime contractor relying on similarly situated entities (an SDVOSB prime with an SDVOSB subcontractor, for example) to meet the applicable performance requirements may not count the subcontractor towards its performance requirements if the subcontractor recertifies as an entity other than that which it had previously certified.

Indirect Costs in Commercial Subcontracting Plans

Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontracting report (SSR), and SBA's rules currently require that a contractor using a commercial subcontracting plan must include all indirect costs in its SSR. However, SBA's rules do not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the SSR to the commercial subcontracting plan. SBA is proposing to revise § 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans must include indirect costs in the commercial subcontracting plan goals. This will allow agencies to negotiate more realistic commercial subcontracting plans and monitor performance through the SSR.

Subcontracting Compliance Reviews

SBA is also proposing to change the nomenclature that applies to subcontracting compliance reviews. Instead of rating firms as ''Outstanding,'' ''Highly Successful,'' or ''Acceptable,'' SBA will utilize the terminology ''Exceptional,'' ''Very Good,'' and ''Satisfactory.'' SBA proposes to revise § 125.3(f)(3) to implement these changes to align title 13 of the CFR and the FAR to rectify ambiguity in terminology which causes confusion by Government personnel and industry partners when attempting to ascertain the value and differences of the SBA's rating under § 125.3(f)(3) in an SBA Compliance Review and the ratings in FAR 42.1503 under a Subcontracting Evaluation when FAR 52.219–9 is used and made part of the firm's past performance record.

Independent Contractors—Employees/ Subcontractors

SBA's size regulations provide that SBA considers ''all individuals employed on a full-time, part-time, or other basis'' to be employees of the firm whose size is at issue. 13 CFR 121.106(a). ''This includes employees obtained from a temporary employee

agency, professional employee organization or leasing concern.'' Id. Further, ''SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern.'' Id. In determining what it means to be employed on an ''other'' basis, SBA issued Size Policy Statement No. 1. 51 FR 6099–01 (February 20, 1986). The Size Policy Statement sets forth 11 criteria SBA will consider in determining whether an individual should be treated as an employee. If an individual meets one or more of the criteria they may be treated as an employee. Pursuant to this guidance, an individual contractor paid through a 1099 may be properly treated as an employee for purposes of SBA's regulations (including SBA's regulations governing performance of work or LOS requirements). The reason for such treatment was to prevent a firm that exceeded an applicable employee-based size standard from ''firing'' a specific number of employees in order to get below the size standard, but to then hire them back or ''subcontract'' to them as independent contractors. SBA did not want to encourage firms to attempt to evade SBA's size regulations.

Historically, SBA has said that if an individual qualifies as an ''employee'' under part 121 of SBA's regulations for purposes of determining size, then SBA should consider that individual to be an employee of the firm for the performance of work (or now LOS) requirements of 13 CFR 125.6 (or 124.510). It would not be equitable to say that a given individual counts against a firm in determining size (because he/she is considered an ''employee'' of the firm) and then to say that that same individual also counts against the firm for the LOS requirements (because he/she is not considered an ''employee'' of the firm). Thus, for a contract that is assigned a NAICS code having an employee-based size standard, an independent contractor could be deemed an ''employee'' of the concern for which he/she is doing work. If such an individual is considered an employee for size purposes, he/she would also be considered an employee for LOS purposes.

It appears that SBA's regulation at 13 CFR 125.6(e)(3) has caused some confusion as to how to properly treat independent contractors for purposes of the LOS provisions. That provision provides that ''Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable LOS where the independent contractor qualifies as a similarly situated entity.'' (Emphasis added). This provision was meant to apply to service or construction contracts. For service contracts, work performed by an independent contractor would always be considered a subcontract, so that a service contractor could not claim that a non-similarly situated entity independent contractor should be considered an employee of the service contractor. For example, for a WOSB service contract, SBA did not want a WOSB prime contractor to pass performance of the contract to one or more independent contractors that would not themselves qualify as WOSBs. The provision identifies that an independent contractor could qualify as a ''similarly situated entity'' and meet the LOS that way, but would not permit a service contractor to effectively avoid meeting the LOS by claiming that independent contractors were in fact employees of the firm.

This proposed rule revises § 125.6(e)(3) to clarify SBA's intent regarding both contracts assigned a NAICS code with an employee-based size standard and those assigned a NAICS code with a receipts-based size standard. Where a contract is assigned a NAICS code with an employee-based size standard, an independent contractor may be deemed an employee of the firm under the terms of the Size Policy Statement. Where a contract is assigned a NAICS code with a receipts-based size standard, an independent contractor could not be considered an employee of the firm for which he or she is performing work, but, rather, would always be deemed a subcontractor. In either case, as a subcontractor, an independent contractor may be considered a ''similarly situated entity'' and work performed by the independent contractor would then count toward meeting the applicable limitation on subcontracting.

Limitation on Subcontracting Compliance

Congress has expressed its strong support for small business government contracting, and has provided agencies with numerous tools to set aside acquisitions for exclusive competition among, or in some cases award contracts on a sole source basis to, SBCs, 8(a) BD Program Participants, HUBZone SBCs, WOSBs, Economically Disadvantaged Women-Owned (EDWOSB) SBCs, and SDVO SBCs. 15 U.S.C. 631(a), 637(a), (m), 644(a), (j), 657a, 657f. As a condition of these preferences, small businesses are limited in their ability to subcontract to other than small business concerns, so that small businesses actually perform a certain percentage of the work. These LOS appear in solicitations and contract clauses for small business set aside and sole source awards. Like with all contract administration, it is the responsibility of the contracting officer to monitor compliance with terms and conditions of a contract. (FAR 1.602–2), including the LOS clause. SBA is proposing language to clarify that contracting officers have the discretion to request information from contractors to demonstrate compliance with LOS clauses. The Government Accountability Office (GAO) has noted in reports that contracting officers have not been monitoring compliance with the limitations on subcontracting. ''Contract Management; Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight,'' GAO–06–39, April 2006; ''8(a) Subcontracting Limitations, Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change,'' GAO–14–706, September 2014; and ''Federal Contracting Monitoring and Oversight of Tribal 8(a) Firms Need Attention,'' GAO–12–84, January 2012. The type of information that small business prime contractors may be requested to provide to demonstrate compliance with the LOS could be copies of subcontracts for a particular procurement or an email that lists the amount that the prime contractor has paid to its subcontractors for a particular procurement and whether those subcontractors are similarly situated entities. In addition, SBA proposed to require information demonstrating compliance with the applicable LOS from all prime contractors performing set-aside and sole-source contracts awarded through SBA's small business programs when the prime contractor intends to rely on similarly situated subcontractors to comply with the LOS. 79 FR 77955 (December 29, 2014). SBA did not adopt such a requirement in the final rule, but indicated that it intended to seek comment on this issue. 81 FR 34243 (May 31, 2016).

SBA is proposing to add new § 125.6(e)(4) to clarify that contracting officers may request information regarding LOS compliance, and to clarify that it is not required for every contract. SBA is requesting comment on whether all small business prime contractors performing set-aside or sole source contracts should be required to demonstrate compliance with LOS to the contracting officer, and if so, how

often should this be required, such as annually or quarterly. What salient data would best provide assurance of compliance? Should demonstrating compliance depend on the length of the contract or the type of contract? Whether it is for commercial products and services? Whether the contract is fixed price? Whether the contract is above the SAT or the TINA threshold? What other considerations should there be when applying the requirement for a contractor to document LOS compliance? We are requesting that industry provide comment on what information can be efficiently requested and provided.

