

shall refund all or part of the payments received, plus interest, determined in accordance with part 1403 of this chapter. The county FSA committee, in consultation with NRCS, has the option of requiring only partial refund of the payments received if a previously installed conservation practice can function independently, is not affected by the violation or other conservation practices that would have been installed under the contract, and the participant agrees to operate and maintain the installed conservation practice for the life span of the practice.

(2) If CCC terminates a contract due to breach of contract or the participant voluntarily terminates the contract before any contractual payments have been made, the participant shall forfeit all rights for further payments under the contract and shall pay such liquidated damages as are prescribed in the contract.

(3) When making all contract termination decisions, CCC may reduce the amount of money owed by the participant by a proportion which reflects the good-faith effort of the participant to comply with the contract, or the hardships beyond the participant's control that have prevented compliance with the contract.

(4) The participant may voluntarily terminate a contract if, based on CCC's determination that such termination would be in the public interest, CCC approves the termination.

### Subpart C—General Administration

#### § 1468.30 Appeals.

(a) An applicant or participant may obtain administrative review of an adverse decision made with respect to this part and the CFO contract in accordance with parts 2 and 614 of this title, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

- (1) CCC funding allocations;
- (2) Eligible conservation practices; and
- (3) Other matters of general applicability.

#### § 1468.31 Access to operating unit.

Any authorized CCC representative shall have the right to enter an operating unit or tract for the purpose of ascertaining the accuracy of any representations made in a contract or in anticipation of entering a contract, or as to the performance of the terms and conditions of the contract. Access shall include the right to provide technical assistance and inspect any work undertaken under the contract. The CCC

representative shall make a reasonable effort to contact the participant prior to the exercise of this right to access.

#### § 1468.32 Performance based upon advice or action of representatives of CCC.

If a participant relied upon the advice or action of any authorized representative of CCC, and did not know or have reason to know that the action or advice was improper or erroneous, the county FSA committee, in consultation with NRCS, may accept the advice or action as meeting the requirements of the program and may grant relief, to the extent it is deemed desirable by CCC, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant.

#### § 1468.33 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any participant shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States. The regulations governing offsets and withholdings found at part 1403 of this chapter shall apply to contract payments.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at part 1404 of this chapter.

#### § 1468.34 Misrepresentation and scheme or device.

(a) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part shall not be entitled to contract payments and must refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) An applicant or participant who is determined to have knowingly adopted any scheme or device that tends to defeat the purpose of the program, made any fraudulent representation, or misrepresented any fact affecting a program determination, shall refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter, received by such applicant or participant with respect to CFO contracts.

Signed in Washington, D.C. on March 26, 1998.

**Pearlie S. Reed,**

*Vice President, Commodity Credit Corporation.*

[FR Doc. 98-8505 Filed 4-1-98; 8:45 am]

BILLING CODE 3410-16-P

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121, 125, and 126

#### HUBZone Empowerment Contracting Program

**AGENCY:** Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) is proposing to add to its regulations a new Part 126 to implement a new program entitled the "HUBZone Empowerment Contracting Program" ("hereinafter the HUBZone Program"). This program was created by the HUBZone Act of 1997, which is contained in Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592). The proposed rule would set forth the program requirements for qualification as a HUBZone small business concern (HUBZone SBC), the federal contracting assistance available to qualified HUBZone SBCs, and other aspects of this program.

**DATES:** SBA must receive comments by no later than May 4, 1998.

**ADDRESSES:** You may submit your comments by first class mail to Michael McHale, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Michael McHale, Assistant Administrator, Office of Procurement Policy and Liaison, (202) 205-6731.

**SUPPLEMENTARY INFORMATION:** Title VI of the Small Business Reauthorization Act of 1997, Public Law 105-135, December 2, 1997, creates a new program called the "HUBZone Program". The purpose of the HUBZone program is to provide federal contracting opportunities for certain qualified small business concerns (SBCs) located in distressed communities in an effort to promote private-sector investment and employment opportunities in these communities. Fostering the growth of federal contractors in these areas and ensuring that these contractors remain viable businesses for the long-term will help to empower these areas while not adversely affecting recent efforts to streamline and improve the federal procurement process.

The legislative history contains many strong indications that Congress wanted the SBA to implement the program in a manner that builds on the President's proposed Empowerment Contracting program (launched by Executive Order, May 21, 1996) and is consistent with the Federal government's other existing community empowerment programs—most notably the Empowerment Zone program. The legislative history also

contains many indications that Congress wanted SBA to implement the HUBZone program without harming SBA's existing 8(a) program. Furthermore, by increasing the small business contracting goal in this title, Congress sent a strong signal to SBA that it also should avoid harm to other Congressionally recognized programs which benefit small business. SBA is sensitive to these indications of Congressional intent and believes that this proposal reflects a balanced approach to HUBZone implementation.

The HUBZone Act directs the Administrator of SBA to promulgate regulations to "carry out this title and the amendments made by this title." (Pub.L. 105-135, Sec. 605(a)). This proposed rule would add a new part to Title 13 of the Code of Federal Regulations to include the regulations for the HUBZone program. The regulations set out the general principles and definitions applicable to the program; the departments and agencies affected by the program; the qualification requirements for HUBZone concerns; the certification procedures of the program; the verification processes which SBA will use for this program; the contractual assistance provided by the program; the applicable subcontracting percentage requirements; the protest and appeal procedures; and various applicable penalties.

The proposed rule would also provide conforming amendments necessary to integrate the HUBZone program into the SBA size regulations and regulations related to government procurement.

The HUBZone Act requires the Administrator of SBA to establish and maintain a database of qualified HUBZone SBCs. The proposed rule refers to this database as the List of those concerns that have been certified by SBA as qualified HUBZone SBCs (the List). The List will include, to the extent practicable, the name, address, and type of business of each concern; must be updated at least annually; and must be provided upon request to any Federal agency or other entity.

SBA has attempted to write the proposed regulations in plain English. To this end, SBA has written proposed section headings in question and answer format for ease of use and has tried to avoid unnecessary verbiage.

SBA encourages comments on all aspects of this proposed rule. This is a new government program with the potential to achieve significant public policy objectives. Like many new programs, it also carries the potential for abuse. SBA has developed these proposed regulations in an effort to achieve an appropriate balance; broad

public comment will assist it in developing a final rule.

### Section by Section Analysis

The following is a section by section analysis of each provision of SBA's regulations that would be affected by this proposed rule:

The authority citation for 13 CFR Part 121 would be revised to include Title VI of Public Law 105-135, as Part 121 would be amended to include references to the HUBZone program.

Section 121.401 would be amended to add the HUBZone program to the list of government procurement programs subject to size determinations.

Section 121.1001 would be amended by redesignating paragraph (a)(6) as (a)(7) and adding a new paragraph (a)(6) to describe who may initiate a size protest or request for formal size determination in the HUBZone program.

Section 121.1008 would be amended by adding a sentence which requires the SBA Government Contracting Area Director, or designee, to notify the AA/HUB of receipt of a size protest concerning a qualified HUBZone SBC.

The authority citation for Part 125 of this title would be revised to include Title VI of Public Law 105-135, as § 125.3 would be amended to include HUBZone SBCs in the subcontracting assistance provisions of this section.

A new part 126 would be added to Title 13 of the Code of Federal Regulations to implement the HUBZone program.

Section 126.100 would explain that the purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities and investment in those areas.

Proposed § 126.101 lists the departments and agencies affected directly by the HUBZone program.

Section 126.102 would describe the effect the HUBZone program would have on the section 8(d) subcontracting program. The HUBZone Act of 1997 amended section 8(d) of the Small Business Act, 15 USC 637(d), to include qualified HUBZone SBCs in the formal subcontracting plans required by section 8(d) of the Small Business Act and described in § 125.3 of this title.

Section 126.103 would define terms that are important to the HUBZone program. In defining some terms essential to the HUBZone program, the HUBZone Act of 1997 relied upon definitions provided by other federal agencies. This proposed rule would cross reference those definitions for use

in connection with the HUBZone program.

For example, the HUBZone Act defines a "HUBZone" as an "historically underutilized business zone which is in an area located within one or more qualified census tracts, qualified non-metropolitan counties, or lands within the external boundaries of an Indian reservation." Further, the HUBZone Act states that the term "qualified census tracts" has the meaning given that term in section 42(d)(5)(C)(ii)(I) of the Internal Revenue Code. This section of the Internal Revenue Code refers to the low-income housing credit program maintained by the Department of Housing and Urban Development (HUD). The Secretary of HUD designates the qualified census tracts by Notice published periodically in the **Federal Register**. These notices are titled "Statutorily Mandated Designation of Qualified Census Tracts and Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986." The most recent Notice may be found at 59 FR 53518 (1994). The proposed rule includes a cross reference to section 42(d)(5)(C)(ii)(I) of the Internal Revenue Code.

The term "qualified non-metropolitan counties" is based on the most recent data available concerning median household income and unemployment rates. The Bureau of Census of the Department of Commerce gathers the data regarding median household income and the Bureau of Labor Statistics of the Department of Labor gathers the data regarding unemployment rates. One may find the information from the Bureau of Census at any local Federal Depository Library. To find the nearest Federal Depository Library, one may call toll-free (888) 293-6498. The information from the Bureau of Labor Statistics is available for public inspection at the US Department of Labor, Bureau of Labor Statistics, Division of Local Area Unemployment Statistics office in Washington DC (the text of the proposed rule lists the complete address). Again, the proposed rule would cross reference this information to provide guidance in determining whether or not a small business concern is located in a HUBZone.