Exclusions From the Limitations on Subcontracting

SBA's LOS regulations provide that for a set aside service contract, the prime contractor must agree that it will not pay more than 50% of the amount paid from the government to firms that are not similarly situated. 13 CFR 125.6(a)(1). Unlike supply and construction contracts, where materials are excluded, no costs are specifically excluded under a service contract, other than for mixed contracts where the non-service portion, such as incidental supplies, are excluded. SBA has received several requests from industry for exclusions related to specific types of contracts, and one related to all industries. Some have advocated that certain direct costs, such as airline tickets and hotel costs, be excluded from the calculation of the amount paid under the contract. In addition, in certain types of contracts or industries, there are factors that may complicate compliance with the LOS, potentially hindering agencies from setting aside acquisitions for small business concerns.

For example, for certain contracts performed outside of the United States, contractors must use non-U.S. local organizations or independent contractors to perform consulting services regarding a particular foreign country. These individuals are not located in the United States, do not reside in the United States, and are not likely to be employees of a United States SBC. SBA is proposing to further clarify how to determine whether an individual is an employee or independent contractor.

In the environmental remediation industry (NAICS 562910), a large part of the cost of the contract is tied to the transportation and disposal of hazardous, toxic and radiological waste. According to some SBCs in this industry that have contacted SBA, given the fact that these services are highly regulated and capital intensive, these particular transportation services can generally be performed only by other than small business concerns. For example, all of the disposal facilities in the United States are large businesses, and most railroads and shipping companies that transport hazardous waste are other than small concerns. This rule proposes to exclude transportation and disposal services from the LOS compliance determination where small business concerns cannot provide the disposal or transportation services. Similarly, where the government acquires media services from small business concerns, the placement of the content in the media may require large payments to the other than small business concerns, even though that is not the principal purpose of the acquisition. SBA is proposing to exclude these media purchases from the LOS determination.

In a prior rulemaking, SBA determined that remote hosting on servers or networks, or cloud computing, should be considered a service and therefore the NMR would not apply. 13 CFR 121.1203(d)(3). Due to the costs and scale involved, cloud computing is generally provided by other than small business concerns. SBA is proposing to exclude cloud computing from the LOS calculation, where the small business concern will perform other services that are the primary purpose of the acquisition. Alternatively, SBA is requesting comment on whether it should treat cloud computing as a supply, and therefore the NMR would apply, which would allow SBA to issue individual or class waivers of the NMR for cloud computing. SBA is also requesting comment on the definition of cloud computing, such as the definition in National Institute of Standards and Technology Special Publication 800–145, so that we can ensure the definition is not used to allow other than small businesses to provide an excessive portion of services on small business set aside contracts.

SBA is requesting comment on whether these types of costs should be excluded from the calculation for purposes of compliance with the LOS. For example, some have suggested that travel costs should be excluded. However, SBA is also concerned about abuse of such exceptions. For example, SBA does not want agencies to receive credit for a small business contract award where the principal purpose of the acquisition is to obtain services from an other than small business concern. If that is the norm for a particular type of contract, perhaps that type of contract should not be set aside for small business concerns. The intent of the LOS is to prevent other than small business concerns from benefitting more than small business concerns on small business set aside contracts. SBA is requesting comment from industry on these issues.

Subcontracting to a Small Business Under a Socioeconomic Program Set Aside

In the context of socioeconomic set aside or sole source service contracts, the ostensible subcontractor rule applies when a small business is unduly reliant on an other than small subcontractor, or when the other than small subcontractor will perform primary and vital parts of the contract. In such cases, assuming that an exception to joint venture affiliation does not apply, SBA will treat the small business prime contractor and its subcontractor as joint venturers, and therefore affiliates. If the subcontractor is other than small, the prime contractor is ineligible for award due to this affiliation. SBA has become aware of service contract set asides for the SDVO, HUBZone, 8(a) or WOSB programs, where the prime contractor subcontracts most or all of the actual performance to a small business that is small for the applicable NAICS code but not eligible to compete for award of the prime contract, and thus not a similarly situated entity as that term is defined at § 125.1.

Under SBA's recently amended joint venture rules (81 FR 34243, May 31, 2016; 13 CFR 121.103(h)(3)(i)), a joint venture can qualify as small as long as each member of the joint venture is small. In the scenario described above, the joint venture regulation prevents SBA from performing an analysis under the ostensible subcontractor rule because both the prime contractor and subcontractor are small for the size standard that applies to the contract and thus subject to the exception from affiliation for joint venture partners that are each small for the size standard. There is no existing regulatory mechanism for an unsuccessful offeror, SBA, or contracting officer to protest a socioeconomic set aside or sole source award to a prime contractor that is unduly reliant on a small, but not similarly situated entity subcontractor. The underlying premise that ostensible subcontractors and their prime contractors should be treated as joint ventures is still SBA's policy. Firms that are performing contracts in a manner more consistent with a joint venture than a prime/sub relationship should follow the requirements of SBA's regulations regarding socioeconomic joint ventures.

The performance of a set-aside or sole source service contract by a small business concern that is not eligible to compete for the prime contract is contrary to the intent and purpose of the statutory authorities for socioeconomic category set-aside and sole source procurements. Thus, SBA is proposing language at §§ 124.507(b)(2), 125.18(f), 125.29(c), 126.601(i), 126.801(a), 127.504(c), and 127.602, which will allow SBA to make a determination concerning a small business program participant's overreliance on a non-similarly situated subcontractor as part of an eligibility or status protest determination. SBA will evaluate these contractor relationships under the established ostensible subcontractor test. If SBA finds that the subcontractor is an ostensible subcontractor, SBA will treat the arrangement between the contractors as a joint venture that does not comply with the formal requirements necessary to receive and perform the socioeconomic program set aside or sole source award as a joint venture.

This rulemaking will not apply to non-service contracts, such as construction contracts or contracts involving non-manufacturers. Due to the nature of the industry, SBA's rules allow small businesses to subcontract large amounts of performance on construction contracts. The Small Business Act, and SBA's regulations generally provide that for set aside supply contracts, a non-manufacturer must supply the product of a small business, unless SBA has issued a waiver. This means that for an SDVO, HUBZone, 8(a), or WOSB set aside or sole source supply contract, the prime contractor that is a non-manufacturer must qualify as an SDVO, HUBZone, 8(a) or WOSB, but the product can be made by a small business that does not qualify as SDVO, HUBZone, 8(a), or WOSB. When the non-manufacturer rule applies to a small business program contract, it is considered an exception to the limitations on subcontracting. Where a waiver of the non-manufacturer rule has been issued that applies to a small business program set-aside or sole source contract, the prime contractor may supply a product manufactured by any size business, also without regard to whether the subcontractor qualifies for the applicable small business program set-aside or sole source contract.

Kit Assemblers

SBA is proposing to remove specific rules related to kit assemblers and the NMR, which are currently contained at 13 CFR 121.406(c). The existing kit assembler rule requires that 50 percent of the total value of the items in the kit must be manufactured by small business concerns, but excludes items manufactured by other than small business concerns if the contracting officer specifies the item for the kit. This rule has led to confusion concerning how to calculate total value, and whether a waiver of the non-manufacturer rule can or must be requested in order to supply items manufactured by other than small concerns. SBA recently amended its rules to address the NMR and multiple item acquisitions. If the majority of items in a kit are made by small business concerns, then the acquisition can be set aside for small business without the need to request a waiver. If the majority of items in a kit are not made by small business concerns, then an individual or class waiver of one or more of the items is necessary for the acquisition to be set aside for small business concerns for acquisitions above the simplified acquisition threshold or for all other socioeconomic set-asides, regardless of value. SBA is proposing to delete the kit assembler exception, and instead apply the multiple item rule in § 121.406(e) to kit assembler acquisitions. Like all other acquisitions, the NMR will not apply to small business set-asides with a value at or below the simplified acquisition threshold.