The terms "qualified census tract" and "qualified non-metropolitan counties" are based on statistics gathered periodically by various federal agencies. The census reflects changes every 10 years, while unemployment statistics are calculated annually. Changes in either can generate changes in the areas that qualify as HUBZones—even as often as annually.

The HUBZone Act of 1997 does not define "lands within the external boundaries of an Indian reservation." For purposes of the HUBZone program, SBA has adopted the definition of "Indian reservation" used in the Bureau of Indian Affairs' (BIA) regulations and the proposed rule includes a cross-reference to 25 CFR 151.2(f). The BIA definition of "Indian reservation" includes "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary [of the Interior or authorized representative]." 25 CFR 151.2(f). BIA's definition of "tribe" includes Alaska Native entities. See 25 CFR 81.1(w).

SBA created a website that enables individuals to input the address of their business to determine if it is located in a HUBZone. Additionally, through the SBA website, individuals may obtain lists of the qualified census tracts and qualified non-metropolitan counties on a state-by-state basis. The website also contains a "hot link" to a directory of BIA's Land Titles and Records Offices and their respective jurisdictions.

Proposed § 126.200 contains the HUBZone eligibility requirements. In general, as described in the regulations, the company must be a small business concern; the company must be owned and controlled by one or more persons each of whom is a citizen of the United States; the principal office of the concern must be located in a HUBZone; and at least thirty-five percent (35%) of the concern's employees must reside in a HUBZone. To be counted as residing in the HUBZone, an employee must either be registered to vote in the HUBZone or have resided in the HUBZone for a period of not less than 180 days.

Proposed § 126.201 describes who is considered to own a HUBZone SBC.

Proposed § 126.202 explains who is considered to control a HUBZone SBC.

Section 126.203 would state that a HUBZone SBC must meet SBA's size standards for its primary industry classification as defined in Part 121.

SBA believes that current size standards for the procurement assistance program is an effective size standard for HUBZone purposes. However, because the focus of the HUBZone program is creating jobs in HUBZone communities rather than development of individual businesses, SBA is considering whether a different

approach for HUBZones may be more appropriate. SBA is specifically seeking comments on policies that may help to create HUBZone areas. One way SBA is considering is a minimum alternative size standard for non-8(a) HUBZone SBCs of at least 16 employees. SBCs in the 8(a) program could have fewer than 16 employees. SBA is also considering a maximum size standard for most SBCs of one-half the procurement assistance size standard for purposes of initial qualification only. (The full procurement assistance size standard would apply to HUBZone contracting opportunities.) SBA is specifically seeking comments on the potential impact of a minimum size standard of 16 employees, except for 8(a) SBCs and a maximum size standard of one-half of the SBA size standard for initial qualification purposes, except for 8(a) firms and women-owned firms. Comments should address the potential impact of such size standards on types of businesses and specific industries, particularly those with large numbers of firms with very few employees, such as business consulting, health care, and construction.

SBA believes a minimum size standard might better ensure that the HUBZone program concentrates its benefits on concerns with at least a minimum base of employees residing in HUBZones. Such a minimum base could enhance the impact that a HUBZone contract would have, both in terms of number of required resident employees and in terms of number of new employees to perform contracts. Directing HUBZone contracts to somewhat large firms may also ease the task of contract administration for contracting officers who will be dealing with HUBZone SBCs for the first time, and increase the likelihood that they will view favorably the prospect of working with such concerns.

It should also be noted that, unlike the 8(a) program, the HUBZone program is not primarily aimed at encouraging the development of individual concerns. The HUBZone program focuses on job creation and investment in HUBZone communities, and uses Federal procurement contract awards to qualified HUBZone SBCs to achieve that purpose. The exception for 8(a) firms also ties in with the fact that smaller 8(a) participants have a mechanism in place to assist them with performing contracts—the Mentor-Protégé program.

The minimum size standard of 16 employees also would help distinguish the HUBZone program from the Very Small Business (VSB) program. The VSB program sets a maximum size standard of 15 employees. Like the 8(a) program,

the VSB program is primarily designed as a developmental program and uses Federal contracting opportunities to assist in the development of individual firms. Setting a minimum size standard of 16 employees for the HUBZone program could help balance the objectives of the HUBZone program, the 8(a) program, and the VSB program.

In addition to the minimum size standard under discussion, SBA also is reviewing a maximum size standard for qualified HUBZone SBCs. Under this alternative approach, at the time of application for certification, a concern could not exceed one-half the size standard corresponding to the SIC code of the concern's primary industry, unless the concern is an 8(a) participant or a small business concern owned and controlled by women.

SBA is inviting public comment on whether this reduced size standard would best fulfill the purposes of the HUBZone program. SBA wants to avoid the situation where the award of a single HUBZone contract likely would result in a qualified HUBZone SBC exceeding the size standard for its primary industry classification. (Example: Assume that a qualified HUBZone SBC has 499 employees and its primary industry has a size standard of 500 employees. Should the concern receive a HUBZone contract and add 10 new employees to perform the contract, it would no longer meet the employee size standard.) The program may better achieve its intended purposes by providing incentives for existing qualified HUBZone SBCs to remain and expand in HUBZones without losing their eligibility, and by attracting non-HUBZone SBCs into HUBZones where they will provide new employment opportunities and spur community economic development. With a maximum size standard for qualified HUBZone SBCs, they will have room to grow in HUBZone communities before they are no longer small for purposes of obtaining contract awards under the program. SBA specifically invites comments on the question of whether there should be a maximum size standard for the HUBZone program that is different from other procurement programs, and what the impact of such a size standard would be on different types of business and specific industries.

Additionally, if the commenter believes a lower initial maximum size standard for the HUBZone program is appropriate, SBA asks that the commenter address the issue of whether there should be an exception to that size standard for 8(a) participants or SBCs owned and controlled by women. SBA

is discussing exceptions for such firms. The 8(a) program is clearly a developmental program with its purpose to develop concerns owned and controlled by socially and economically disadvantaged individuals into competitively viable businesses that can survive upon graduation from the 8(a) program. SBA believes the HUBZone program could provide an additional source of government contract support while the 8(a) participant remains in the program. It is reluctant to impose any restrictions on such concerns that would conflict with other regulations governing the 8(a) program directly.

In addition, the Small Business Act contains a congressional finding that assistance to women-owned businesses (WOBs) is needed to remove discriminatory barriers to their development. Similar to the developmental objectives of the 8(a) program, SBA is seeking comment on whether allowing WOBs a maximum opportunity to qualify as HUBZone SBCs would assist in overcoming such barriers and aid in their development.

Under proposed § 126.203, if SBA cannot verify that a concern is small, SBA may deny the concern status as a qualified HUBZone SBC, or SBA may request a formal size determination from the responsible Government Contracting Area Director or designee.

Section 126.204 would provide that qualified HUBZone SBCs may have affiliates so long as the affiliates are also qualified HUBZone SBCs.

Proposed § 126.205 explains that WOBs, 8(a) participants, and small disadvantaged business concerns (SDBs) also can qualify as HUBZone SBCs if they meet the requirements set forth in this part.

Section 126.206 would state the conditions under which regular dealers can qualify as HUBZone SBCs.

Proposed § 126.207 explains that a qualified HUBZone SBC may have offices or facilities located in another HUBZone or even outside a HUBZone. However, in order to qualify as a HUBZone SBC, the concern's principal office must be located in a HUBZone.

Sections 126.300 through 126.306 would describe how a concern is certified as a qualified HUBZone SBC. This section would explain how SBA certifies a concern for the program, when the certification takes place, and whether a concern can certify itself.

Proposed § 126.304 sets forth what a concern must submit to be certified by SBA as a qualified HUBZone SBC. Proposed § 126.304(f) explains that if a concern is applying for certification based on a location "within the external boundaries of an Indian reservation", it

must submit official documentation from the Bureau of Indian Affairs Land Titles and Records Office governing their area that confirms that the concern is located within the external boundaries of an Indian reservation. This additional requirement is necessary because, while the qualified census tracts and qualified non-metropolitan counties are contained in databases available in an electronic format, the data concerning Indian reservations is available only through the BIA Land Titles and Records Offices and is not available in an electronic format. Consequently, concerns applying for HUBZone status based on location within the external boundaries of an Indian reservation must submit the additional documentation.

Proposed § 126.307 states where SBA will maintain the List and proposed § 126.308 explains what a concern can do in the event SBA inadvertently omits it from the List.

Section 126.309 would state that if SBA declines or de-certifies a concern, it may seek certification or re-certification no sooner than one year from the date of decline or de-certification, if it believes that it has overcome all of the reasons for decline or de-certification. SBA requests comments addressing the prohibition on seeking certification sooner than one year from the date of decline or de-certification and, in particular, whether the time period is appropriate. SBA asks commenters to propose alternatives if they believe the time period is inappropriate.

Proposed §§ 126.400 through 126.405 discuss program examinations, including who will conduct program exams, what the examiners will review, and when examinations will be conducted. In addition, this section would set out the action SBA may take when it cannot verify a concern's eligibility and what action SBA will take once it has verified a concern's eligibility. Concerns would have an obligation to maintain relevant documentation for 6 years.

Sections 126.500 through 126.503 would set forth how a concern maintains its HUBZone status; a qualified HUBZone SBC's ongoing obligation to SBA and the consequences for failure to uphold that obligation; the length of time a concern may qualify as a HUBZone SBC; and when SBA may remove a concern from the List. Specifically, a concern wishing to remain on the List must self-certify annually to SBA that it remains a qualified HUBZone SBC. This self-certification must take place within 30 days after the one-year anniversary of

their date of certification. SBA is particularly interested in comments specifically addressing the requirement of annual self-certification to SBA. SBA asks commenters to propose alternatives if they believe the time period is inappropriate.

This section would also explain the qualified HUBZone SBC's ongoing obligation to immediately notify SBA of any material change which could affect its eligibility. The consequences for failure to do so will be immediate de-certification, removal from the List, and possibly the imposition of penalties under § 126.900 of this part. In order to be placed upon the List again, the concern must re-apply for certification pursuant to §§ 126.300 through 126.309 of this part. Additionally, the application for certification must include a full explanation of why the concern failed to notify SBA of the material change. If SBA is not satisfied with the explanation, SBA may decline to certify the concern pursuant to § 126.306 of this part.

SBA proposes that qualified HUBZone SBCs remain eligible for HUBZone status for a period of 3 years beyond the date that the HUBZone in which the concern is located ceases to meet the definition of a HUBZone, if the concern continues to meet all other eligibility requirements. SBA specifically invites public comment on this particular issue. SBA desires to balance the need to de-certify concerns that are no longer located in a HUBZone against the need to not discourage concerns from investing in HUBZone communities and creating jobs and expanded business operations in those communities in reliance on HUBZone program benefits.

Proposed §§ 126.600 through 126.616 explain the general conditions applicable to HUBZone contracts. These sections include provisions regarding sole source contract awards; competitive contract awards; price evaluation preferences and their effect on qualified HUBZone SBCs; when SBA may appeal a non-award to a qualified HUBZone SBC; and when a HUBZone contract may be prohibited by other SBA programs or other Government programs.

Proposed § 126.609 discusses what a contracting officer may do if a contract opportunity does not exist for competition among qualified HUBZone SBCs. This section explains that, in this situation, the contracting officer may make an award under the 8(a) program on either a sole source or competitive basis, make award to a HUBZone SBC on a sole source award basis, or utilize a small business set-aside, in that order

of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through full and open competition. SBA believes this order of precedence will aid in providing the maximum practicable opportunity for the development of SBCs owned by members of socially and economically disadvantaged groups, as Congress intended in the Small Business Act (15 U.S.C. 632(f)(1)(e)), and yet is consistent with the new HUBZone legislation.

Proposed § 126.613 explains how a price evaluation preference affects the bid of a qualified HUBZone SBC in full and open competition. In a full and open competition, a contracting officer must deem the price offered by a qualified HUBZone SBC to be lower than the price offered by another offeror (other than another small business concern) if the price offered by the qualified HUBZone SBC is not more than 10% higher than the price offered by the otherwise lowest, responsive, and responsible offeror. An example of the application of the HUBZone price evaluation preference is included in this section of the proposed rule.

Proposed § 126.614 describes how a contracting officer must apply both HUBZone and SDB price evaluation preferences in a full and open competition. The HUBZone price evaluation preference is described in proposed § 126.613 of this part. The SDB price evaluation preference currently applies to the Department of Defense only, and is set forth in 10 U.S.C. 2323. The Department of Defense regulations implementing this preference are set out in § 252.219-7006 of the Defense Federal Acquisition Regulation Supplement.

This proposed rule requires that the contracting officer first apply the SDB price evaluation preference, then apply the HUBZone price evaluation preference. The SDB price evaluation preference should be applied first in order to establish the lowest, responsive, and responsible offeror. Once the contracting officer establishes the lowest, responsive, and responsible offeror, if the qualified HUBZone SBC's offer is not more than 10 percent higher than that offer (unless the lowest, responsive, responsible offeror is another small business concern) the contracting officer must deem the price offered by the qualified HUBZone SBC to be lower than the price offered by the otherwise lowest, responsive, and responsible offeror. The SDB price evaluation must be applied first because if the contracting officer applies the HUBZone price evaluation preference

first, the SDB price evaluation preference would effectively negate the HUBZone price evaluation preference. An example of the application of both HUBZone and SDB price evaluation preferences is included in proposed § 126.614 of the regulations.

It is possible that the qualified HUBZone SBC that submits an offer on a contract will be both a qualified HUBZone SBC and an SDB. For example, a qualified HUBZone SBC (but not an SDB) submits an offer of \$102; a qualified HUBZone SBC that is also an SDB submits an offer of \$105; an SDB (but not a qualified HUBZone SBC) submits an offer of \$107; a small business concern (but not a qualified HUBZone SBC or an SDB) submits an offer of \$100; and a large business submits an offer of \$93. Under this proposal, the contracting officer must go through the following steps:

1. Apply the SDB price evaluation preference to establish the lowest, responsive, and responsible offeror. Thus, the qualified HUBZone SBC's offer becomes \$112.2; the qualified HUBZone SBC/SDB's offer remains \$105; the SDB's offer remains \$107; the small business concern's offer becomes \$110; and the large business's offer becomes \$102.3. As a result of the SDB price evaluation preference, the large business is the lowest, responsive, and responsible offeror.

2. Apply the HUBZone price evaluation preference and if a qualified HUBZone SBC's price is not more than 10 percent higher than the large business's price, the contracting officer must deem its price to be lower than the large business's price. In this example, the qualified HUBZone price of \$112.2 is not more than 10 percent higher than the large business's price, however, the qualified HUBZone/SDB's price of \$105 is also not more than 10 percent higher than the large business's price and is lower than the qualified HUBZone SBC's price.

Consequently, as specified by this proposed rule, the contracting officer must deem the price of the qualified HUBZone/SDB as the lowest, responsive, and responsible offeror.

This example illustrates the potential effect of according a small business concern a "dual status" as both a qualified HUBZone SBC and an SDB. SBA invites comments specifically addressing whether such an application of "dual status" is appropriate. Should concerns be able to benefit from both their qualified HUBZone status and their small disadvantaged status? Or, should they be required to choose one or the other when submitting an offer on a contract in full and open competition?

Proposed § 126.616 specifically discusses the circumstances in which a contracting officer may award a HUBZone contract to a joint venture. This section explains that a qualified HUBZone SBC may enter into a joint venture with one or more other qualified HUBZone SBCs for the purpose of performing a specific HUBZone contract. By allowing joint ventures between qualified HUBZone SBCs, 8(a) participants and WOBs, SBA would make it more possible for such concerns to bid on larger contracts.

Proposed § 126.616(b) explains the size standards applicable to such joint ventures. A joint venture of qualified HUBZone SBCs could submit an offer for a HUBZone procurement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided that, for a procurement having an employee-based size standard, the procurement exceeds \$10 million. On August 14, 1997, SBA proposed a similar rule for the 8(a) program. Although the final rule for the 8(a) program has yet to be published, SBA anticipates that the final rule will be the same on this issue. To achieve consistency within its programs, SBA modeled this section of the proposed rule after § 124.512 of the 8(a) program proposed rule.

Since a principal purpose of the HUBZone program is job creation and job growth, SBA would like commenters to address specifically whether HUBZone contract opportunities should be limited to certain types of contracts only. For example, should HUBZone contracts only be available for industries that are considered "labor-intensive"? The proposed rule does not now contain such a restriction.

Additionally, SBA requests that commenters discuss whether HUBZone contract opportunities should be limited to those not now awarded to SBCs. It also invites suggestions for ways in which HUBZone implementation can better help government contracting activities meet their SDB and WOB goals.

Proposed § 126.700 discusses the subcontracting percentage requirements applicable to the HUBZone program; the limited circumstances under which the subcontracting percentage requirements may be changed; and the procedures for changing those requirements. For purposes of definitions applicable to § 126.700, as well as §§ 126.304(a)(5) and 126.602(b), SBA specifically solicits comment and, in particular, with regard to an appropriate definition for "materials". SBA asks commenters to discuss whether substantially completed products with only minor

modifications should be considered materials, and whether and how labor costs involved in producing such products should be considered.

Proposed § 126.800 addresses protests relating to a small business concern's HUBZone status. This section would explain who may file a protest, what the protest must contain, how and where a protest must be filed, who decides the protest, and what appeal rights are available.

Proposed § 126.900 prescribes the penalties applicable under the HUBZone program including procurement and non-procurement suspension or debarment, as well as applicable civil and criminal penalties.

**Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)**

SBA certifies that this proposed rule may constitute a major rule within the meaning of Executive Order 12866, and may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* SBA submits the following economic analysis prepared pursuant to Executive Order 12866 and Initial Regulatory Flexibility Analysis (IRFA) prepared pursuant to the Regulatory Flexibility Act.

In making its determination that this proposed rule may constitute a major rule and may have a significant economic impact on a substantial number of small entities, SBA used the definition of small business set forth in 13 CFR Part 121.

The HUBZone Act of 1997, Title VI of Public Law 105-135, 111 Stat. 2592 (December 2, 1997), creates the HUBZone program and directs the Administrator of SBA to promulgate regulations to implement it. The proposed rule sets forth the program requirements for qualification as a HUBZone SBC, the federal contracting assistance available to qualified HUBZone SBCs, and other aspects of this program.

The HUBZone program will benefit SBCs by increasing the number of federal government contracts awarded to them. SBA cannot predict with any accuracy the number or dollar amount of contracts that will be awarded to qualified HUBZone SBCs or determine the magnitude of the shift, if any, among small and large businesses. SBA is seeking data or comments from the public on the impact of the proposed rule on all small businesses. The program also will benefit HUBZone

communities by providing much needed jobs and investment in those communities.

Prior to submitting an offer on a HUBZone contract, an interested small business must apply to SBA for certification as a qualified HUBZone SBC. The concern must submit information relating to its eligibility for the program, including supporting documentation. Once a concern is certified as a qualified HUBZone SBC, it must self-certify annually to SBA that there has been no material change in its circumstances that would affect eligibility. The information required for certification consists of general information about the business. SBA estimates that each concern will be able to complete the certification application in one hour or less.