Clarification on Size Determinations

SBA is also proposing to amend its regulations to remove language that has caused confusion on when size is determined. The general rule is that size is determined at the time of initial offer including price, with the understanding that there are some exceptions such as architecture and engineering procurements, and certain unpriced indefinite delivery indefinite quantity (IDIQ) contracts. However, § 121.404(a) also contains the parenthetical, ''(or other formal response to the solicitation).'' Some parties have misread this to mean formal responses that are after the initial offer, such as final proposal revisions. The clear intent of SBA's general rule is to give both firms and the government certainty as to when size will be determined, the initial response, including price, because in the current government contracting environment a vast amount of time may pass between initial offer and award. Offer covers bids and proposals, and SBA recognizes that in simplified acquisitions the initial response may be acceptance of the government's offer. Thus, SBA is proposing to amend § 121.404(a) to make it clear that size is generally determined at the time of initial offer or response including price. SBA is also proposing to add a paragraph at § 121.404(a)(1)(iv), to articulate an exception to the general rule for when size is determined. When an agency uses an IDIQ multiple award contract that does not require offers for the contract to include price, size will be determined on the date of initial offer for the IDIQ contract, which may not include price. This proposed change reflects the statutory change found at section 825 of the National Defense Authorization Act for Fiscal Year 2017, 114 Public Law 328, (December 23, 2016), and section 876 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 115 Public Law 232, (August 13, 2018). SBA is also proposing to remove the last sentence of paragraph § 121.404(g)(5), because it conflicts with recent rules that provide that a firm may rely on similarly situated entities to meet the applicable LOS. The last sentence of (g)(5) is unnecessary, as § 121.103(h) is controlling with respect to the affiliation.

SBA proposes to amend § 121.103(h)(4) to clarify that when two or more small businesses either form a joint venture or are treated as joint venturers due to their relationship as prime and subcontractor, the joint venture exception to affiliation found at § 121.103(h)(3)(i) applies if both firms are considered small for the size standard associated with the procurement. SBA proposes to remove the phrase ''and therefore affiliates'' from the ostensible subcontractor rule at § 121.103(h)(4) to clarify this point. To allow affiliation between firms that are considered joint venturers because of their ostensible subcontracting relationship, even when each firm is individually small for the size standard associated with the procurement, would negate the purpose of § 121.103(h)(3)(i), which explicitly provides an exception to affiliation for such joint ventures.

The purpose of the ostensible subcontractor rule is to treat the relationship between a prime contractor and its subcontractor as a joint venture where the subcontractor performs primary and vital work for the procurement. SBA's current joint venture rules do not aggregate the partners to a joint venture in determining the size of the joint venture, but rather permit a joint venture to qualify as small as long as each partner to the joint venture is individually small. Thus, a rule that equates a prime-sub relationship to that of a joint venture because the subcontractor is performing primary and vital work and then affiliates the two

parties (*i.e.,* requiring them to aggregate their revenues or employees) is inconsistent with the joint venture size rules themselves. The phrase ''and therefore affiliates'' that SBA proposes to delete was a holdover from previous regulations that aggregated the receipts or employees of joint venture partners when determining whether a joint venture qualified as a small business. When SBA changed its size regulations to broaden the exclusion from affiliation for small business to allow two or more small businesses to joint venture for any procurement without being affiliated (*i.e.,* the joint venture would be considered small provided each of the joint venture partners individually qualified as small and SBA would not aggregate the receipts or employees of joint venture partners), SBA amended § 121.103(h)(3), but did not make a correspondingly similar change in § 121.103(h)(4). See 81 FR 34243, 34258 (May 31, 2016). This proposed rule intends to make it clear that if a prime-sub relationship is deemed to be a joint venture because of the ostensible subcontractor rule, then all of the rules pertaining to joint ventures would apply. As already noted, a prime-sub relationship where both parties individually qualified as small would be considered an award to small business. Similarly, if the ostensible subcontractor were a large business that was the SBA-approved mentor of the prime contractor, then the award could qualify as an award to small business if the prime contractor/protégé firm qualifies as small and the relationship (treated as a joint venture) meets the normal requirements for a joint venture. See §§ 124.513(c) and (d); 125.18(b)(2) and (3); 126.616(c) and (d); and 127.506(c) and (d). Although SBA recognizes that it is unlikely that a prime-subcontractor relationship would meet the necessary joint venture requirements of those paragraphs, it is possible, and a prime-sub/joint venture that did in fact meet those requirements could qualify as small.

In addition, the proposed rule further clarifies in § 121.103(h)(4) to provide that the ostensible subcontractor rule does not apply to similarly situated entities, as that term is defined at § 125.1. SBA notes, however, that when both partners to a joint venture are small for the assigned NAICS code but the subcontractor partner is not a similarly situated entity, the prime alone is responsible for compliance with the applicable LOS and cannot rely on its subcontractors to satisfy the LOS requirement.

Clarification Where One Acceptable Offer Is Received on a Set Aside

SBA is proposing to add new § 125.2(e)(5) to clarify that a contracting officer may make an award under a small business or socioeconomic set-aside where only one acceptable offer is received. The decision to conduct a set aside is based on the contracting officer's expectation based on market research that he or she will obtain two or more fair market price offers from capable small business concerns. Pursuant to the FAR, the contracting officer must perform market research before issuing a solicitation to determine whether there are small businesses (including 8(a), HUBZone, SDVO SBCs, WOSBs) that can perform the requirement. 48 CFR 10.001(a)(2); 19.202–2. A contracting officer's ''rule of two'' determination is prospective. Whether there appear to be at least two small businesses that can perform a procurement at a fair price is an analysis that is done during acquisition strategy planning and prior to the issuance of a solicitation. As long as the market research leads a contracting officer to conclude that the agency will receive offers from at least two small business concerns that are technically acceptable and award will be made at a fair market price, the ''rule of two'' is satisfied, no matter how many offers are actually received or how many offers remain after evaluations are conducted, a competitive range is established, or offerors are eliminated in some other fashion.

The FAR currently addresses small business set-asides below $150,000, and provides, ''If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm.'' FAR 19.502–2(a). There is no reason this policy should not apply to all set-asides above or below $150,000. The contracting officer must determine that an offeror is responsible and price is fair and reasonable before awarding any contract. FAR 9.103(a); 9.104–1; 14.408–2; and 15.304(c)(1). It would be inefficient and detrimental to the Government and offerors to arbitrarily prevent an award where a competition was conducted but only one offer was received. Such a policy would unreasonably prolong the procurement process, requiring a procuring agency to cancel one solicitation and reprocure using another where only one small business offer is received, and could cause contracting officers to limit the use of set-asides.

Compliance With Executive Orders 12866, 13563, 12988, 13132, 13771, the Unfunded Mandates Reform Act of 1995, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612) Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. The benefits to small business from this proposed rule far outweigh any associated costs. The proposed rule makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These proposed changes should make SBA's regulations easier for SBCs to use and understand. The proposed change to § 121.404 clarifies when size for a government contract is determined, which will reduce confusion for small business concerns. The proposed change to § 121.406 clarifies that the size standard for information technology value added resellers is 150 employees, again to eliminate confusion among small business concerns. The proposed changes to § 125.2(a) will benefit small business by clarifying that a contracting officer can award a contract to a small business under a set-aside if only one offer is received. The proposed changes to § 125.2(b) implement section 1811 of the NDAA of 2017, and govern what acquisitions PCRs can review and would not impact small business concerns. The proposed changes to § 125.2(d) implement section 863 of the NDAA of 2016 and direct contracting officers on how to notify the public about consolidation and substantial bundling, and will not impact small business concerns. The proposed changes to § 125.2(e) authorize agencies to set aside orders for socioeconomic programs where the contract was set aside for small business, and will benefit firms that qualify for those set asides. The proposed changes to § 125.3 implement section 1821 of the NDAA of 2017 by providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, and will benefit small businesses by providing such examples so that contracting officers can hold other than small prime contractors accountable for failing to make a good faith effort to comply with their small business subcontracting plan. The proposed changes to § 125.3 also implement section 1821 by providing that the contracting officer should evaluate whether an other than small business complied with the requirement to report