As the HUBZone program is new and this proposed rule is designed to implement the program, there are no relevant federal rules that may duplicate, overlap or conflict with the proposed rule. Additionally, since the HUBZone Act of 1997 directs the Administrator to promulgate regulations to implement this program, without new legislation there are no alternatives to implementing this proposed rule.

The small entities who this proposed rule may affect are those who fit within the definition of a small business concern as defined by SBA in 13 CFR Part 121 and new Part 126 and who participate in government contracting. Because the program is new, SBA cannot estimate precisely the number or classes of small entities that this proposed rule will affect. However, as explained below, SBA estimates that more than 30,000 SBCs will apply for certification as qualified HUBZone SBCs.

Based on 1992 census data and making reasonable extrapolations to account for growth in recent years, SBA estimates that there are approximately 5 million businesses with employees in the United States; of this number, approximately 4.9 million—or 98 percent—are considered small. Clearly, not all of the businesses who are considered small seek to participate in federal government contracting or will seek to participate in the HUBZone program. Currently, there are approximately 170,000 SBCs registered on PRO-Net, SBA's database of SBCs actively seeking federal government contracts.

The number of entities that seek certification as qualified HUBZone SBCs will depend, first, on the number of businesses located in HUBZones. The potential number of HUBZones is significant. Based on the data available,

there are approximately 61,000 census tracts in the United States; of those tracts, about 7,000—or 11 percent—are qualified census tracts for purposes of the HUBZone program. In addition, there are approximately 3,000 non-metropolitan counties in the United States; of those counties, about 900—or 30 percent—are qualified non-metropolitan counties for purposes of the HUBZone program. (At the time of publishing this proposed rule, there was no data available on the number of Indian reservations in the United States.) Based on combining the qualified census tract and qualified non-metropolitan county data, SBA estimates that approximately 12 percent of the census tracts and non-metropolitan counties in the United States will qualify as HUBZones. For purposes of these estimates, the number of Indian reservations is not significant.

If all small businesses interested in Federal procurement were evenly distributed geographically, then approximately 12 percent of the 170,000 SBCs registered on PRO-Net—or 20,000—would be located in HUBZones. However, SBA believes that a much higher number of small business are located in qualified census tracts than in qualified non-metropolitan counties; therefore, SBA adjusts this number upward and estimates that 25,000 SBCs—or 15 percent—interested in Federal procurement will be located in HUBZones.

The incentives available through participation in the program should result in additional relocating to HUBZone areas. SBA is unable to predict the impact of this factor on the total number of qualified HUBZone SBCs, but estimates that roughly 30,000 concerns are either now HUBZone SBCs or will become HUBZone SBCs and will apply for certification.

Because the HUBZone program is new, SBA also cannot estimate precisely the economic impact the proposed rule may have on the economy. According to the Congressional Budget Office (CBO), in 1996 the federal agencies specified in the HUBZone Act contracted for more than 90 percent of all federal procurement obligations. (143 Cong. Rec. S8976 (daily ed. September 9, 1997)). In FY 1996, the federal government spent \$197.6 billion on the procurement of goods and services. The government awarded small businesses \$41.1 billion in direct contract actions—21 percent of the total \$197.6 billion in contract actions.

The HUBZone Act of 1997 amends the Small Business Act to increase the Government-wide federal contracting goal for SBCs from 20 percent to 23

percent of all federal prime contracts. In addition, the HUBZone Act sets the government contracting goal for HUBZone SBCs initially at 1 percent of all federal prime contracts with a gradual increase to 3 percent by the year 2003. Thus, by 2003, assuming the participating agencies reach the 3 percent contracting goal, HUBZone SBCs may be awarded approximately \$6 billion in federal contract actions (3 percent of \$197.6 billion).

In addition to the procurement contract awards available to qualified HUBZone concerns, the HUBZone program will have other effects on the economy including the possibility of increased costs to the government. CBO anticipates that implementation of the HUBZone program will increase the incidence of sole source contracting. According to CBO, about 19 percent of federal procurement is awarded through sole source contracts. It is not possible to project any increase in sole source awards at this time, however, there might not be any increase in sole source awards at all. Instead, qualified HUBZone SBCs might receive sole source awards that would otherwise go to large businesses or other small businesses.

CBO also estimates that implementing the HUBZone program would significantly increase discretionary spending for the federal agencies affected by the program. According to CBO, "[s]uch costs could total tens of millions of dollars each year, but CBO cannot estimate such costs precisely." (143 Cong. Rec. S8976 (daily ed. September 9, 1997)). CBO anticipated that these additional costs would stem from both additional administrative responsibilities for SBA and other federal agencies, as well as the likely increased use of sole source contracting. SBA is not in a position to shed much additional light on this subject. It has received an appropriation of \$2 million in FY 1998 to begin implementing the program and has requested \$4 million for FY 1999. No other cost information is available at the present time. Assessing whether the government will have a net cost from this program is very subjective. It is at least possible that increased competition from HUBZone SBCs will cause competing concerns to lower prices thereby reducing government procurement costs (perhaps substantially).

Under all of these circumstances, SBA has determined that this proposed rule may constitute a major rule within the meaning of E.O. 12866, and may have a significant impact on a substantial number of small entities within the

meaning of the Regulatory Flexibility Act.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule imposes new reporting or recordkeeping requirements on concerns applying to be certified as qualified HUBZone SBCs. The proposed rule requires such concerns to submit evidence that they meet the eligibility requirements set forth in the rule; once certified, in order to remain on the List a concern must self-certify annually to SBA that it remains qualified; and qualified HUBZone SBCs must notify SBA immediately of any material change in circumstances which could affect their eligibility.

For purposes of Executive Order 12612, SBA certifies that this proposed rule has no federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that it has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 2 of that Order.

(Catalog of Federal Domestic Assistance Programs, No. 59.009)

## 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 125

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

### 13 CFR Part 126

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

Accordingly, for the reasons set forth above, SBA proposes to amend Title 13, Code of Federal Regulations (CFR), as follows:

## PART 121—[AMENDED]

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

**Authority:** Pub. L. 105-135 sec. 601 *et seq.*, 111 Stat. 2592; 15 U.S.C. 632(a), 634(b)(6), 637(a) and 644(c); and Pub. L. 102-486, 106 Stat. 2776, 3133.

2. Section 121.401 is amended by deleting the word "and" before "Federal Small Disadvantaged Business Programs," adding a comma after

"Federal Small Disadvantaged Business Programs," and adding the following language at the end of the sentence "and SBA's HUBZone program".

3. Section 121.1001 is amended by redesignating paragraph (a)(5) as (a)(6) and by adding the following new paragraph (a)(5) to read as follows:

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

(c) Size Status Protests. \* \* \*

(5) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

(i) Any concern that submits an offer for a specific HUBZone set-aside contract;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC;

(iii) The contracting officer; and

(iv) The Associate Administrator for Government Contracting, or designee.

\* \* \* \* \*

4. Section 121.1008 is amended by revising paragraph (a) to read as follows:

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

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

\* \* \* \* \*

## PART 125—[AMENDED]

5. The authority section for 13 CFR Part 125 is revised to read as follows:

**Authority:** Pub. L. 105-135 sec. 601 *et seq.*, 111 Stat. 2592; 15 U.S.C. 634(b)(6), 637, and 644; 31 U.S.C. 9701, 9792.



6. Section 125.3 is amended by revising paragraphs (b) and (c) and by revising the last sentence of paragraph (d) to read as follows:

**§ 125.3 Subcontracting assistance.**

(a) \* \* \*

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

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

(d) \* \* \* Source identification means identifying those small, small disadvantaged, and HUBZone firms which can fulfill the needs assessed from the opportunity development process.

7. Add a new part 126 to read as follows:

**PART 126—HUBZONE PROGRAM**

**Subpart A—Provisions of General Applicability**

Sec.

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

**Subpart B—Requirements to be a Qualified HubZone SBC**

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

- 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?

**Subpart C—Certification**

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

**Subpart D—Program Examinations**

- 126.400 Who will conduct program examinations?
- 126.401 What will SBA examine?
- 126.402 When may SBA conduct program examinations?
- 126.403 May SBA require additional information from a HUBZone SBC?
- 126.404 What happens if SBA is unable to verify a qualified HUBZone SBC's eligibility?
- 126.405 What happens if SBA verifies eligibility?

**Subpart E—Maintaining HUBZone Status**

- 126.500 How does a qualified HUBZone SBC maintain HUBZone status?
- 126.501 What are a qualified HUBZone SBC's ongoing obligations to SBA?
- 126.502 Is there a limit to the length of time a qualified HUBZone SBC may be on the List?
- 126.503 When is a concern removed from the List?

**Subpart F—Contractual Assistance**

- 126.600 What are HUBZone contracts?
- 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?
- 126.602 What additional requirements apply during contract performance?
- 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?
- 126.604 Who decides if a HUBZone contract opportunity exists?
- 126.605 What requirements are not available for HUBZone contracts?
- 126.606 May a contracting officer request that SBA release an 8(a) requirement for award as a HUBZone contract?
- 126.607 When must a contracting officer set aside a requirement for competition among qualified HUBZone SBCs?
- 126.608 What may the contracting officer do if an award cannot be made based on a set-aside for competition among qualified HUBZone SBCs?

- 126.609 What may the contracting officer do if a contract opportunity does not exist for competition among qualified HUBZone SBCs?

- 126.610 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a HUBZone contract?
- 126.611 What is the process for such an appeal?
- 126.612 When may a contracting officer award sole source contracts to a qualified HUBZone SBC?
- 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?
- 126.614 How must a contracting officer apply HUBZone and SDB price evaluation preferences in a full and open competition?
- 126.615 May a large business participate on a HUBZone contract?
- 126.616 What requirements must a joint venture satisfy to bid on a HUBZone contract?

**Subpart G—Subcontracting Percentage Requirements**

- 126.700 What are the subcontracting percentage requirements under this program?
- 126.701 Can these subcontracting percentage requirements change?
- 126.702 How can the subcontracting percentage requirements be changed?
- 126.703 What are the procedures for requesting changes in subcontracting percentages?

**Subpart H—Protests**

- 126.800 Who may protest the status of a qualified HUBZone SBC?
- 126.801 How does one submit a HUBZone status protest?
- 126.802 Who decides a HUBZone status protest?
- 126.803 How will SBA process a HUBZone status protest?
- 126.804 Will SBA decide all HUBZone status protests?
- 126.805 What are the procedures for appeals of HUBZone status determinations?

**Subpart I—Penalties**

- 126.900 What penalties may be imposed under this part?

**Authority:** Pub.L. 105–135 sec. 601 *et seq.*, 111 Stat. 2592; 15 U.S.C. 632(a).

**Subpart A—Provisions of General Applicability**

**§ 126.100 What is the purpose of the HUBZone program?**

The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas.



**§ 126.101 Which government departments or agencies are affected directly by the HUBZone program?**

(a) Until September 30, 2000, the HUBZone program applies only to procurements by the following departments and agencies:

- (1) Department of Agriculture;
  - (2) Department of Defense;
  - (3) Department of Energy;
  - (4) Department of Health and Human Services;
  - (5) Department of Housing and Urban Development;
  - (6) Department of Transportation;
  - (7) Department of Veterans Affairs;
  - (8) Environmental Protection Agency;
  - (9) General Services Administration;
- and
- (10) National Aeronautics and Space Administration.

(b) After September 30, 2000, the HUBZone program will apply to all federal departments and agencies which employ one or more contracting officers as defined by 41 U.S.C. 423(f)(5).

**§ 126.102 What is the effect of the HUBZone program on the section 8(d) subcontracting program?**

The HUBZone Act of 1997 amended the section 8(d) subcontracting program to include qualified HUBZone SBCs in the formal subcontracting plans described in § 125.3 of this title.

**§ 126.103 What definitions are important in the HUBZone program?**

*Administrator* means the Administrator of the United States Small Business Administration (SBA).

*AA/8(a)BD* means SBA's Associate Administrator for 8(a) Business Development.

*AA/HUB* means SBA's Associate Administrator for the HUBZone Program.

*ADA/GC&8(a)BD* means SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development.

*Certify* means the process by which SBA determines that a HUBZone SBC is qualified for the HUBZone program and entitled to be included in SBA's "List of Qualified HUBZone SBCs."

*Citizen* means a person born or naturalized in the United States. SBA does not consider holders of permanent visas and resident aliens to be citizens.

*Concern* means a firm which satisfies the requirements in §§ 121.105(a) and (b) of this title.

*Contract opportunity* means a situation in which a requirement for a procurement exists, and either:

- (1) HUBZone contracts (including options) awarded by the contracting activity to HUBZone SBCs do not

aggregate more than 3 percent of all contract awards by that activity that fiscal year; or

(2) The contracting activity has reached a HUBZone contracting level of 3 percent but the contracting activity also has met all other contracting goals applicable to SDBs and WOBs. See other definitions in this section for further details.

*County unemployment rate* is the rate of unemployment for a county based on the most recent data available from the United States Department of Labor, Bureau of Labor Statistics. The appropriate data may be found in the DOL/BLS publication titled "Supplement 2, Unemployment in States and Local Areas." This publication is available for public inspection at the Department of Labor, Bureau of Labor Statistics, Division of Local Area Unemployment Statistics located at 2 Massachusetts Ave., NE, Room 4675, Washington DC 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW, Washington DC 20416.

*De-certify* means the process by which SBA determines that a concern is no longer a qualified HUBZone SBC and removes that concern from its List.

*Employee* means a person (or persons) employed by a HUBZone SBC on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

Example 1: 4 employees each work 20 hours per week; SBA will regard that circumstance as 2 full-time equivalent employees.

Example 2: 1 employee works 20 hours per week and 1 employee works 15 hours per week; SBA will regard that circumstance as not a full-time equivalent.

Example 3: 1 employee works 15 hours per week, 1 employee works 10 hours per week, and 1 employee works 20 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

Example 4: 1 employee works 30 hours per week and 2 employees each work 15 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

*HUBZone* means a historically underutilized business zone, which is an area located within one or more

qualified census tracts, qualified non-metropolitan counties, or lands within the external boundaries of an Indian reservation. See other definitions in this section for further details.

*HUBZone small business concern (HUBZone SBC)* means a concern that is small as defined by § 126.203, is exclusively owned and controlled by persons who are United States citizens, and has its principal office located in a HUBZone.

*Indian reservation* has the meaning used by the Bureau of Indian Affairs in 25 CFR 151.2(f). This definition refers generally to land over which a "tribe" has jurisdiction, and "tribe" includes Alaska Native entities under 25 CFR 81.1(w).

*Interested party* means any concern that submits an offer for a specific HUBZone sole source or set-aside contract, any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC, the contracting activity's contracting officer, or SBA.

*List* refers to the database of qualified HUBZone SBCs that SBA has certified.

*Median household income* has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, "1990 Census of Population, Social and Economic Characteristics," Report Number CP-2, pages B-14 and B-17. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository library, call toll-free (888) 293-6498 or contact the Bureau of the Census, Income Statistics Branch, Housing and Economic Statistics Division, Washington DC 20233-8500.

*Metropolitan statistical area* means an area as defined in section 143(k)(2)(B) of the Internal Revenue Code of 1986. (title 26, United States Code).

*Non-metropolitan* has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, "1990 Census of Population, Social and Economic Characteristics," Report Number CP-2, page A-9. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository Library, call toll-free (888) 293-6498 or contact the Bureau of the Census, Population Distribution Branch, Population Division, Washington DC 20233-8800.

*Person* means a natural person. Pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1626(e), Alaska Native Corporations and any

direct or indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation are deemed to be owned and controlled by Natives, and are thus persons.

*Principal office* means the location where the greatest number of the concern's employees at any one location perform their work.

*Qualified census tract* has the meaning given that term in section 42(d)(5)(C)(ii)(I) of the Internal Revenue Code (title 26, United States Code).

*Qualified HUBZone SBC* means a HUBZone SBC that SBA certifies as qualified for federal contracting assistance under the HUBZone program.

*Qualified non-metropolitan county* means any county that:

(1) Based on the most recent data available from the Bureau of the Census of the Department of Commerce—

(i) Is not located in a metropolitan statistical area; and

(ii) In which the median household income is less than 80 percent of the non-metropolitan State median household income; or

(2) Based on the most recent data available from the Secretary of Labor, has an unemployment rate that is not less than 140 percent of the statewide average unemployment rate for the State in which the county is located.

*Reside* means to live in a primary residence at a place for at least 180 days, or as a currently registered voter, and with intent to live there indefinitely.

*Small disadvantaged business (SDB)* means a concern that is small pursuant to part 121 of this title, and is owned and controlled by socially and economically disadvantaged individuals, tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

*Statewide average unemployment rate* is the rate based on the most recent data available from the Bureau of Labor Statistics, United States Department of Labor, Division of Local Area Unemployment Statistics, 2 Massachusetts Ave., NE, Room 4675, Washington, DC 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW, Washington DC 20416.

*Women-owned business (WOB)* means a concern that is small pursuant to part 121 of this title, and is at least 51 percent owned and controlled by women.

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

### § 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?

(a) The concern must be a HUBZone SBC as defined in § 126.103; and

(b) At least 35 percent of the concern's employees must reside in a HUBZone. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction round up to the nearest whole number.

Example 1: A concern has 25 employees, 35 percent or 8.75 employees must reside in a HUBZone. Thus, 9 employees must reside in a HUBZone.

Example 2: A concern has 95 employees, 35 percent or 33.25 employees must reside in a HUBZone. Thus, 34 employees must reside in a HUBZone.

### § 126.201 For this purpose, who does SBA consider to own a HUBZone SBC?

An owner of a HUBZone SBC is a person who owns any legal or equitable interest in such HUBZone SBC. More specifically:

(a) *Corporations.* SBA will consider any person who owns stock, whether voting or non-voting, to be an owner. SBA will consider options to purchase stock to have been exercised. SBA will consider the right to convert debentures into voting stock to have been exercised.

(b) *Partnerships.* SBA will consider a partner, whether general or limited, to be an owner if that partner owns an equitable interest in the partnership.

(c) *Sole proprietorships.* The proprietor is the owner.

(d) *Limited liability companies.* SBA will consider each member to be an owner of a limited liability company.

Example 1: All stock of a corporation is owned by U.S. citizens. The president of the corporation, a non-U.S. citizen, owns no stock in the corporation, but owns options to purchase stock in the corporation. SBA will consider the option exercised, and the corporation is not eligible to be a qualified HUBZone SBC.

Example 2: A partnership is owned 99.9 percent by persons who are U.S. citizens, and 0.1 percent by someone who is not. The partnership is not eligible because it is not 100 percent owned by U.S. citizens.

### § 126.202 Who does SBA consider to control a HUBZone SBC?

Control means both the day-to-day management and long-term decisionmaking authority for the HUBZone SBC. Many persons share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, and manager. In addition, key employees who possess critical licenses, expertise or

responsibilities related to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.