on small business subcontracting plan performance. The proposed changes to § 125.6(a) will benefit small business concerns by allowing small businesses to exclude certain costs from the calculation of the limitations on subcontracting. Without these changes, some agencies will not be able to set contracts aside for small business, because certain costs attributable to other than small concerns are too high. The proposed changes to § 125.6 also help small businesses by clarifying the difference between an employee and an independent contractor. The proposed changes to § 125.6 will impose some requirements on small business concerns to demonstrate compliance with the LOS, but only to the extent the information is not already in the possession of the government. Contractors may have this information readily available since it pertains to contract performance and subcontracting of that performance. These information requests are not mandatory, as the contracting officer simply has the discretion to request such information. Contracting officers already have the authority to request information on performance, and this proposed change simply clarifies that the authority exists. Finally, the benefits to small business concerns of this proposed rule substantially outweigh any minor costs imposed by the exercise of existing contracting authority. The proposed addition of part 129 implements section 2108 of the RISE Act and benefits small businesses by providing agencies with an incentive to set aside contracts for small business concerns located in a disaster area. Accordingly, the next section contains SBA's Regulatory Impact Analysis. However, this is not a major rule under the Congressional Review Act, 5 U.S.C. 801, *et seq.*

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The proposed rule implements section 863 of the National Defense Authorization Act of 2016, Public Law 114–92, 129 Stat. 726 (15 U.S.C. 644(e)(3)); section 2108 of the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), Public Law 114–88, 129 Stat. 686 (15 U.S.C. 644(f)); and sections 1811 and 1821 of the National Defense Authorization Act of 2017, Public Law 114–328, 130 Stat. 2000 (15 U.S.C. 637(d), 644(l)). In addition, it makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These proposed changes should make SBA's regulations easier to use and understand. With respect to contractors demonstrating compliance with the limitations on subcontracting, for decades the general rule has been that on a set aside contract, a small business or socioeconomic small business must generally perform some of the work (services, construction, or manufacturing). This helps ensure that the benefits of a small business set-aside contract flow to the recipients whom Congress intends to help by creating the set aside authority. If performance of a set-aside contract is passed through to other-than-small business concerns, there may not be a need for set-asides in the first place, and the government may be paying more for a good or service without any value added. These limitations on subcontracting appear as a clause in a set aside contract and help to ensure that the intended beneficiaries of set aside contracts are receiving those benefits. The contracting officer is responsible for monitoring compliance with clauses in a contract. FAR 1.602. Nothing in SBA's regulations or the FAR prohibits a contracting officer from requesting documents demonstrating compliance with the limitations on subcontracting clause. It is SBA's view that such authority exists, but that the authority is not clear or express. Without clarifying the authority or process, some contracting officers simply are not monitoring compliance. The result is that there may be increased fraud, waste, and abuse, in the performance of contracts that are set aside for small business concerns, because subcontractors that are not eligible to receive the prime contract may be performing more work than section 46 of the Small Business Act (15 U.S.C. 657s), SBA regulations at 13 CFR 125.6, and FAR clause 52.219–14 permit. This type of fraud frustrates the policy goals associated with awarding contracts set aside for small business concerns.

In this proposed rule, SBA proposes to clarify, by expressly stating, that the contracting officer may request information to demonstrate a contractor's compliance with the limitations on subcontracting clause. SBA proposes to clarify that it is within the contracting officers' discretion to request such a showing of compliance, because in some cases it will not be necessary, such as when a small business performs the contract itself without the use of subcontractors or when information regarding compliance is already available to the Government. Through this proposed rule, SBA intends to deter and reduce potential fraud, waste, and abuse, due to noncompliance with the limitations on subcontracting. Additionally, clarifying a contracting officer's authority to request that a small business concern demonstrate compliance with the limitations on subcontracting is consistent with recommendations made by the U.S. Government Accountability Office (GAO) in several reports: ''Contract Management; Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight,'' GAO–06–39, April 2006; ''8(a) Subcontracting Limitations, Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change,'' GAO–14–706, September 2014; and ''Federal Contracting Monitoring and Oversight of Tribal 8(a) Firms Need Attention,'' GAO–12–84, January 2012.

2. What are the potential benefits and costs of this regulatory action?

The majority of the proposed changes in this rule will have de minimis costs and qualitative benefits that are difficult to quantity: Protecting the integrity of the small business procurement system. The rule proposes to provide exceptions to the LOS in certain service contracts where small businesses must use the services of other than small subcontractors in substantial amounts in order to fully perform a set aside service contract. This will help small business by making acquisitions available for small business set-asides that would not otherwise be available. Many of the other clarifications in this rule will benefit small businesses, by reducing confusion in the marketplace, but this benefit is difficult to quantify. The proposed rule allowing agencies to receive double credit toward its small business procurement goals for awards to local small business concerns in the event of a disaster is intended to benefit local small businesses and provide employment and revenue to concerns located in an area devastated by a disaster. While the authority for contracting preferences for businesses located in a disaster area already exists in FAR subpart 26.2, small businesses located in these areas may receive a greater benefit under this proposed rule due to the incentive for the procuring agency to receive double credit toward its small business procurement goals by utilizing this authority.

SBA is proposing to clarify that the contracting officer may require the prime contractor to demonstrate compliance with the LOS. We believe that contracting officers already possesses the authority to request

information from a contractor concerning compliance with a clause in the contract pursuant to FAR 1.602–2. In addition, on some contracts, compliance can already be reviewed or monitored by reviewing invoices. The proposed rule would clarify that contracting officers have the authority to request information in connection with a contractor's compliance with applicable limitations on subcontracting clauses. Approximately 56,000 firms received approximately 180,000 sole source or set aside awards in FY 2016. SBA is proposing that a contracting officer may request information regarding compliance with prime contractors' limitations on subcontracting. In some cases this information may not be necessary based on the nature of the contract and the invoices submitted. SBA estimates that less than ten percent of small business concerns and contracts would be subject to a request for this information (5,600 small business concerns and 18,000 contracts), and compliance should take on average less than an hour. Small businesses that do not issue subcontracts will not have anything to report. Small businesses may be able to easily report on any subcontracts, as information on subcontracting and paying subcontractors is routinely compiled as part of the normal accounting procedures for any business concern. Accounting or contract management personnel should be able to determine whether the firm issued any subcontracts in connection with the prime contract. SBA estimates that this rule will be finalized in FY 2019. SBA estimates an overall annual cost of approximately $600,120 for small businesses to provide information on compliance with the limitations on subcontracting, as requested by the contracting officer.

This proposed rule will require an other than small prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. Based on data from the Electronic Subcontracting Reporting System (eSRS), in FY 2017 approximately 700 firms had commercial subcontracting plans. SBA estimates that approximately 95% of those 700 firms include indirect costs in their subcontracting goals. Thus, this proposal would impact approximately 35 firms. The burden would be de minimis, as the accounting or contract manager would know the firm's indirect costs. The benefit of requiring that indirect costs be included in subcontracting goals where a commercial subcontracting plan is utilized, is that it will increase the small business subcontracting goal and thus increase the amount of funds the prime contractor will subcontract to small business concerns. Increasing the value and number of awards to small business concerns provides financial benefits to those firms, who may hire more staff and invest in more resources to support the increased demand. Furthermore, increasing the number and value of awards to small business concerns has macroeconomic and qualitative benefits to the national economy because small businesses are the foundation of the country's economic success.