### § 126.203 What size standards apply to HUBZone SBCs?

(a) *At time of application for certification.* A HUBZone SBC must meet SBA's size standards for its primary industry classification as defined in § 121.201 of this title. If SBA is unable to verify that a concern is small, SBA may deny the concern status as a qualified HUBZone SBC, or SBA may request a formal size determination from the responsible Government Contracting Area Director or designee.

(b) *At time of contract offer.* A HUBZone SBC must be small within the size standard corresponding to the SIC code assigned to the contract.

### § 126.204 May a qualified HUBZone SBC have affiliates?

Yes. A qualified HUBZone SBC may have affiliates so long as the affiliates also are qualified HUBZone SBCs, 8(a) participants, or WOBs.

### § 126.205 May WOBs, 8(a) participants or SDBs be qualified HUBZone SBCs?

Yes. WOBs, 8(a) participants, and SDBs can qualify as HUBZone SBCs if they meet the additional requirements in this part.

### § 126.206 May regular dealers be qualified HUBZone SBCs?

Yes. Regular dealers (also known as non-manufacturers) may be certified as qualified HUBZone SBCs if they meet all the requirements set forth in § 126.200 and they can demonstrate that there are manufacturers located in a HUBZone who can provide the product required in the contract. The manufacturer must be located in a HUBZone and must meet the employee residence requirement set forth in § 126.200(b). Additional requirements that regular dealers must meet to bid on a contract are set out in § 126.601(d).

### § 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?

Yes. A qualified HUBZone SBC may have offices or facilities in another HUBZone or even outside a HUBZone and still be a qualified HUBZone SBC. However, in order to qualify, the concern's principal office must be located in a HUBZone.

**Subpart C—Certification****§ 126.300 How may a concern be certified as a qualified HUBZone SBC?**

A concern must apply to SBA for certification. The application must include a representation that it meets the eligibility requirements described in § 126.200 and must submit relevant supporting information. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its sole discretion, may rely solely upon the information submitted to establish eligibility, or may request additional information, or may verify the information before making a determination. If SBA determines that the concern is a qualified HUBZone SBC, it will issue a certification to that effect and add the concern to the List.

**§ 126.301 Is there any other way for a concern to obtain certification?**

No. SBA certification is the only way to qualify for HUBZone program status.

**§ 126.302 When may a concern apply for certification?**

A concern may apply to SBA and submit the required information whenever it can represent that it meets the eligibility requirements, subject to § 126.309. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

**§ 126.303 Where must a concern file its certification?**

The concern must file its certification with the AA/HUB, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

**§ 126.304 What must a concern submit to SBA?**

(a) To be certified by SBA as a qualified HUBZone SBC, a concern must represent to SBA that under the definitions set forth in § 126.103:

(1) It is a small business concern that is both owned only by United States citizens and controlled only by United States citizens;

(2) Its principal office is located in a HUBZone;

(3) Not less than 35 percent of its employees reside in a HUBZone;

(4) It will use good faith efforts to ensure that a minimum percentage of 35 percent of its employees continue to reside in a HUBZone so long as SBA certifies it as qualified and during the performance of any contract awarded to

it on the basis of its status as a qualified HUBZone SBC; and

(5) It will ensure that, where it enters into subcontracts to aid in performance of any prime contracts awarded to it because of its status as a qualified HUBZone SBC, it will incur not less than a certain minimum percentage of certain contract costs for itself or subcontractor qualified HUBZone SBCs, as follows:

(i) If a service contract, 50 percent of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

(ii) If a contract for supplies not from a regular dealer in such supplies, 50 percent of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone;

(iii) If a contract for general construction, 15 percent of the cost of contract performance incurred for personnel on the concern's employees or the employees of other qualified HUBZone SBCs; and

(iv) If a contract for special trade construction, 25 percent of the cost of contract performance incurred for personnel on the concern's employees or the employees of other qualified HUBZone SBCs.

(b) If the concern is applying for HUBZone status based on a location within the external boundaries of an Indian reservation, the concern must submit with its application for certification official documentation from the appropriate Bureau of Indian Affairs (BIA) Land Titles and Records Office with jurisdiction over the concern's area, confirming that it is located within the external boundaries of an Indian reservation. BIA lists the Land Titles and Records Offices and their jurisdiction in 25 CFR 150.4 and 150.5.

(c) In addition to these representations, the concern must submit the forms, attachments, and any additional information required by SBA.

**§ 126.305 What format must the certification to SBA take?**

A concern must submit the required information in either a written or electronic application form provided by SBA. An electronic application must be sufficiently authenticated for enforcement purposes.

**§ 126.306 How will SBA process the certification?**

(a) The AA/HUB is authorized to approve or decline certifications. SBA will receive and review all certifications, but SBA will not process incomplete packages. SBA will make its

determination within 30 calendar days after receipt of a complete package whenever practicable. The decision of the AA/HUB is the final agency decision.

(b) SBA will base its certification on facts existing on the date of submission. SBA, in its sole discretion, may request additional information or clarification of information contained in the submission at any time.

(c) If SBA approves the application, SBA will send a written notice to the concern and automatically enter it on the List described in § 126.307.

(d) A decision to deny eligibility must be in writing and state the specific reasons for denial.

**§ 126.307 Where will SBA maintain the List of qualified HUBZone SBCs?**

SBA maintains the List at its Internet website at <http://www.sba.gov/HUB>. Requesters also may obtain a copy of the List by writing to the AA/HUB at U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416 or via e-mail at [aahub@sba.gov](mailto:aahub@sba.gov).

**§ 126.308 What happens if SBA inadvertently omits a qualified HUBZone SBC from the List?**

A HUBZone SBC that has received SBA's notice of certification, but is not on the List within 10 business days thereafter should immediately notify the AA/HUB in writing at U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416 or via e-mail at [aahub@sba.gov](mailto:aahub@sba.gov). The concern must appear on the List to be eligible for HUBZone contracts.

**§ 126.309 How may a declined or de-certified concern seek certification at a later date?**

A concern that SBA has declined or de-certified may seek certification no sooner than one year from the date of decline or de-certification if it believes that it has overcome all reasons for decline through changed circumstances, and is otherwise eligible.

**Subpart D—Program Examinations****§ 126.400 Who will conduct program examinations?**

SBA field staff or others designated by the AA/HUB will conduct program examinations.

**§ 126.401 What will SBA examine?**

(a) *Eligibility.* Examiners will verify that the qualified HUBZone SBC met the requirements set forth in § 126.200 at the time of its application for certification and at the time of examination.

(b) *Scope of review.* Examiners may review any information related to the

HUBZone SBC qualifying requirements, including documentation related to the location and ownership of the concern and the employee percentage requirements. The qualified HUBZone SBC must document each employee's residence address through employment records. The examiner also may review property tax, public utility or postal records, and other relevant documents. The concern must retain documentation demonstrating satisfaction of the employee residence and other qualifying requirements for 6 years from date of submission to SBA.

**§ 126.402 When may SBA conduct program examinations?**

SBA may conduct a program examination at the time the concern certifies to SBA that it meets the requirements of the program or at any other time while the concern is on the List or subsequent to receipt of HUBZone contract benefits. For example, SBA may conduct a program examination to verify eligibility upon notification of a material change under § 126.501. Additionally, SBA, in its sole discretion, may perform random program examinations to determine continuing compliance with program requirements, or it may conduct a program examination in response to credible information calling into question the HUBZone status of a small business concern. For protests to the HUBZone status of a small business concern in regard to a particular procurement, see § 126.800.

**§ 126.403 May SBA require additional information from a HUBZone SBC?**

Yes. At the discretion of the AA/HUB, SBA has the right to require that a HUBZone SBC submit additional information as part of the certification process, or at any time thereafter. If SBA finds a HUBZone SBC is not qualified, SBA will de-certify the concern and delete its name from the List. SBA may choose to pursue penalties against any concern that has made material misrepresentations in its submissions to SBA in accordance with § 126.900.

**§ 126.404 What happens if SBA is unable to verify a qualified HUBZone SBC's eligibility?**

(a) Authorized SBA headquarters personnel will first notify the concern in writing of the reasons why it is no longer eligible.

(b) The concern will have 10 business days to respond to the notification.

(c) The AA/HUB will consider the reasons for proposed de-certification and the concern's response before making a decision whether to de-certify.

**§ 126.405 What happens if SBA verifies eligibility?**

If SBA verifies that the concern is eligible, it will amend the date of certification on the List to reflect the date of verification.

**Subpart E—Maintaining HUBZone Status**

**§ 126.500 How does a qualified HUBZone SBC maintain HUBZone status?**

(a) Any qualified HUBZone SBC wishing to remain on the List must self-certify annually to SBA that it remains a qualified HUBZone SBC. There is no limit to the length of time a concern may remain on the List so long as it continues to satisfy SBA that it meets all eligibility requirements set forth in § 126.200.

(b) Concerns wishing to remain in the program without any interruption must self-certify their continued eligibility to SBA within 30 calendar days after the one-year anniversary of their date of certification. Failure to do so will result in SBA de-certifying the concern. The concern then would have to submit a new application for certification under §§ 126.300 through 126.306.

(c) The self-certification to SBA must be in writing and must represent that the circumstances relative to eligibility which existed on the date of certification showing on the List have not materially changed.

**§ 126.501 What are a qualified HUBZone SBC's ongoing obligations to SBA?**

The concern must immediately notify SBA of any material change which could affect its eligibility. The notification must be in writing, and must be sent or delivered to the AA/HUB to comply with this requirement. Failure of a qualified HUBZone SBC to notify SBA of such a material change will result in immediate de-certification and removal from the List, and SBA may seek the imposition of penalties under § 126.900. If the concern later becomes eligible for the program, the concern must apply for certification pursuant to §§ 126.300 through 126.309 and must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern pursuant to § 126.306.

**§ 126.502 Is there a limit to the length of time a qualified HUBZone SBC may be on the List?**

(a) There is no limit to the length of time a qualified HUBZone SBC may remain on the List so long as it continues to follow the provisions of

§§ 126.500, 126.501, and 126.503, and so long as the HUBZone in which it is located remains a HUBZone.

(b) In the event a HUBZone ceases to meet the definition of a HUBZone, qualified HUBZone SBCs may remain on the List for a period of 3 years from the date of the change in the status of the HUBZone, if they continue to meet all the eligibility requirements set forth in this part.

**§ 126.503 When is a concern removed from the List?**

If SBA determines at any time that a HUBZone SBC is not qualified, SBA may de-certify the HUBZone SBC, remove the concern from the List, and seek imposition of penalties pursuant to § 126.900. An adverse finding in the resolution of a protest also may result in de-certification and removal from the List, and the imposition of penalties pursuant to § 126.900. Failure to notify SBA of a material change which could affect a concern's eligibility will result in immediate de-certification, removal from the List, and SBA may seek the imposition of penalties under § 126.900.

**Subpart F—Contractual Assistance**

**§ 126.600 What are HUBZone contracts?**

HUBZone contracts are contracts awarded to a qualified HUBZone SBC through any of the following procurement methods:

(a) Sole source awards to qualified HUBZone SBCs;

(b) Set-aside awards based on competition restricted to qualified HUBZone SBCs; or

(c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.

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

(a) In order to submit an offer on a specific HUBZone contract, a concern must be small under the size standard corresponding to the SIC code assigned to the contract.

(b) At the time a qualified HUBZone SBC submits its offer on a specific contract, it must certify to the contracting officer that:

- (1) It is a qualified HUBZone SBC which appears on SBA's List;
- (2) there has been no material change in its circumstances since the date of certification shown on the List which could affect its HUBZone eligibility; and
- (3) It is small under the SIC code assigned to the procurement.

(c) If bidding as a joint venture, each qualified HUBZone SBC must make the

certifications in paragraphs (b)(1), (2), and (3) separately under its own name.

(d) A qualified HUBZone SBC which is a regular dealer may submit an offer on a contract for supplies if it meets the requirements under the non-manufacturer rule as defined in § 121.406(b) of this title and if the small manufacturer is located in a HUBZone and meets the employee residence requirement of § 126.200(b). The Administrator or designee may waive the requirement set forth in § 121.406(b)(1)(iii) of this title, but the manufacturer must be located in a HUBZone and must meet the employee residence requirement of § 126.200(b). The procedures for waivers of the non-manufacturer rule are set out in §§ 121.1201 through 121.1205 of this title.

**§ 126.602 What additional requirements apply during contract performance?**

(a) The qualified HUBZone SBC must attempt to maintain the required percentage of employees who reside in a HUBZone during the performance of any contract awarded to the concern on the basis of HUBZone status. "Attempt to maintain" means making substantive and documented efforts to maintain that percentage such as written offers of employment, published advertisements seeking employees, and attendance at job fairs. HUBZone contracts are described more fully in § 126.600.

(b) During the performance of a contract for procurement of supplies (other than a procurement from a regular dealer in such supplies), the qualified HUBZone SBC must spend at least 50 percent of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. See § 126.700(a)(4).

(c) Enforcement of paragraphs (a) and (b) of this section will be the responsibility of the contracting officer and violation of either requirement may be grounds for termination of the contract at the election of the contracting officer.

**§ 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?**

No. Qualified HUBZone SBCs should market their capabilities to appropriate procuring agencies in order to increase their prospects of having a requirement set aside for HUBZone contract award.

**§ 126.604 Who decides if a HUBZone contract opportunity exists?**

The contracting officer for the contracting activity makes this decision.

**§ 126.605 What requirements are not available for HUBZone contracts?**

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

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

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

(c) That requirement has an estimated value of between \$2,500 and \$100,000 and otherwise would be procured under simplified acquisition procedures; or

(d) The requirement does not meet the definition of contract opportunity in § 126.103. This provision does not apply to awards made to a qualified HUBZone SBC as a result of a price evaluation preference in a full and open competition.

**§ 126.606 May a contracting officer request that SBA release an 8(a) requirement for award as a HUBZone contract?**

Yes. However, SBA will grant its consent only where neither the incumbent nor any other 8(a) participant(s) can perform the requirement, and where the 8(a) program will not be adversely affected. The SBA official authorized to grant such consent is the AA/8(a)BD.

**§ 126.607 When must a contracting officer set aside a requirement for competition among qualified HUBZone SBCs?**

(a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting or is not a "contract opportunity," pursuant to § 126.605. If the requirement is not excluded and is not a contract opportunity, then the contracting officer must set aside the requirement for competition restricted to qualified HUBZone SBCs if the contracting officer:

(1) Has a reasonable expectation that at least 2 qualified HUBZone SBCs will submit offers; and

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

(b) The contracting officer must review SBA's List of qualified HUBZone SBCs to determine whether there are 2 or more qualified HUBZone SBCs available to perform the requirement.

**§ 126.608 What may the contracting officer do if an award cannot be made based on a set-aside for competition among qualified HUBZone SBCs?**

If the contracting officer sets the requirement aside for competition restricted to qualified HUBZone SBCs, and

(a) If the contracting officer only receives one acceptable offer from a responsible qualified HUBZone SBC, the contracting officer may make an award to that concern on a sole source basis; or

(b) If the contracting officer receives no acceptable offers from responsible qualified HUBZone SBCs, the contracting officer may withdraw the set-aside and re-solicit the requirement, if still valid, as an 8(a) contract or a small business set-aside. If procurement through the 8(a) program or through a small business set-aside is not possible, the contracting officer may re-solicit the procurement through full and open competition.

**§ 126.609 What may the contracting officer do if a contracting opportunity does not exist for competition among qualified HUBZone SBCs?**

The contracting officer may make an award under the 8(a) program on either a sole source or competitive basis, make award to a qualified HUBZone SBC on a sole source award basis, or utilize a small business set-aside, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through full and open competition.

**§ 126.610 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a HUBZone contract?**

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as a HUBZone sole source or a HUBZone set-aside contract.

**§ 126.611 What is the process for such an appeal?**

(a) *Notice of appeal.* SBA must notify the contracting officer within 5 business days of SBA's receipt of the contracting officer's decision if the Administrator intends to appeal the decision. The contracting officer must notify SBA's procurement center representative or the AA/HUB as soon as practicable after a decision to not make an award to a qualified HUBZone SBC on either a HUBZone sole source or set-aside basis provided the decision was for reasons other than the applicability of § 126.605.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the

contracting officer must suspend further action regarding the procurement until the head of the contracting activity issues a written decision on the appeal, unless the head of the contracting activity makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the head of the contracting activity or that agency may consider the appeal withdrawn.

(d) *Decision.* The contracting activity must specify in writing the reasons for a denial of an appeal brought under this section.

**§ 126.612 When may a contracting officer award sole source contracts to a qualified HUBZone SBC?**

A contracting officer may award a sole source contract to a qualified HUBZone SBC only if the contracting officer determines that

(a) None of the provisions of § 126.605 apply;

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

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

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

(c) Two or more qualified HUBZone SBCs are not likely to submit offers;

(d) A qualified HUBZone SBC is a responsible contractor able to perform the contract; and

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

**§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?**

Where a contracting officer will award a contract on the basis of full and open competition, the contracting officer must deem the price offered by a qualified HUBZone SBC to be lower than the price offered by another offeror (other than another small business concern) if the price offered by the qualified HUBZone SBC is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

Example: In a full and open competition, a qualified HUBZone SBC submits an offer of \$102; another small business concern submits an offer of \$100; and a large business submits an offer of \$93. The lowest, responsive, responsible offeror would be the large business. However, the contracting officer must consider whether to apply the

HUBZone price evaluation preference. If the qualified HUBZone SBC's offer is not more than 10 percent higher than the large business's offer, the contracting officer must deem the qualified HUBZone SBC's price as lower than the price of the large business. In this example, the qualified HUBZone SBC's price is not more than 10 percent higher than the large business's price and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror.

**§ 126.614 How must a contracting officer apply HUBZone and SDB price evaluation preferences in a full and open competition?**

A contracting officer may receive offers from both qualified HUBZone SBCs and SDB concerns, or from concerns that qualify as both, during a full and open competition. First, the contracting officer must apply the SDB price evaluation preference described in 10 U.S.C. 2323 to all appropriate offerors. Second, the contracting officer must apply the HUBZone price evaluation preference as described in § 126.613 to all appropriate offerors. A contracting officer must apply both price preferences to concerns that qualify as both qualified HUBZone SBCs and SDB concerns.

Example: In a full and open competition, a qualified HUBZone SBC (but not an SDB) submits an offer of \$102; an SDB (but not a qualified HUBZone SBC) submits an offer of \$107; and a large business submits an offer of \$93. The contracting officer first applies the SDB price evaluation preference and adds 10 percent to the qualified HUBZone SBC's offer thereby making that offer \$112.2, and to the large business's offer thereby making that offer \$102.3. As a result, the large business is the lowest, responsive, and responsible offeror. Now the contracting officer applies the HUBZone preference and, since the qualified HUBZone SBC's offer is not more than 10 percent higher than the large business's offer, the contracting officer must deem the price offered by the qualified HUBZone SBC to be lower than the price offered by the large business.