This proposed rule will establish that failure to provide timely subcontracting reports may constitute a material breach of the contract. These reports are already required by law at 13 CFR 125.3(a). This rule will make failure to provide the report a material breach of the contract, which could subject other than small business concerns to liquidated damages. SBA is not aware of any case where a firm has been subject to liquidated damages for failure to comply with a subcontracting plan. Thus any costs would be de minimis. The benefit of this proposed rule is that it will assist SBA and contracting officers with oversight of prime contractor compliance with subcontracting plans and may result in increased compliance with subcontracting plans.

This proposed rule requires recertification of status on full and open contracts. SBA intended for recertification to occur whenever an agency receives credit for an award towards it goals, and this proposed rule is just a clarification that socioeconomic recertification is required on all contracts, including full and open contracts. We estimate that approximately 150 firms a year recertify on full and open contracts. This will only impact firms that are acquired, merged, or where there is a novation or the firm grows to be other than small on a long term contract. Agencies have goals for the award of prime contractor dollars to small and socioeconomic concerns. The purpose of recertification is to ensure that an agency does not receive small business credit for an award to an other-than-small concern.

This proposed rule will limit the scope of Procurement Center Representative reviews of Department of Defense acquisitions performed outside of the United States and its territories. This applies to the government and will not impose costs or burdens on the public.

This proposed rule will remove the kit assembler exception to the non-manufacturer rule. This clarification requires agencies to request a waiver of the non-manufacturer rule for kits, in accordance with existing regulations. This will reduce confusion, by having only one non-manufacturer rule procedure for purposes of multi-item procurements.

3. What are the alternatives to this rule?

Many of the proposed regulations are required to implement statutory provisions, thus there are no apparent alternatives for these regulations. With respect to the proposal clarifying that contracting officers may request information on compliance with the limitations on subcontracting, SBA considered whether prime contractors should be required to provide this information on compliance with the LOS on all set aside or sole source contracts. However, that may unnecessarily burden small businesses, if compliance is already readily apparent to the contracting officer based on the type of contract, invoicing, or observation. We estimate the alternative considered, having all small businesses provide information on compliance, would have an annual cost of $1,867,040. SBA decided to clarify instead that the contracting officer has the discretion to request such information to the extent such information is not already available. This will enable the contracting officer to request this information as he or she sees fit, in order to ensure that the benefits of the small business programs are flowing to the intended recipients. However, SBA is requesting comment on whether all small businesses should provide information on compliance with the LOS for set aside or sole source contracts.

Executive Order 13563

This executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. *Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g.,*

identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System—Next Generation, System for Award Management and Electronic Subcontracting Reporting System.

2. *Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?*

The proposed rule will have a 60 day comment period and will be posted on *www.regulations.gov* to allow the public to comment meaningfully on its provisions. In addition, the proposed rule was discussed with the Small Business Procurement Advisory Council, which consists of the Directors of the Office of Small and Disadvantaged Business Utilization. SBA also submitted the rule to multiple agencies with representatives on the FAR Small Business Subcommittee prior to submitting the rule to the Office of Management and Budget for interagency review.

3. *Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?*

Yes, the proposed rule implements statutory provisions and will provide clarification to rules that were requested by agencies and stakeholders. In addition, SBA is proposing to make clear that contracting officers may request information from their contractors in order to determine whether the contractor is complying with the LOS. This information may already be provided as part of invoicing under certain contracts, and in any event, the information should be readily provided by the contractor, as it simply pertains to what extent the prime contractor is subcontracting work under the contract. Clarifying that the contracting officer has the authority to request this information, instead of requiring all small businesses to submit reports, significantly reduces cost and burden.

Executive Order 12988

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

Unfunded Mandates Reform Act

This rule will not result in an unfunded mandate that will result in expenditures by State governments of $100 million or more (adjusted annually for inflation since 1995).

Executive Order 13132

SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

Small businesses, such as 8(a) BD Program Participants, HUBZone SBCs, WOSBs, Economically Disadvantaged Women-Owned (EDWOSBCs, and SDVO SBCs, are eligible to receive set-aside or sole source contracts. 15 U.S.C. 631(a), 637(a), (m), 644(a), (j), 657a, 657f. As a condition of these preferences, and to help ensure that small businesses actually perform a certain percentage of the work on a contract, the recipients of set-aside or sole source contracts are limited in their ability to subcontract to other-than-small business concerns by the limitations on subcontracting (LOS) clauses in the particular contract. See, 48 CFR 52.219–3, 52.219–4, 52.219–7, 52.219–14, 52.219–18, 52.219–27, 52.219–29, 52.219–30. Contracting officers are responsible for ensuring contractor compliance with the terms of a contract (FAR 1.602–2). The SBA proposed rule will provide express authority for contracting officers to request information on contractor's compliance with the LOS. Therefore, SBA will seek PRA review and approval from the Office of Management and Budget (OMB) to cover contracting officers' requests for information from small businesses regarding their LOS compliance.

A summary description of the reporting requirement, description of respondents, and estimate of the annual burden is described below. Included in the estimate is the time for reviewing requirements, gathering and maintaining the data needed, and submitting the report to the contracting officer.

Title: Compliance with the Limitations on Subcontracting.

OMB Control Number: (To be determined; new collection).

Summary Description of Compliance Information: In order to show that it is in compliance with the limitations on subcontracting terms that are included in its set-aside or sole source contract, a small business concern may be required to submit certain information to the contracting officer. The specific information relevant to a particular contract will be identified by the contracting officer but could include, where applicable, identification of subcontractor, dollar amount of subcontract, and costs to be excluded from the LOS calculation (*e.g.,* for contracts for supplies, materials).

Description of and Estimated Number of Respondents: Small business concerns that are awarded set-aside or sole source contracts. Based on FPDS data, SBA estimates that approximately 56,000 concerns receive approximately 180,000 small business sole source or set-aside awards in a fiscal year and that no more than ten percent (5,600) of concerns will be asked to provide information on compliance with the limitations on subcontracting for no more than ten percent (18,000) of the awards that have been received.

Estimated Annual Responses: 18,000.

Estimated Response Time per Respondent: 1 hour.

Total Estimated Annual Hour Burden: 18,000.

Estimated costs based on officer's salary: $33.34/hour (based on median pay for accountants and auditors, Bureau of Labor Statistics).

Total estimated hour annual cost burden: 18,000 hours × $33.34/hour = $600,120.

SBA will submit this new information collection (reporting requirement) to the Office of Management and Budget (OMB) for review, and invites the public to comment on: (1) Whether the reporting requirement is necessary for the proper performance of SBA programs, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden for the reporting requirement; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the

burden imposed as a result of the reporting requirement on the respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology.

Comments must be received by the deadline stated in the **DATES** section of this rule. Refer to the **ADDRESS** section for instructions on how and where to submit comments.

Regulatory Flexibility Act, 5 U.S.C. 601–612

Under the Regulatory Flexibility Act (RFA), this proposed rule may have a significant impact on a substantial number of small businesses. Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) addressing the impact of the proposed rule in accordance with section 603, Title 5, of the United States Code. The IRFA examines the objectives and legal basis for this proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this proposed rule; and whether there are any significant alternatives to this proposed rule.

1. What are the need for and objective of the rule?

The proposed rule implements section 863 of the National Defense Authorization Act of 2016, Public Law 114–92, 129 Stat. 726 (15 U.S.C. 644(e)(3)); section 2108 of the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), Public Law 114–88, 129 Stat. 686 (15 U.S.C. 644(f)); and sections 1811 and 1821 of the National Defense Authorization Act of 2017, Public Law 114–328, 130 Stat. 2000 (15 U.S.C. 637(d), 644(l)). In addition, the proposed rule makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These proposed changes should make SBA's regulations easier to use and understand. The proposed rule will make it easier for agencies to award set aside contracts to SBCs. Failure to promulgate this rule could result in a loss of set aside opportunities for SBCs.

The proposed change to § 121.404 clarifies when size for a government contract is determined, which will reduce confusion for small business concerns. The proposed change to § 121.406 clarifies that the size standard for information technology value added resellers is 150 employees, again to eliminate confusion among small business concerns. The proposed changes to § 125.2(a) will benefit small business by clarifying that a contracting officer can award a contract to a small business under a set aside if only one offer is received. The proposed changes to § 125.2(b) implement section 1811 of the NDAA 2017, and govern what acquisitions PCRs can review and would not impact small business concerns. The proposed changes to § 125.2(d) implement section 863 of the NDAA of 2016 and direct contracting officers on how to notify the public about consolidation and substantial bundling, and will not impact small business concerns. The proposed changes to § 125.2(e) authorize agencies to set aside orders for socioeconomic programs where the contract was set aside for small business, and will benefit firms that qualify for those set asides. The proposed changes to § 125.3 implement section 1821 of the NDAA of 2017 by providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, and will benefit small businesses by providing such examples so that contracting officers can hold other than small prime contractors accountable for failing to make a good faith effort to comply with their small business subcontracting plan. The proposed changes to § 125.3 also implement section 1821 by providing that the contracting officer should evaluate whether an other than small business complied with the requirement to report on small business subcontracting plan performance. The proposed changes to § 125.6(a) will benefit small business concerns by allowing small businesses to exclude certain costs from the calculation of the limitations on subcontracting. Without these changes, some agencies will not be able to set contracts aside for small business, because certain costs attributable to other than small concerns are too high. The proposed changes to § 125.6 also help small businesses by clarifying the difference between an employee and an independent contractor. The proposed changes to § 125.6 will impose some information production requirements on small business concerns, but only to the extent the information is not already in the possession of the government. Further, this information is readily available since it pertains to contract performance and subcontracting of that performance. These reports are not mandatory, as the contracting officer simply has the discretion to request such reports. Contracting officers already have the authority to request information demonstrating performance, and this proposed change simply clarifies that the authority exists. Finally, the benefits to small business concerns of this proposed rule substantially outweigh any minor costs imposed by the reporting authority. The proposed addition of part 129 implements section 2108 of the RISE Act and benefits small businesses by providing agencies with an incentive to set aside contracts for small business concerns located in a disaster area.

With respect to the limitation on subcontracting to an ineligible small business under a socioeconomic set aside (proposed 13 CFR 124.507(b)(2)(vi), 125.29(c), 126.601(i), and 127.504(c)), the rule will impact very few firms. The vast majority of small business prime contractors self-perform the required percentage of work, or will subcontract to a similarly situated entity, as is allowed under FAR 52.219–3 (Notice of HUBZone Set-Aside or Sole Source Award), 52–219–27 (Notice of Service-Disabled Veteran-Owned Small Business Set-Aside), and as will be allowed when SBA's rules on similarly situated entities (13 CFR 125.6) are implemented in the FAR. The benefits that will flow to the intended beneficiaries of a socio-economic set-aside far outweigh any impact on firms that have no intention of performing the contract or are not eligible to bid on that contract.

2. What are SBA's description and estimate of the number of small entities to which the rule will apply?

If the proposed rule is adopted in its present form, the rule would be applicable to all small business concerns participating in the Federal procurement market that seek to perform government prime contracts or to perform subcontracts awarded by other than small concerns. SBA estimates that there are approximately 320,000 firms identified as small business concerns in the Dynamic Small Business Search database.

3. What are the projected reporting, recordkeeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

The proposed rule does not impose new recordkeeping requirements. Contractors already keep records on contract performance and subcontracting. Information may be required, but only to the extent the information is not available through invoices or existing progress reports. The proposed rule would clarify that contracting officers may request access to information in connection with a

contractor's compliance with applicable limitations on subcontracting clauses. Approximately 56,000 firms received sole source or set aside awards in FY 2016. SBA is clarifying that a contracting officer may request information to assure compliance with the LOS clause, and in some cases this information may not be necessary based on the nature of the contract and the invoices submitted. We estimate that less than ten percent of contracts would be subject to a request to provide this information (18,000), and compliance should take less than an hour for each of those contracts. Accounting or contract management personnel should be able to determine whether the firm issued any subcontracts in connection with the prime contract. We estimate the SBA rule will be finalized in FY 2019. We estimate an overall annual cost of approximately $600,120.

4. What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?

We are not aware of any rules that duplicate, overlap or conflict with this rule. The FAR will have to be amended to implement portions of this rule. That will be done through a separate rulemaking.

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

Many of the proposed changes are required to implement statute, and impose requirements on contracting personnel, agencies or other than small concerns, and do not impact small business concerns. Further, many of the proposed changes will benefit small business concerns by clarifying areas where there is confusion and by making it easier for agencies to set aside contracts and orders for small business and small socioeconomic concerns. As an alternative, SBA considered whether prime contractors should be required to provide information on compliance with the LOS on all set aside or sole source contracts. However, that may unnecessarily burden small businesses, if compliance is already readily apparent to the contracting officer based on the type of contract, invoicing, or observation.

List of Subjects

13 CFR Part 121

Government procurement; Government property; Grant programs—business, Individuals with disabilities; Loan programs—business; Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

13 CFR Part 125

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

13 CFR Part 126

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 129

Administrative practice and procedure, Government contracts, Government procurement, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, and 127 and to add 13 CFR part 129 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

■ 2. Amend § 121.103 by revising the first sentence of paragraph (h)(4) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) * * *

(4) A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. * * *

* * * * *

■ 3. Amend § 121.404 by revising paragraph (a) introductory text, adding paragraph (a)(1)(iv), and revising paragraph (g)(5) to read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.

(1) * * *

(iv) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

* * * * *

(g) * * *

(5) If during contract performance a subcontractor that is not a similarly situated entity performs primary and vital requirements of a contract, the contractor and its ostensible subcontractor will be treated as joint venturers. See § 121.103(h)(4).

* * * * *

■ 4. Amend § 121.406 by:
■ a. Revising paragraph (b)(1)(i);
■ b. Removing paragraph (c); and
■ c. Redesignating paragraphs (d) through (f) as paragraphs (c) through (e) respectively.

The revision to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?

* * * * *

(b) * * *

(1) * * *

(i) Does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS Code 541519, which is found at § 121.201, footnote 18);

* * * * *

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

■ 5. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 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.

■ 6. Amend § 124.503 by revising paragraphs (c)(1)(iii) and (iv) and adding paragraph (c)(1)(v) to read as follows:

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

* * * * *

(c) * * *

(1) * * *

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

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

(v) The Participant is performing the primary and vital requirements of the service contract, or of an order, and is not unusually reliant on a subcontractor that is not similarly situated, as that term is defined at § 125.1.

■ 7. In § 124.507, add paragraph (b)(2)(vi) to read as follows:

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

* * * * *

(b) * * *

(2) * * *

(vi) Performing the primary and vital requirements of the service contract, or of an order, or is unusually reliant on a subcontractor that is not a similarly situated entity, as that term is defined at § 125.1.

■ 8. In § 124.521, add paragraph (e) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) *Recertification.* (1) Generally, a concern that represents itself and qualifies as an 8(a) Participant at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an 8(a) Participant throughout the life of that contract. For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the contract, a concern that represents itself and qualifies as an 8(a) Participant at the time of initial offer, which may not include price, is considered an 8(a) Participant throughout the life of that contract. This means that if an 8(a) Participant is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an 8(a) Participant for each order issued against the contract, unless a contracting officer requests a new 8(a) certification in connection with a specific order. Where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to an SDB. However, the following exceptions apply:

(i) Where an 8(a) contract is novated to another business concern, or where the concern performing the 8(a) contract is acquired by, acquires, or merges with another concern and contract novation is not required, the concern must comply with the process outlined at §§ 124.105(i) and 124.515.

(ii) Where an 8(a) Participant receives a non-8(a) contract that is novated to another business concern, the concern that will continue performance on the contract must certify its status as an 8(a) Participant to the procuring agency, or inform the procuring agency that it does not qualify as an 8(a) Participant, within 30 days of the novation approval. If the concern is not an 8(a) Participant, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

(iii) Where an 8(a) Participant receives a non-8(a) contract, and that Participant acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its 8(a) status to the procuring agency, or inform the procuring agency that it no longer qualifies as an 8(a) Participant. If the contractor is not an 8(a) Participant, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its 8(a) status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. Where a concern fails to recertify its 8(a) status during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.

(3) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(4) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(5) A concern's status may be determined at the time of a response to a solicitation for an basic ordering agreement (BOA), basic agreement (BA), or blanket purchase agreement (BPA) and each order issued pursuant to the BPA, BOA, or BA.

■ 9. In § 124.1015, add paragraph (f) to read as follows:

§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

* * * * *

(f) *Recertification.* (1) Generally, a concern that represents itself and qualifies as an SDB at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDB throughout the life of that contract. For an indefinite delivery indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of their offer for the contract, a concern that represents itself and qualifies as an SDB at the time of initial offer, which may not include price, is considered an SDB throughout the life of that contract. This means that if an SDB is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDB for each order issued against the contract, unless a contracting officer requests a new SDB certification in connection with a specific order. Where a concern later fails to qualify as an SDB, the procuring agency may exercise options and still count the award as an award to an SDB. However, the following exceptions apply:

(i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDB to the procuring agency, or inform the procuring agency that it does not qualify as an SDB, within 30 days of the novation approval. If the concern is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

(ii) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDB. If the contractor is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its SDB status no more than 120 days prior to the end of the fifth

year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as an SDB, either initially or prior to an option being exercised, may recertify itself as an SDB for a subsequent option period if it meets the eligibility requirements at that time.

(4) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 9. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657f; 657r.

■ 10. Amend § 125.2 by:
■ a. Revising paragraph (a);
■ b. In paragraph (b)(1)(i)(A):
■ i. Revising the second sentence; and
■ ii. Adding a sentence at the end of the paragraph;
■ c. Adding paragraph (d)(1)(v);
■ d. Redesignating paragraph (d)(7) as paragraph (d)(8);
■ e. Adding new paragraph (d)(7); and
■ f. Revising paragraph (e)(6).

The revisions and additions to read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

(a)(1) The objective of the SBA's contracting programs is to assist small business concerns, including 8(a) BD Participants, HUBZone small business concerns, Service Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

(i) Maintaining or mobilizing the Nation's full productive capacity;

(ii) War or national defense programs;

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

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

(2) If the contracting officer receives only one acceptable offer from a responsible small business concern in response to any small or socioeconomic set-aside, the contracting officer should make an award to that firm.

(b) * * *

(1) * * *

(i) * * * (A) * * * At the SBA's discretion, PCRs may review any acquisition to determine whether a set aside or sole source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. * * * Unless the contracting agency requests a review, PCRs will not review an acquisition by or on behalf of the Department of Defense if the acquisition is conducted for a foreign government pursuant to section 22 of the Arms Control Export Act (22 U.S.C. 2762), is a humanitarian operation as defined in 10 U.S.C. 401(e), is for a contingency operation as defined in 10 U.S.C. 101(a)(13), is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed, or where both the place of award and place of performance are entirely outside of the United States and its territories.

* * * * *

(d) * * *

(1) * * *

(v) Not later than 7 days after making a determination that an acquisition strategy involving a consolidation of contract requirements is necessary and justified under subparagraph (d)(1)(i) of this section, the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO), or designee, shall publish a notice on the agency's website that such determination has been made. Any solicitation for a procurement related to the acquisition strategy shall not be issued earlier than 7 days after such notice is published. Along with the publication of the solicitation, the SPE or CAO (or designee) must publish in the Government-wide Point of Entry (GPE) the justification for the determination, which shall include the information in paragraphs (d)(1)(i)(A) through (E) of this section.

* * * * *

(7) *Notification to Public of Rationale for Substantial Bundling.* If the head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements, the head of a contracting agency shall publish a notice on the agency's website that such determination has been made not later than 7 days after making such determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. Along with the publication of the solicitation, the head of a contracting agency shall publish in the GPE a justification for the determination, which shall include the following information:

(i) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling.

(ii) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements.

(iii) An assessment of—the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and

(iv) The specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

* * * * *

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j, the contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business. This includes order set asides for 8(a) Participants, HUBZone SBCs, SDVO SBCs and WOSBs.

* * * * *

■ 11. Amend § 125.3 by:
■ a. Revising the last sentence of paragraph (c)(1)(iv);
■ b. Revising paragraph (d)(3);
■ c. Adding paragraph (d)(11); and
■ d. Revising the first sentence of paragraph (f)(3).

The revisions and addition to read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(c) * * *

(1) * * *

(iv) * * * A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR;

* * * * *

(d) * * *

(3) Evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.

(i) Evidence that a large business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(A) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(B) Although the contractor may have failed to achieve its goal in one socioeconomic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories; or

(C) The contractor fulfilled all of the requirements of its subcontracting plan.

(ii) Examples of activities reflective of a failure to make a good faith effort to comply with a subcontracting plan include, but are not limited, to:

(A) Failure to submit the acceptable individual or summary subcontracting reports in eSRS by the report due dates or as provided by other agency regulations within prescribed time frames;

(B) Failure to pay small business concern subcontractors in accordance with the terms of the contract with the prime;

(C) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan;

(D) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flow-down requirements;

(E) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan;

(F) Failure to correct substantiated findings from federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the government;

(G) Failure to conduct market research identifying potential small business concern subcontractors through all reasonable means including outreach, industry days, or the use of federal database marketing systems such as SBA's Dynamic Small Business Search (DSBS) or SUBNet Systems or any successor federal systems;

(H) Failure to comply with regulations requiring approval by the contracting officer to change small business concern subcontractors that were used in preparing offers; or

(I) Falsifying records of subcontracting awards to SBCs.

* * * * *

(11) Evaluating whether the contractor or subcontractor complied in good faith with the requirement to provide periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the contractor or subcontractor with the subcontracting plan. Failure to make a good faith effort shall be a material breach of such contract or subcontract and may be considered in any past performance evaluation of the contractor.

* * * * *

(f) * * *

(3) Upon completion of the review and evaluation of a contractor's performance and efforts to achieve the requirements in its subcontracting plans, the contractor's performance will be assigned one of the following ratings: Exceptional, Very Good, Satisfactory, Marginal or Unsatisfactory. * * *

* * * * *

■ 12. Amend § 125.6 by:
■ a. Adding two sentences at the end of paragraph (a)(1);
■ b. Adding a sentence at the end of paragraph (c);
■ c. Revising paragraph (e)(3); and
■ d. Adding paragraph (e)(4).

The revision and additions to read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

(a) * * *

(1) * * * Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases. In addition, work performed by an independent contractor under a contract that was awarded pursuant to the Foreign Assistance Act of 1961 may also be excluded.

* * * * *

(c) * * * A prime contractor may no longer count a similarly situated entity towards compliance with the limitations on subcontracting where the subcontractor ceases to qualify as small or under the relevant socioeconomic status.

* * * * *

(e) * * *

(3)(i) For contracts assigned a NAICS code with an employee-based size standard, where an independent contractor is not otherwise treated as an employee of the concern for which he/she is performing work for size purposes under § 121.106(a) of this chapter, work performed by the independent contractor shall be considered a subcontract. Such work will count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.

(ii) For contracts assigned a NAICS code with a revenue-based size standard, work performed by an independent contractor shall be considered a subcontract, and will count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity. A firm's treatment and reporting of an individual for tax purposes governs whether that individual should be treated as an employee or independent contractor for limitations on subcontracting purposes.

(4) The contracting officer may require the contractor to demonstrate its compliance with the limitations on subcontracting, if the information regarding such compliance is not already available to the contracting officer (*e.g.,* invoices).

* * * * *

■ 13. Amend § 125.18 by:
■ a. In paragraph (e)(1)(i), removing the phrase ''an SDVO contract'' and adding in its place the phrase ''a contract'';
■ b. In paragraph (e)(1)(ii), removing the phrase ''an SDVO SBC contract'' and adding in its place the phrase ''a contract''; and
■ c. Adding paragraph (f).

The addition to read as follows:

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

* * * * *

(f) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set aside or sole source service contract or order, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set aside service or sole source contract or order, the prime contractor is not eligible for award of an SDVO contract. When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for an SDVO status protest, as described in subpart D of this part. When the subcontractor is other than small, or alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest subject to the ostensible subcontractor rule, as described at § 121.103(h)(4) of this chapter.

■ 14. In § 125.29, add paragraph (c) to read as follows:

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

* * * * *

(c) *Ostensible subcontractor.* In cases where the prime contractor appears unduly reliant on a small, non-similarly situated entity subcontractor or where the small non-similarly situated entity is performing the primary and vital requirements of the contract, the Director, Office of Government Contracting will consider a protest only if the protester presents credible evidence of the alleged undue reliance or credible evidence that the primary and vital requirements will be performed by the subcontractor.

PART 126—HUBZONE PROGRAM

■ 15. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111–240, 24 Stat. 2504.

■ 16. Amend § 126.601 by:

■ a. In paragraph (h)(1)(i), removing the phrase ''HUBZone contract (or a HUBZone contract awarded through full and open competition based on the HUBZone price evaluation preference'' and adding in its place the word ''contract'';

■ b. In paragraph (h)(1)(ii), removing the phrase ''HUBZone contract'' and adding in its place the word ''contract''; and

■ c. Adding paragraph (i).

The addition to read as follows:

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

* * * * *

(i) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set aside service contract, the prime contractor is not eligible for award of a HUBZone contract. When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a HUBZone status protest, as described in subpart H of this part. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(4) of this chapter.

■ 17. Amend § 126.801 by adding in paragraph (a) a sentence after the third sentence to read as follows:

§ 126.801 How does one file a HUBZone status protest?

(a) * * * SBA will also consider a protest challenging whether a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract. * * *

* * * * *

PART 127—WOMEN–OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 18. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

§ 127.503 [Amended]

■ 19. In § 127.503, amend paragraphs (h)(1)(i) and (ii) by removing the phrase ''WOSB/EDWOSB contract'' wherever it appears and adding in its place the word ''contract''.

■ 20. In § 127.504, add paragraph (c) to read as follows:

§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(c) Where a subcontractor that is not similarly situated performs primary and vital requirements of a set aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract. When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small, or alleged to be other than small, for the size standard assigned to the procurement, this issue may be a ground for a size protest, as described at § 121.103(h)(4) of this chapter.

■ 21. Amend § 127.602 by revising the second sentence and adding a new third sentence to read as follows:

§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

* * * SBA will also consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in § 127.300. In addition, when sufficient credible evidence is presented, SBA will consider a protest challenging whether the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in § 125.1 of this chapter, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set aside or sole source WOSB or EDWOSB contract.

■ 22. Add part 129 to read as follows:

PART 129—CONTRACTS FOR SMALL BUSINESSES LOCATED IN DISASTER AREAS

Sec.

Authority: 15 U.S.C. 636(j)(13)(F)(ii), 644(f).

§ 129.100 What definitions are important in this part?

For the purposes of this part:

Concern located in a disaster area is a firm that during the last twelve months—

(1)(i) Had its main operating office in the area; and

(ii) That office generated at least half of the firm's gross revenues and employed at least half of the offeror's permanent employees.

(2) If the firm does not meet the criteria in paragraph (1) of this definition, factors to be considered in determining whether a firm resides or primarily does business in the disaster area include—

(i) Physical location(s) of the firm's permanent office(s) and date any office in the disaster area(s) was established;

(ii) Current state licenses;

(iii) Record of past work in the disaster area(s) (*e.g.,* how much and for how long);

(iv) Contractual history the firm has had with subcontractors and/or suppliers in the disaster area;

(v) Percentage of the firm's gross revenues attributable to work performed in the disaster area;

(vi) Number of permanent employees the firm employs in the disaster area;

(vii) Membership in local and state organizations in the disaster area; and

(viii) Other evidence that establishes the firm resides or primarily does business in the disaster area. For example, sole proprietorships may submit utility bills and bank statements.

Disaster area means the area for which the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Assistance Act (42 U.S.C. 5170), during the period of the declaration.

Emergency response contract means a contract with private entities that supports assistance activities in a disaster area, such as debris cleanup, distribution of supplies, or reconstruction.

§ 129.200 What contracting preferences are available for small business concerns located in disaster areas?

Contracting officers may set aside solicitations for emergency response contracts to allow only small businesses located in the disaster area to compete.

§ 129.300 What small business goaling credit do agencies receive for awarding an emergency response contract to a small business concern under this part?

If an agency awards an emergency response contract to a local small business concern through the use of a local area set aside that is also set aside under a small business or socioeconomic set-aside (8(a), HUBZone, SDVO, WOSB, EDWOSB), the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under section 15(g)(1)(A) of the Small Business Act (15 U.S.C. 644(g)(1)(A)). The procuring agency shall enter the actual contract value, not the doubled contract value in the required contract reporting systems, and appropriately code the contract action to receive the credit. SBA will provide the double credit as part of the Scorecard process.

§ 129.400 What are the applicable performance requirements?

The performance requirements of § 125.6 of this chapter apply to small and socioeconomic set asides under this part. A similarly situated entity as that term is used in § 125.6 of this chapter must qualify as a concern located in a disaster area.

§ 129.500 What are the penalties of misrepresentation of size or status?

The penalties relevant to the particular size or socioeconomic status representation under title 13 §§ 121.108, 125.32, 126.900, and 127.700 of this chapter are applicable to set asides under this part.

Dated: November 8, 2018.

Linda E. McMahon,

Administrator.

[FR Doc. 2018–25705 Filed 12–3–18; 8:45 am]

BILLING CODE 8025–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2018–0676; FRL–9986–65–Region 6]

Air Plan Approval; Texas; Emission Statements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve a portion of a State Implementation Plan (SIP) revision submitted by the State of Texas for the 2008 8-hour ozone national ambient air quality standards (NAAQS). The portion of the SIP revision being approved pertains to CAA 2008 ozone NAAQS requirement for emission statements in the Dallas/Fort Worth ozone nonattainment area (DFW area).

DATES: Written comments should be received on or before January 3, 2019.

ADDRESSES: Submit your comments, identified by EPA–R06–OAR–2018–0676, at *https://www.regulations.gov* or via email to *ruan-lei.karolina@epa.gov.* For additional information on how to submit comments see the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Karolina Ruan Lei, 214–665–7346, *ruan-lei.karolina@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, the EPA is approving the State's SIP submittal as a direct rule without prior proposal because the Agency views this as noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action no further activity is contemplated. If the EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: November 26, 2018.

Anne Idsal,

Regional Administrator, Region 6.

[FR Doc. 2018–26297 Filed 12–3–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2018–0771; FRL–9987–00–Region 1]

Air Plan Approval; Massachusetts; Air Emissions Inventory, Emissions Statements, Source Registration, and Emergency Episode Planning Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions submitted by the Commonwealth of Massachusetts. The revisions establish a 2011 base year emissions inventory, an emissions statement certification, revisions to an existing stationary source registration program, and requirements to be undertaken during air pollution emergencies. This action is being taken under the Clean Air Act.