**§ 126.615 May a large business participate on a HUBZone contract?**

A large business may not participate as a prime contractor on a HUBZone award but may participate as a subcontractor to an otherwise qualified HUBZone SBC, subject to the subcontracting limitations set forth in § 126.700.

**§ 126.616 What requirements must a joint venture satisfy to bid on a HUBZone contract?**

A joint venture may bid on a HUBZone contract if the joint venture meets all of the following requirements:

(a) *HUBZone joint venture.* A qualified HUBZone SBC may enter into a joint venture with one or more other qualified HUBZone SBCs, 8(a)

participants, or WOBs for the purpose of performing a specific HUBZone contract.

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

(c) *Performance of work.* The aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by § 126.700.

**Subpart G—Subcontracting Percentage Requirements**

**§ 126.700 What are the subcontracting percentage requirements under this program?**

(a) *Subcontracting percentage requirements.* A qualified HUBZone SBC can subcontract part of a HUBZone contract, provided:

(1) In the case of a contract for services (except construction), the qualified HUBZone SBC spends at least 50 percent of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

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

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

(4) In the case of a contract for procurement of supplies (other than a procurement from a regular dealer in such supplies), the qualified HUBZone SBC spends at least 50 percent of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. One or more qualified HUBZone SBCs may combine to meet this subcontracting percentage requirement.

(b) *Definitions.* Many definitions applicable to this section can be found in § 125.6 of this title.

**§ 126.701 Can these subcontracting percentage requirements change?**

Yes. The Administrator may change the subcontracting percentage requirements if the Administrator determines that such action is necessary to reflect conventional industry practices.

**§ 126.702 How can the subcontracting percentage requirements be changed?**

Representatives of a national trade or industry group (as defined by two-digit Major Group industry codes) may request a change in subcontracting percentage requirements for that industry. Changes in subcontracting percentage requirements may be requested only for categories defined by two-digit Major Group industry codes in the Standard Industry Classification (SIC) Code system. SBA will not consider requests from anyone other than a representative of a national trade or industry group or requests for changes for four-digit SIC Code categories.

**§ 126.703 What are the procedures for requesting changes in subcontracting percentages?**

(a) *Format of request.* There is no prescribed format, but the requester should try to demonstrate to the Administrator that a change in percentage is necessary to reflect conventional industry practices, and should support its request with information including, but not limited to:

- (1) Information relative to the economic conditions and structure of the entire national industry;
- (2) Market data, technical changes in the industry and industry trends;
- (3) Specific reasons and justifications for the change in the subcontracting percentage;
- (4) The effect such a change would have on the Federal procurement process; and
- (5) Information demonstrating how the proposed change would promote the purposes of the HUBZone Program.

(b) *Notice to public.* Upon an adequate preliminary showing to SBA, SBA will publish in the **Federal Register** a notice of its receipt of a request that it consider a change in the subcontracting percentage requirements for a particular industry for HUBZone contracts. The notice will identify the group making the request, and give the public an opportunity to submit to the Administrator information and arguments in both support and opposition.

(c) *Comments.* Once SBA has published a notice in the **Federal Register**, it will afford a period of not less than 60 days for public comment.

(d) *Decision.* SBA will render its decision after the close of the comment period. If it decides against a change, it will publish notice of its decision in the **Federal Register**. Concurrent with the notice, SBA will advise the requester of its decision in writing. If it decides in

favor of a change, SBA will propose an appropriate change to this part in accordance with proper rulemaking procedures.

**Subpart H—Protests****§ 126.800 Who may protest the status of a qualified HUBZone SBC?**

(a) *For sole source procurements.* SBA or the contracting officer may protest the apparent successful offeror's qualified HUBZone SBC status.

(b) *For all other procurements.* Any interested party may protest the apparent successful offeror's qualified HUBZone SBC status.

**§ 126.801 How does one submit a HUBZone status protest?**

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a qualified HUBZone SBC is a "small" business for purposes of any Federal program are subject to part 121 of this title. If a protest includes both the size of the HUBZone SBC and whether the concern meets the HUBZone qualifying requirements set forth in § 126.200, SBA will process each protest concurrently, under the procedures set forth in part 121 of this title and this part.

(b) *Format.* Protests must be in writing and state all specific grounds for the protest. A protest merely asserting that the protested concern is not a qualified HUBZone SBC, without setting forth specific facts or allegations, is insufficient.

(c) *Filing.* (1) An unsuccessful offeror must submit its written protest to the contracting officer.

(2) A contracting officer and SBA must submit their protest to the AA/HUB.

(3) Protestors may deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period).

(d) *Timeliness.* (1) An interested party must submit its protest by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror (in negotiated acquisitions).

(2) Any protest received after the time limits is untimely.

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

(e) *Referral to SBA.* The contracting officer must forward to SBA any non-premature protest received,

notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send protests to AA/HUB, U.S. Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

**§ 126.802 Who decides a HUBZone status protest?**

The AA/HUB or designee will determine whether the concern has qualified HUBZone status.

**§ 126.803 How will SBA process a HUBZone status protest?**

(a) *Notice of receipt of protest.* (1) SBA immediately will notify the contracting officer and the protestor of the date SBA receives a protest and whether SBA will process the protest or dismiss it in accordance with § 126.804.

(2) If SBA determines the protest is timely and sufficiently specific, SBA will notify the protested HUBZone SBC of the protest and the identity of the protestor. The protested HUBZone SBC may submit information responsive to the protest within 5 business days.

(b) *Time period for determination.* (1) SBA will determine the HUBZone status of the protested HUBZone SBC within 15 business days after receipt of a protest.

(2) If SBA does not contact the contracting officer within 15 business days, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(3) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

(c) *Notice of determination.* SBA will notify the contracting officer, the protestor, and the protested concern of its determination.

(d) *Effect of determination.* The determination is effective immediately and is final unless overturned on appeal by the ADA/GC&8(a)BD, pursuant to § 126.805. If SBA upholds the protest, SBA will de-certify the concern as a qualified HUBZone SBC. If SBA denies the protest, after considering the merits of the protest, SBA will amend the date of certification on the List to reflect the date of protest decision.

**§ 126.804 Will SBA decide all HUBZone status protests?**

SBA will decide all protests not dismissed as premature, untimely or non-specific.

**§ 126.805 What are the procedures for appeals of HUBZone status determinations?**

(a) *Who may appeal.* The protested HUBZone SBC, the protestor, or the



contracting officer may file appeals of protest determinations with SBA's ADA/GC&8(a)BD.

(b) *Timeliness of appeal.* SBA's ADA/GC&8(a)BD must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the 5-day period.

(c) *Method of submission.* The party appealing the decision may deliver its appeal in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period).

(d) *Notice of appeal.* The party bringing an appeal must provide notice of the appeal to the contracting activity contracting officer and either the protested HUBZone SBC or original protestor, as appropriate.

(e) *Grounds for appeal.* (1) SBA will re-examine a protest determination only if there was a clear and significant error in the processing of the protest or if the AA/HUB failed completely to consider a significant fact contained within the information supplied by the protestor or the protested HUBZone SBC.

(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the AA/HUB's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(f) *Contents of appeal.* The appeal must be in writing. The appeal must identify the protest determination being appealed and set forth a full and specific statement as to why the decision is erroneous or what significant fact the AA/HUB failed to consider.

(g) *Completion of appeal after award.* An appeal may proceed to completion even after award of the contract that prompted the protest, if so desired by the protested HUBZone SBC, or where SBA determines that a decision on appeal is meaningful.

(h) *Decision.* The ADA/GC&8(a)BD will make its decision within 5 business days of its receipt, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested HUBZone SBC, consistent with law. The ADA/GC&8(a)BD's decision is the final agency decision.

#### Subpart I—Penalties

##### **§ 126.900 What penalties may be imposed under this part?**

(a) *Suspension or debarment.* The Agency Debarment Official may suspend

or debar a person or concern pursuant to the procedures set forth in part 145 of this title. The contracting agency debarment official may debar or suspend a person or concern under the Federal Acquisition Regulation, 8 CFR part 9, subpart 9.4.

(b) *Civil penalties.* Persons or concerns are subject to civil remedies under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws.

(c) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the HUBZone status of a small business concern in connection with procurement programs pursuant to sec. 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended; 18 U.S.C. 1001; and 31 U.S.C. 3729–3733. Persons or concerns also are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to sec. 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

Dated: March 26, 1998.

**Aida Alvarez,**  
Administrator.

[FR Doc. 98–8585 Filed 4–1–98; 8:45 am]  
BILLING CODE 8025–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 98–CE–04–AD]

RIN 2120–AA64

#### **Airworthiness Directives; Alexander Schleicher Segelflugzeugbau Model AS–K13 Sailplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes to adopt a new airworthiness directive (AD) that would apply to certain Alexander Schleicher Segelflugzeugbau (Alexander Schleicher) Model AS–K13 sailplanes. The proposed AD would require inspecting the main spar fitting for excessive tolerance, traces, movement, etc., and repairing the main spar fitting if any of the above conditions exist. The proposed AD is the result of mandatory continuing

airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by the proposed AD are intended to prevent failure of the main spar caused by excessive movement of the main spar fitting, which could result in loss of control of the sailplane.

**DATES:** Comments must be received on or before May 8, 1998.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–04–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Alexander Schleicher Segelflugzeugbau, 6416 Poppenhausen, Wasserkuppe, Federal Republic of Germany. This information also may be examined at the Rules Docket at the address above.

**FOR FURTHER INFORMATION CONTACT:** Mr. J. Mike Kiesov, Project Officer, FAA, Small Airplane Directorate, Aircraft Certification Service, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6932; facsimile: (816) 426–2169.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped