

# **HUBZONE PROGRAM**

## **FINAL RULE**

(Effective September 9, 1998)

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**SUMMARY:** The HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592), created the HUBZone Empowerment Contracting Program (hereinafter “the HUBZone Program”). This final rule adds a new Part 126 to Title 13 of the Code of Federal Regulations to implement the HUBZone program.

**DATES:** The effective date of this rule is September 9, 1998. However, at the conclusion of the congressional review, if the effective date has been changed, the Small Business Administration (SBA) will publish a document in the Federal Register to establish the actual effective date or to terminate the rule.

**FOR FURTHER INFORMATION CONTACT:** Michael McHale, Assistant Administrator, Office of Procurement Policy and Liaison, 409 Third Street, SW, Washington, DC 20416, (202) 205-6731.

**SUPPLEMENTARY INFORMATION:** On April 2, 1998, SBA published a proposed rule to implement the HUBZone program. See 63 FR 16148. The proposed rule 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. SBA published a technical correction on April 14, 1998. See 63 FR 18150.

The public comment period closed on May 4, 1998. SBA received 35 comment letters on the proposed rule. This final rule includes changes based on some of the comments received.

### **Section-by-Section Analysis**

The conforming amendments to Part 121 of this title remain as proposed. However, SBA has added a second conforming amendment to Part 125 of this title. Section 125.2 of this title must be amended to include HUBZone contracts in the contracts reviewed by SBA's procurement center representatives.

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

**Section 126.100** explains that the purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns (SBC) located in historically underutilized business zones in an effort to increase employment opportunities and investment in those areas. SBA received no comments concerning this section and it remains as proposed.

**Section 126.101** lists the departments and agencies affected directly by the HUBZone program. SBA received no comments concerning this section and it remains as proposed.

**Section 126.102** describes the effect the HUBZone program will have on the 8(d) subcontracting program. The HUBZone Act of 1997 amended section 8(d) of the Small Business Act, 15 U.S.C. 637(d), to include qualified HUBZone SBCs in the formal subcontracting plans required by 8(d) of the Small Business Act and described in section 125.3 of this title. Two comments on this section stated that SBA has not adequately addressed how SBA will implement the inclusion of qualified HUBZone SBCs in the 8(d) subcontracting assistance program. SBA refers commenters to changes made to section 125.3 of this title, concerning SBA's 8(d) subcontracting program, to implement the inclusion of qualified HUBZone SBCs in this program. Changes to the Federal Acquisition Regulation also will need to be made to further implement these changes. This section remains as proposed.

**Section 126.103** defines terms that are important to the HUBZone program. SBA received comments regarding several of the proposed definitions.

In defining some terms essential to the HUBZone program, the HUBZone Act of 1997 relied upon definitions provided by other federal agencies. This final rule cross-references those definitions for use in connection with the HUBZone program. HUBZone definition: The HUBZone Act defines a HUBZone as “a 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 tract” has the meaning given that term in Sec. 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 rule includes a cross-reference to Sec. 42(d)(5)(C)(ii)(I) of the Internal Revenue Code.

Qualified non-metropolitan counties definition: 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. The public can find the information from the Bureau of Census at any local Federal Depository Library. To find the nearest Federal Depository Library, call toll-free (888) 293-6498. The information from the Bureau of Labor Statistics is available for public inspection at the U.S. Department of Labor, Bureau of Labor Statistics, Division of Local Area Unemployment Statistics office in Washington, D.C. (the text of the rule lists the complete address). Again, the rule cross-references this information to provide guidance in determining whether or not a small business concern is located in a HUBZone.

Qualified census tract definition: 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 [[Page 31897]] annually. Changes in either can generate changes in the areas that qualify as HUBZones--even as often as annually.

Several commenters requested that SBA make various changes to these definitions that create HUBZones. Several comments stated that the definitions are unfair because communities that need the assistance of the HUBZone program will not get it because they do not fall within one of the definitions of HUBZone, especially small rural states and rural counties. One commenter stated that the criteria should include actual population and employment trends in a particular area. Another commenter stated that a definition based on poverty rates would be more appropriate in an inner-city community that does not contain low income housing. Some commenters suggested alternative definitions. For example, one comment suggested that SBA use Department of Commerce's Economic Development Administration's designation of “Long Term Economic Deteriorated Areas” as one definition of HUBZone. Two comments suggested that areas in which an active SBA Certified Development Company operates should be considered HUBZones. The definition of HUBZone is based on statutory language in the HUBZone Act of 1997 and, therefore, SBA has no authority to modify it. The definitions remain as proposed.

Lands within the external boundaries of an Indian reservation definition: The HUBZone Act of 1997 does not define “lands within the external boundaries of an Indian reservation.” For purposes of the HUBZone program, SBA proposed a definition of “Indian reservation” used in the

Bureau of Indian Affairs" (BIA) regulations and the 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).

Indian reservation definition: Several commenters objected to the proposed definition of "Indian reservation" by reference to a Bureau of Indian Affairs regulation. One commenter said that using BIA's definition is inappropriate because it includes only federally recognized Indian tribes and that SBA should include in the definition state-recognized tribes and individual Indians residing on "former Indian lands." One comment stated that the BIA definition should not control because it restricts the definition to lands over which the tribes exercise governmental jurisdiction and there are pockets of land within the outermost boundaries of a reservation that were allotted to individual Indians and therefore passed out of tribal ownership and control, creating a "checkerboard" pattern. This commenter suggested that the phrase "lands within the external boundaries of an Indian reservation" includes those pockets of land, even though those pockets are not considered part of the reservation itself.

SBA has decided to keep the definition of "Indian reservation" as proposed. SBA believes that its use of a definition of "Indian reservation" created by the Federal agency responsible for Indian affairs is appropriate. SBA believes that if Congress had intended to include other than federally recognized Indian tribes or Indian land not part of an Indian reservation, Congress would have expressly stated that in the HUBZone Act of 1997.

However, to accommodate the "checkerboard" pattern of ownership, SBA has added a definition for the term "lands within the external boundaries of an Indian reservation." The definition states that all lands within the outside perimeter of an Indian reservation, whether tribally owned and governed or not, are included in the scope of "lands within the external boundaries of an Indian reservation" and, therefore, are in a HUBZone.

Contract opportunity definition: SBA has redefined contract opportunity in light of several comments received which point out practical difficulties with the proposed rule and its reliance on goal achievement statistics. After further consideration of the issue, SBA has chosen to eliminate goaling statistics to define HUBZone contracting opportunities. That approach was considered impractical by procuring agencies and, therefore, was not likely to encourage the use of HUBZone contracting. In resolving this issue, SBA balanced HUBZone contracting with the stated Congressional purpose in the Small Business Act of maximizing 8(a) contracting, where practicable. In effect, SBA has replaced the three percent limitation on HUBZone set-aside contracting with revised provisions at Sec. 126.607 which create a priority for HUBZone firms which are also 8(a) participants and other 8(a) participants. No limitation on the amount of HUBZone contracting would then apply. This approach is also consistent with comments asking for a clear order of precedence regarding HUBZone contracting. In terms of priority, this approach would also retain consistency with the existing Defense Federal Acquisition Regulation Supplement. SBA anticipates that the HUBZone statutory goals will be readily achieved by this approach, and that there will now be no regulatory impediment to exceeding those goals.

County definition: SBA has added a definition of “county” to make clear that county equivalents are considered counties for purposes of the “non-metropolitan county” definition of HUBZone.

Employee definition: Two commenters suggested alternative definitions for “employee.” One stated that the proposed definition is limiting and should be expanded to include temporary employees. Another commenter recommended that SBA use the term “full-time equivalent” in lieu of “employee.” The purpose behind the definition as proposed was to focus on those jobs that best fulfill the statutory purpose of the HUBZone Act of 1997. This is why SBA specifically excluded temporary and leased employees and independent contractors from the definition. SBA also sought to encourage the maximum number of jobs by allowing companies to count part-time employees but only where their combined hours added up to at least 40 hours per week. This definition remains as proposed.

HUBZone small business concern definition: One commenter objected that the 100 percent ownership requirement is too rigid. Two commenters noted that this requirement may be especially difficult for publicly-held corporations to meet. SBA considers that the statutory language in the HUBZone Act of 1997 requires that the HUBZone SBC be 100 percent owned and controlled by U.S. citizens. This definition remains as proposed.

HUBZone 8(a) concern definition: SBA has added a definition for HUBZone 8(a) concerns to provide guidance in applying Sec. 126.607.

Principal office definition: The six comments received on this definition stated either that: (1) the “principal office” may change contract-by-contract for certain types of businesses with on-site contract performance (e.g., construction, trash removal); or (2) the term “principal office” is generally understood to mean the central headquarters or center of operations of the business, not where most of the businesses' employees are located. [[Page 31898]]

Suggestions for alternative definitions included “where the company performs its general and administrative business functions,” “central headquarters or center of operations,” and “where the greatest proportion of the concern's labor cost is incurred.”

According to the HUBZone Act of 1997, a HUBZone SBC's principal office must be located in a HUBZone. SBA crafted the definition to fulfill the statutory purpose of hiring residents in HUBZones by encouraging businesses to move to or expand their business operations in a HUBZone (as opposed to just their headquarters, which may be where only a few employees work). As a result, SBA declines to accept these suggested changes. SBA acknowledges that for some types of businesses, their “principal office” may change contract by contract. However, this should not prevent those businesses from meeting the terms of this definition and participating in the HUBZone program. SBA has retained the definition as proposed.

Reside definition: Several comments stated that it is unclear how SBA or the qualified HUBZone SBC will determine an employee's intent to reside in a HUBZone indefinitely. One commenter suggested that the criteria be more stringent than voter registration, noting that persons may have a voter registration in a state where they have not lived for some time. Another commenter stated that it will be a burden on SBA to check on residency and voting registration.

SBA has retained the definition as proposed. According to the HUBZone Act of 1997, at least 35 percent of a qualified HUBZone SBC's employees must reside in a HUBZone. SBA's definition requires either of two means of indicating a permanent residence in the HUBZone (living there for 180 days or more or being a registered voter), along with "intent to remain there indefinitely." SBA believes that the HUBZone SBC can readily obtain documentation regarding its employees' length of residency or voting registration in order to meet this definition. SBA also believes that a HUBZone SBC reasonably may rely on its employees' representation of their intent to remain in the HUBZone indefinitely.

**Section 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; at least 35 percent of the concern's employees must reside in a HUBZone; the concern must attempt to maintain this percentage during the performance of any HUBZone contract; and the concern must comply with certain contract performance requirements in connection with HUBZone contracts. To be counted as residing in the HUBZone, an employee either must be registered to vote in the HUBZone or have resided in the HUBZone for a period of not less than 180 days.

SBA received two general comments on this section. One commenter recommended that large businesses be included in the HUBZone program in order to encourage further economic growth within HUBZones. SBA considers the statutory language in the HUBZone Act of 1997 to include only small business concerns in the HUBZone program. Another commenter suggested that the 35-percent residency requirement will have a disproportionately adverse affect on smaller HUBZones which may not have an adequate pool of individuals residing within the HUBZone to hire as employees in order to meet the 35-percent requirement. SBA does not consider the statutory language in the HUBZone Act of 1997 to allow any exception to this 35-percent requirement. As a result, SBA did not incorporate either of these suggestions.

In addition, SBA received six comments suggesting that the phrase "attempt to maintain" the appropriate percentage of employees who reside in a HUBZone is not appropriate language. Commenters suggested that SBA should strengthen the language to make it mandatory. SBA declines to accept this recommendation because the phrase "attempt to maintain" comes directly from section 3(p)(5)(A)(i)(II) of the Small Business Act, as amended by section 602(a) of the HUBZone Act of 1997. This language remains the same as in the proposed section.

For additional clarity and to ensure consistency with section 126.304, SBA has inserted all of the statutory requirements into this section.

**Section 126.201** describes who is considered to own a HUBZone SBC. SBA received no comments concerning this section and it remains as proposed.

**Section 126.202** explains who is considered to control a HUBZone SBC. SBA received no comments on this section and it remains as proposed.

**Section 126.203** states that a HUBZone SBC must meet SBA's size standards for its primary industry classification as defined in Part 121 of this title. SBA asked for comments on a proposal to set a minimum size standard of at least 16 employees and a maximum size standard of one-half of the procurement assistance size standard for initial qualification only. SBA received 22 comments addressing these issues.

Minimum size standard of 16 employees: SBA received two comments in support of this idea and 13 comments in opposition. The reasons behind the opposition were primarily that the size

standard would (1) be an unnecessary barrier to start-up businesses; (2) unduly burden rural states where many businesses are under 16 employees; (3) eliminate opportunities for businesses most likely to create new jobs; (4) negatively affect some types of businesses that do not carry 16 full-time employees (e.g., retailers, service providers); and (5) eliminate from eligibility those businesses with fewer than 16 employees that already are located in HUBZones. One commenter noted that SBA's own statistics show that about 80 percent of small business concerns have fewer than 10 employees, so the overwhelming majority of small businesses would be excluded from the program under this minimum size standard. The commenter further noted that the impact would be even greater on minority- and women-owned concerns which tend to be smaller and have fewer employees. The commenter stated that the HUBZone statute did not give SBA discretion to add limitations to the statutory definition. Other commenters stated that HUBZones could benefit from businesses of any size.

Maximum size standard at time of initial qualification of one-half of the procurement assistance size standard: SBA received two comments in support and five in opposition. One opposing commenter stated that this approach would reduce the number of contracts available for award to qualified HUBZone SBCs. This reduction would hinder procuring agencies' ability to reach the HUBZone contracting goal and reduce the benefit to HUBZone communities. Additionally, this commenter believed that there are certain industries in which most of the businesses would be over one-half of the size standard for that industry. The commenter observed that SBA's rationale stated that the HUBZone program is not a business development program so SBA should not be concerned with whether a firm grows out of its size standard due to receiving HUBZone contracts. Rather, SBA should be concerned primarily with accomplishing the statutory purpose of job creation and investment in HUBZones.

Two commenters believed that providing an exception to the one-half [[Page 31899]] size standard for 8(a) participants and women-owned businesses (WOBs) might not survive legal challenge. SBA also received four comments in support of including Indian-owned businesses as another exception to a one-half size standard. SBA received another comment stating that SBA should deem Indian-owned businesses 8(a) participants for purposes of this program. This commenter also stated that 8(a) participants owned by white women or white men and WOBs owned by white women should not receive the benefit of this exception to the maximum one-half size standard.

SBA has carefully considered all of these comments on this issue and has decided not to impose either a minimum size standard of 16 employees or a maximum one-half size standard for initial qualification for the program. As a result, Sec. 126.203 remains as proposed with regard to what size standards apply to HUBZone SBCs.

Under Sec. 126.203(a), if SBA cannot verify that a concern is small, SBA may deny the concern status as a qualified HUBZone SBC or request a formal size determination from the responsible Government Contracting Area Director or designee. SBA received no comments on this section and it remains as proposed.

**Section 126.204** provides that qualified HUBZone SBCs may have affiliates so long as the affiliates are qualified HUBZone SBCs, 8(a) participants, or WOBs. SBA received two comments in opposition to the proposed rule regarding affiliation. Both commenters opposed restricting allowable affiliation to only specified types of SBCs. One commenter noted that there is no similar restriction under the 8(a) program. Another commenter suggested expanding allowable affiliation to include any other SBC. SBA has considered these comments but has declined to accept these recommendations. For the reasons stated in the preamble to the proposed rule, SBA continues to believe the regulation as proposed is appropriate. The regulation remains as proposed.

**Section 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. SBA received two comments on this section. One stated that the section adds nothing substantive. The other stated that allowing firms to qualify under more than one “preference” program likely will result in higher contracting costs to the government. SBA believes that the HUBZone Act of 1997 does not permit excluding any other types of SBCs (i.e., SDBs, WOBs, 8(a) participants, etc.) from participating in the HUBZone program. As a result, SBA retains the section as proposed.

**Section 126.206** states the conditions under which non-manufacturers can qualify as HUBZone SBCs. SBA received five comments concerning this section. Three stated that the section does not specifically require that the HUBZone SBC non-manufacturer supply the products of a manufacturer that is located in a HUBZone and that meets the employee residency requirement. Four comments stated that the term “regular dealer” is obsolete and suggested SBA use the term “non-manufacturer” or “dealer” instead.

SBA has modified the section to state that the non-manufacturer must use a manufacturer that is a qualified HUBZone SBC. SBA believes this requirement will further enhance the impact of HUBZone contracting on job creation in HUBZones. Also, SBA has replaced the term “regular dealer” with “non-manufacturer” throughout Part 126. This term is consistent with current law and practice in government contracting, including Sec. 121.406(b) of this title (SBA's non-manufacturer rule). To show an equivalency, SBA notes in this section that the HUBZone Act of 1997 uses the term “regular dealer.”

**Section 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. SBA addresses the comments it received referring to this section under other sections. This section remains as proposed.

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

Several commenters addressed the certification process as a whole. One commenter suggested that the mere existence of a certification process might discourage participation in the program. Another feared that self-certification risked fraud and abuse and asked SBA to specify when it would seek further information or pursue verification. A third commenter suggested that the period between self-certifications should be three years, not one year. That commenter believed that annual re-certification would be burdensome to the HUBZone SBCs.

SBA has retained these sections essentially as proposed. Both the self-certification and the verification portions of the HUBZone program are based upon the HUBZone Act of 1997. SBA modeled its annual certification process on the 8(a) program where experience has demonstrated that waiting longer than one year postpones addressing too many significant changes in a concern's eligibility. A longer period would allow too many substantive changes to occur, whether voluntary or involuntary, without SBA's knowledge. Although there may be qualified HUBZone SBCs that do not experience changes in the course of a three-year period, SBA's program experience suggests that one year is the optimum period between self-certifications.

Section 126.300 describes how SBA will certify a concern as a qualified HUBZone SBC. One comment suggested that SBA should not rely solely on the submitter's information and should modify its procedure based upon a review of various state and local empowerment programs' certification processes. This commenter believed that lack of verification might result in protests.

SBA has retained the section as proposed. SBA believes that the application process, including an applicant's representations and SBA's ability to request additional information to verify those representations, along with the program examination process, adequately addresses the commenter's concerns.

**Section 126.301** states that only SBA may certify a qualified HUBZone SBC. Section 126.302 prescribes when a concern may apply for certification and section 126.303 provides the address where concerns must file their certifications. SBA received no comments on these sections and therefore they are retained without change.

**Section 126.304** sets forth what a concern must submit to be certified by SBA as a qualified HUBZone SBC. Two commenters raised concerns about the language governing a concern's application and submissions to SBA. The first commenter observed that SBA should move paragraphs (a)(4) and (a)(5) of this section (setting forth the "good faith efforts" requirement to maintain the 35 percent residence standard and ensuring that limitations on subcontracting are met, respectively) to other sections. SBA has not adopted this recommendation because paragraphs (a)(4) or (a)(5) contain representations that the concern is required to make in the application process. The second [[Page 31900]], commenter was concerned with the substantive requirements. Those are dealt with in the discussion of Sec. 126.500 and Sec. 126.700, respectively.

SBA has revised Sec. 126.304(a) to eliminate unnecessary verbiage and to add a cross-reference to Sec. 126.700 for more complete details regarding contract performance requirements.

Section 126.304(b) 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, although 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, not 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. SBA has added a sentence to this subsection stating that if BIA is unable to verify whether a business is located within the external boundaries of an Indian reservation, applicants should contact SBA.

SBA intends to develop electronic data for lands within the external boundaries of an Indian reservation. If SBA succeeds in this effort, it may be able to eliminate this requirement in the future'.

One commenter recommended that "a letter signed by an official" of BIA be required instead of "official documentation from the appropriate Bureau of Indian Affairs (BIA) Land Titles and Records Office with jurisdiction over the concern's area \* \* \*." The commenter suggested that the proposed provision was more complex than necessary and would create potential delays and hindrances for Alaska Native applicants. Another commenter noted that specifying a particular BIA office might create problems if BIA reorganized.

SBA has retained the section as proposed. The section requires "official documentation," which may include a letter. BIA, in consultation with SBA, will decide what documentation best meets this requirement, provides efficient service for applicants, and protects the government against fraud and abuse. SBA does not expect Alaska Native applicants to encounter unusual or unexpected delays and hindrances in obtaining BIA approval and, therefore, has not modified the

section. Although BIA may restructure itself, the function which that office provides to HUBZone applicants would be transferred to a successor office. SBA believes that specifying the name of the BIA office is the most accurate procedure.

Another commenter recommended adding the Form 912 (“Statement of Personal History”) to the list of required items in Sec. 126.304(c). SBA declined to adopt this recommendation for three reasons. First, any listing of forms runs the risk of omitting others. Moreover, as presently worded, the subsection already requires the concern to “submit the forms, attachments, and any additional information required by SBA.” Thus, SBA already is authorized to request any form it may deem appropriate. Finally, specifying a form by its number would necessitate another formal rulemaking procedure to modify the section in the event a form number changes.

**Section 126.305** explains the format for certifications to SBA and **Sec. 126.306** describes how SBA will process the certifications. **Section 126.307** states where SBA will maintain the List and **Sec. 126.308** explains what a concern can do in the event SBA inadvertently omits a qualified HUBZone SBC from the List. SBA received no comments on any of these sections and therefore they remain as proposed.

**Section 126.309** provides a procedure for declined or de-certified concerns to seek certification at a later date. One commenter objected that the certification process lacks the procedural due process safeguards (rights of appeals and reconsideration) that are present in the 8(a) program. SBA has retained this section as proposed (except for a clarifying word) because a firm does not enter or depart, or participate in the HUBZone program in the same way it does with the 8(a) program. The 8(a) program not only helps program participants to obtain federal contracts but also provides ongoing support from SBA program staff to assist participants in their business development. There is a definite entry date, normally a nine-year term, and there is a termination. The HUBZone program merely determines a concern's eligibility to be placed on a list that may permit it to obtain federal contracts. There is no other SBA support available to HUBZone SBCs through the HUBZone program; Congress designed the program to foster community development, not the development of individual concerns.

Four commenters addressed the one-year waiting period imposed on declined or de-certified concerns. One recommended that “reservation-based concerns” be exempt from the one-year waiting period before reapplying. Another suggested that a 30-60 day period was more appropriate. Two other commenters believed a one-year period might be appropriate for intentional misrepresentations or fraud but not for unintentional or minor technical errors.

SBA will not decline applicants for technical errors or problems easily remedied by supplying clarifying information. Instead, SBA will screen out such errors and problems during the application process and will work with applicants who wish to overcome the errors or omissions. SBA is aware that difficulties might arise and Sec. 126.306(b) specifically authorizes SBA to request that the concern provide additional information or that it clarify the information contained in its submission.

SBA considered the comments received and has decided to retain the one-year waiting period. SBA chose the one-year period to give HUBZone SBCs a reasonable period of time within which to make the changes or modifications that are necessary to enable them to qualify for the HUBZone program, and at the same time to allow SBA to administer the HUBZone program effectively with available resources.

**Sections 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, these sections 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. Qualified HUBZone SBCs have an obligation to maintain relevant documentation for six years.

Proposed Sec. 126.401(b) required that qualified HUBZone SBCs retain all documentation demonstrating that it satisfied program qualifying requirements for six years. One commenter believed that SBA should require HUBZone concerns to maintain relevant documents for three years. SBA has decided to retain this section as proposed in order not to hinder enforcement. Many relevant statutes have statutes of limitation much longer than three years.

**Sections 126.402 and 126.403** set forth when SBA may conduct program examinations and state that SBA may require additional information from a HUBZone SBC. SBA received no [[Page 31901]] comments on these sections and has retained them as proposed.

**Section 126.404** discusses the action SBA may take if it is unable to verify a HUBZone SBC's eligibility. One commenter suggested adding language to make clear that the AA/HUB's decision on de-certification is final. SBA has adopted this recommendation and inserted language in Sec. 126.404(c) stating that the AA/HUB's decision is the final Agency decision. Although SBA received no comments on Sec. 126.404(b) (which governs the situation when SBA is unable to verify a qualified HUBZone SBC's eligibility), it added language to clarify the rule. Subsection (a) provides that SBA will notify the concern in writing that it is no longer eligible and subsection (b) granted the concern "10 business days to respond to the notification." SBA has modified subsection (b) to make clear that the 10-day period runs from the date the concern receives SBA's letter of notification.

**Sections 126.500 through 126.503** set forth how a concern maintains its qualified HUBZone SBC 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 each annual anniversary of their date of certification.

One commenter pointed out that two sentences in Secs. 126.500 and 126.502 are inconsistent. SBA has modified the language in Secs. 126.500(a) and 126.502 to clarify how long a concern may remain on the List. SBA eliminated the second sentence in Sec. 126.500(a) because it answered a question that is not posed in this section and there is a more complete and correct answer in Sec. 126.502. Section 126.500(a) only addresses a HUBZone SBCs responsibilities for maintaining its status whereas Sec. 126.502 speaks directly to the time limit for inclusion on SBA's List. SBA also corrects the cross-references listed in Sec. 126.502 by adding Sec. 126.200 and eliminating Sec. 126.503.

Section 126.500 states the requirements for a qualified HUBZone SBC to maintain its status. Two commenters objected that the proposed regulations did not adequately address the situation when an area that had previously qualified as a HUBZone ceases to be a HUBZone. Both commenters noted that the regulations do not indicate how or when the HUBZone SBCs in that area would be notified. One also suggested that the three-year grandfathering period should be extended to a five-year minimum.

SBA has eliminated the "grandfathering" provision (in section 126.502) after careful re-examination. SBA believes that it is consistent with congressional intent to not afford HUBZone program benefits to concerns in a location when that location no longer meets the definition of "HUBZone." Congress elected to tie the HUBZone definition to data which is well-known to be vulnerable to change. Therefore, the SBA website will endeavor to provide detailed statistical data to aid concerns in assessing the likelihood of a change in designation in the future.

In the proposed rule, **Sec. 126.600 through 126.616** explained the general conditions applicable to HUBZone contracts. Based on the comments received regarding these sections, SBA has revised some of these regulations. Section 126.600 states that HUBZone contracts are contracts awarded to a qualified HUBZone SBC through sole source awards, set-aside awards based on competition restricted to qualified HUBZone SBCs, or awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs. SBA received no comments on this section; therefore, the section remains as proposed.

**Section 126.601** provides the additional requirements that a qualified HUBZone SBC must meet in order to bid on a HUBZone contract. SBA received comments with different views on this section. Two commenters suggested that SBA does not have the authority to require a certification to the contracting officer in order to bid on a HUBZone contract. Additionally, the commenters observed that the certifications required appear contrary to Sec. 4301, "Elimination of Certain Certification Requirements," in the Clinger-Cohen Act of 1996. The HUBZone Act of 1997 gives the Administrator the authority to establish appropriate certification procedures by regulation. Furthermore, the Clinger-Cohen Act of 1996 eliminated certain, but not all, certifications and none of those eliminated relate to small business concerns. Finally, the certifications required by this section are consistent with other SBA programs for federal contracting assistance (8(a), SDB, and WOB).

One commenter was concerned that Sec. 126.601(c) implies that each party to a HUBZone joint venture must itself be a qualified HUBZone SBC. This is not the case. As stated in Sec. 126.616(a), a qualified HUBZone SBC may enter into a joint venture with one or more other qualified HUBZone SBCs, 8(a) participants, or women-owned businesses, for the purpose of performing a specific HUBZone contract. Section 126.601(c) simply requires that each qualified HUBZone SBC that is a party to a joint venture make the applicable certifications separately. The List includes the names of individual concerns that SBA has certified as qualified HUBZone SBCs--not joint ventures. In order for the contracting officer to ensure that each qualified HUBZone SBC that is a party to the joint venture is on the List, each concern must certify under its own name.

Finally, one commenter suggested that manufacturers that will provide a product to non-manufacturers and meet the requirements of Sec. 126.601(d) should be on the List of Qualified HUBZone SBCs. SBA has changed this section to specify that manufacturers must also be qualified HUBZone SBCs. Consequently, such firms are listed.

**Section 126.602** clarifies that a qualified HUBZone SBC must "attempt to maintain" the employee residency percentage during performance of any HUBZone contract. SBA received a comment stating that the limitation originally listed in Sec. 126.602(b) also is listed in Sec. 126.700, but the other subcontracting limitations listed in Sec. 126.700 are not listed here. Additionally, numerous commenters challenged the authority and the ability of contracting officers to effectively monitor and enforce the requirements in proposed Sec. 126.602 (a) and (b). Proposed Sec. 126.602(c) set forth that requirement. Many comments indicated that SBA is in a better position than the contracting officer to monitor and enforce these requirements. Further, requiring the contracting officer to enforce these requirements is inconsistent with other SBA programs (including 8(a) and small business set-asides).

After considering these comments, SBA has revised this section to provide that enforcement of Sec. 126.602 will be the responsibility of SBA and SBA will monitor compliance in

accordance with Secs. 126.400-126.505 of this title. Violations of Sec. 126.700 may be grounds for termination of the contract at the election of the contracting officer.

The contracting officer's responsibility can generally be met by obtaining an appropriate representation from the potential awardee. SBA will propose modifications to the FAR that will add this requirement as a new contract [Page 31902]] clause, making it a requirement of contract performance. As revised, this section is consistent with other SBA programs. SBA has further revised this section by eliminating proposed Sec. 126.602(c).

**Section 126.603** states that HUBZone certification does not guarantee receipt of HUBZone contracts. SBA received no comments on this section; therefore, it remains as proposed.

**Section 126.604** provides that the contracting officer determines whether a HUBZone contract opportunity exists. Two commenters suggested that SBA revise this section to add that the contracting officer will make this decision with the advice and recommendation of the procuring agency's Director, Office of Small and Disadvantaged Business Utilization and either the agency's small business technical advisor or SBA's procurement center representative (PCR). Existing provisions of the FAR already require the contracting officer to work with those individuals, consequently, this section remains as proposed. One commenter expressed concern that such decisions by the contracting officers should be tracked for the first two years of program implementation. SBA will track the number and dollar amounts of contracts awarded to qualified HUBZone SBCs for the duration of the program. Additionally, as discussed further in connection with Sec. 126.611, if a contracting officer receives a recommendation from SBA's PCR and decides not to make an award to a qualified HUBZone SBC either on a HUBZone sole source or set-aside basis, the contracting officer must notify SBA's PCR or the AA/HUB, and ultimately the Administrator may appeal the contracting officer's decision.

**Section 126.605** lists those requirements which are not available as HUBZone contracts. One commenter recommended that SBA amend Sec. 126.605 to exclude all acquisitions at or under the simplified acquisition threshold including all procurements with an estimated value under \$2,500 (micro-purchases). SBA does not agree completely with this suggestion. SBA has reconsidered the proposed exclusion as to requirements between \$2,500 and \$100,000. SBA now believes, after further review, that only contracting actions below the micropurchase threshold should not be available for HUBZone set-aside procedures because to include them would be impractical and would likely cause no meaningful impact in terms of job creation. Moreover, it would discourage the use of purchase cards to make small purchases. This does not mean that HUBZone firms could not provide goods and services at the micropurchase level, only that their HUBZone status would be incidental to the contracting action.

Additionally, SBA has determined that the proposed exclusion of contracts above \$2,500 and at or below \$100,000 should be changed. SBA believes these contracts represent too significant a block of potential HUBZone contracting actions to exclude them from the program. At the same time, SBA is mindful of the significant benefits of simplified acquisition procedures which also include a reservation for small business. Accordingly, the final rule does not exclude contracts above the micropurchase threshold and below the simplified acquisition threshold, but makes the use of HUBZone contracting optional for such contracts. Revised Sec. 126.608 makes this clear.

Two commenters recommended that small business set-asides be excluded from HUBZone contracts. SBA declines to accept this recommendation since a very significant segment of government contracting requirements would be lost to HUBZones. As indicated, only contracts below the micropurchase threshold have been excluded in the final rule.

Finally, one commenter asked what the effect of the HUBZone program would be on the Small Business Competitiveness Demonstration program. SBA has reviewed this issue and has decided to include requirements which fall within the Small Business Competitiveness Demonstration Program in Sec. 126.605. Exclusion of such procurements from the HUBZone program would result in a significant loss of contract requirements in many labor intensive industries, including construction, refuse collection and non-nuclear ship repair. SBA has retained Sec. 126.605 (a) and (b) as proposed, amended subsection (c) to exclude contracts below the micropurchase threshold, and deleted Sec. 126.605(d) as no longer necessary in light of the changed definition of contract opportunity in Sec. 126.103.

**Section 126.606** states that a contracting officer may request that SBA release an 8(a) requirement for award as a HUBZone contract. SBA will release only where neither the incumbent nor any other 8(a) participant can perform the requirement and where the 8(a) program will not be adversely affected. One commenter suggested that SBA release an 8(a) requirement if a HUBZone SBC can perform the work as an 8(a) participant would. SBA believes such a modification would adversely affect the 8(a) program. Furthermore, the legislative history includes numerous statements of congressional intent indicating that the HUBZone program should not adversely affect the 8(a) program. SBA declines to accept this recommendation and this section is retained as proposed.

**Section 126.607** describes when a contracting officer must set aside a requirement for qualified HUBZone SBCs. SBA has changed the heading for Sec. 126.607 to now apply more generally to HUBZone contracting.

For the reasons discussed above in connection with the changes to the “contract opportunity” definition, this section now establishes a priority first for qualified HUBZone 8(a) concerns and then other 8(a) concerns. After these preferences, the contracting officer must use a HUBZone set-aside competition when possible. Section 126.607 has been revised to accomplish these changes, while preserving the guidance to contracting officers with respect to consulting SBA's List of Qualified HUBZone SBCs to locate at least two such firms which are likely to compete.

One commenter suggested that SBA add the term “responsible” before “qualified HUBZone SBCs” in subsection (c)(1) (proposed subsection (a)(1)). The comment describes this as a “vital element.” The HUBZone Act of 1997 does not include the term “responsible” in the applicable provision. However, SBA agrees that responsibility is a vital element in the contracting officer's decision and has revised the section to include the term.

SBA has eliminated the proposed **Sec. 126.608** and has created a new Sec. 126.608 to address commenters' concerns with respect to Simplified Acquisition Threshold procedures. As indicated above, the new Sec. 126.608 clarifies that Simplified Acquisition Threshold procedures can be used for HUBZone contracting. SBA eliminated the proposed Sec. 126.608 because it was merely restating general procurement practices. SBA did not intend to create special rules to be followed in the HUBZone context where a competition results in only one or no acceptable offer received.

**Section 126.609** now explains what the contracting officer must do if a contracting opportunity does not exist for competition among qualified HUBZone SBCs. SBA has clarified this section. Section 126.609 now refers specifically to Sec. 126.607, and provides guidance to contracting officers if a contract opportunity does not exist for competition among qualified HUBZone SBCs. SBA received numerous [[Page 31903]]

comments on the issue of order of precedence generally. Sixteen commenters stated that SBA exceeded its authority in proposed Secs. 126.608 and 126.609 by creating an order of

precedence among SBA programs and directing the contracting officer to make certain types of awards (either sole source or full and open competition). The commenters also stated that the two provisions are "confusing," "contradictory," and "inconsistent." However, many of the commenters stated that SBA has the authority to create an order of precedence within SBA programs, but the implementation of any such order should be left to the FAR. One commenter endorsed the order of precedence as proposed and another commenter suggested a priority for 8(a).

SBA believes that it is within its authority to create an order of precedence among SBA's programs; therefore SBA has made the order of precedence in this rule mandatory. However, SBA agrees that the procurement methods a contracting officer uses in other respects should be left to the contracting officer in accordance with existing procedures set out in the FAR. As indicated, Sec. 126.608 has been eliminated in its proposed form. SBA has revised Sec. 126.609 to be

consistent with that approach. SBA has revised Sec. 126.609 to make the order of precedence mandatory. In light of revisions to Sec. 126.607, that section is now simply referred to, and the remaining priorities are identified in Sec. 126.609.

**Section 126.610** states that SBA may appeal a contracting officer's decision not to reserve a procurement for award as a HUBZone contract. One commenter recommended that SBA expand this right of appeal to include contracting officer decisions that adversely affect 8(a) participants. However, the right of the Administrator to appeal the contracting officer's decision not to reserve a requirement for award as a HUBZone contract is the only appeal right provided by the HUBZone Act of 1997. Thus, the text remains as proposed.

**Section 126.611** describes the process for SBA's appeal of a contracting officer's decision not to reserve a procurement for award as a HUBZone contract. One commenter indicated that this section did not clearly identify when a contracting officer must notify SBA of such a decision. Also, five commenters suggested that requiring the contracting officers to notify SBA every time they decided not to reserve a procurement for award as a HUBZone contract imposes a "significant administrative burden" on the procurement process and on contracting officers. One commenter suggested including the HUBZone notification requirement in the documentation reviewed by SBA's PCR. The commenter felt that if an acquisition is not reviewed by a PCR, a separate HUBZone notification should not be required. Another commenter suggested that the contracting officer should notify the PCR only if she or he decides not to set aside a contract opportunity.

Presently, both the FAR and Sec. 125.2 of this title discuss the process by which the contracting officer notifies SBA of such decisions in other small business set-aside programs. SBA has modified slightly subsection 126.611(a). It now provides that the contracting officer must notify the SBA's PCR of a decision not to reserve a procurement for award as a HUBZone contract when the contracting officer rejects a PCR's recommendation to make a requirement available. As previously proposed, if SBA intends to appeal the decision, SBA must notify the contracting officer within five days of receipt of the notification. SBA expects this notification to be in accordance with the procedures that presently exist in the FAR and 13 CFR 125.2. Sections 126.611(b), (c) and (d) are unchanged.

**Section 126.612** states when a contracting officer may award a sole source contract to a qualified HUBZone SBC. One comment suggested that SBA add a new paragraph to this section to provide that where unemployment exceeds 20 percent on an Indian reservation, the anticipated contract award price limits in subsections (b)(1) and (2) do not apply. Three other commenters argued that the limits in subsections (b)(1) and (2) should not apply to Indian

reservation-based businesses. The limitations on sole source requirements set out in subsections (b)(1) and (2) of this section are taken directly from section 31(b)(2)(A) of the Small Business Act, as amended by section 602(b)(1) of the HUBZone Act of 1997. The statute did not include any exceptions to these limitations. Consequently, SBA does not have the authority to provide such an exception. Section 126.612 remains essentially as proposed (there are some minor clarifying word changes).

SBA received 18 comments addressing proposed **Secs. 126.613 and 126.614**. The comments focused on two issues: (1) SBA's interpretation of the HUBZone price evaluation preference as flawed, and (2) whether concerns should be allowed to take advantage of "dual status" (HUBZone SBC and SDB).

Proposed Sec. 126.613 explains how the HUBZone 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 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror. This section includes an example of the application of the HUBZone price evaluation preference. The example has been revised to make it more clear that the preference applies to benefit HUBZone SBCs only where the HUBZone SBC would receive the award. The comments regarding the HUBZone price evaluation preference suggested that according to the HUBZone Act of 1997, the preference should never displace the offer of another small business concern. Commenters suggested that in the example included in this section, the small business concern submitting the \$100 offer should receive the award. In other words, the HUBZone price evaluation preference should do no more than eliminate the lowest, responsive, responsible offeror that is a large business, leaving the small business concern as the new lowest, responsive, responsible offeror which would receive the award. One commenter suggested using the term "apparent successful offeror" instead of "lowest, responsive, and responsible offeror." Responsibility is determined later in the acquisition process and not at the time the offers are evaluated. SBA did not change the term. The term "lowest, responsive, and responsible offeror" is taken directly from the statute.

SBA does not interpret section 31(b)(3) of the Small Business Act, as amended by section 602(b) of the HUBZone Act of 1997, in this way. SBA interprets this statutory language to require that the lowest offer from a qualified HUBZone SBC displace the lowest, responsive, responsible offeror that is a large business, and replace that offeror with that HUBZone SBC. This would result in the HUBZone SBC receiving the award, in the example included in this section of the rule. SBA does not agree that a small business concern that is not a qualified HUBZone SBC can benefit from the HUBZone price evaluation preference. SBA believes that this result is contrary to the intent and goals of the HUBZone program.

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**Proposed Sec. 126.614** described how a contracting officer must apply both HUBZone and SDB price evaluation preferences in a full and open competition in some detail and with an example. The comments SBA received on this section generally agreed that SBA's "methodology is flawed" and that the proposed application would result in an award to a qualified HUBZone/SDB at a "differential above 20 percent." Two comments suggested that statutory authority does not allow payment of differentials above 20 percent. Commenters also stated that SBA's methodology does not take into account exceptions to the application of the SDB

price evaluation preference (e.g., otherwise successful offers of eligible products under the Trade Agreements Act when the acquisition meets or exceeds a certain dollar threshold). The consensus of the commenters concerned with process was that SBA regulations should contain a broad policy statement regarding the HUBZone price evaluation preference and SBA should leave the actual implementation to the FAR.

In addition, SBA also received numerous comments dealing with the substance of the issue and whether dual status should be permitted at all. There were four in favor of allowing dual status and seven against. The comments in favor stated that dual status will encourage more minority-owned concerns to compete for federal contracts in HUBZones and create jobs; will assist SDBs in competing against qualified HUBZone SBCs; and would avoid harm to the SDB program. The opposing comments stated that concerns should be required to select one status or the other at the time they submit their offer on a contract because the application of multiple preferences is too confusing; would not work with negotiated procurements; would make it extremely difficult for a contracting officer to declare a price to be fair and reasonable; and would provide an unfair competitive advantage in favor of the "dual status" concerns.

SBA has considered these comments carefully and has decided not to change its position in the final rule. As a result, SBA has eliminated proposed Sec. 126.614 from the final rule. Nothing in the HUBZone Act requires that the HUBZone program displace a contracting activity's authority or responsibilities regarding any other programs designed to promote the development of small, small disadvantaged, or women-owned small businesses. Therefore, SBA has implemented the HUBZone program in such a way that any preference a concern receives under this program must be added to the preference it may receive pursuant to other statutory or regulatory programs.

However, SBA has decided not to prescribe how a contracting officer must apply the two types of preferences in a full and open competition, leaving the mechanics for implementation in the FAR. As a result, SBA has revised Sec. 126.614 to merely state the principle that firms which are both qualified HUBZone SBCs and SDBs must receive the benefit of both.

Section 126.615 states that a large business may not participate as a prime contractor on a HUBZone contract but may participate as a subcontractor to an otherwise qualified HUBZone SBC. SBA received no comments on this section and it remains as proposed.

**Section 126.616** describes the circumstances in which a contracting officer may award a HUBZone contract to a joint venture. This section also explains that a qualified HUBZone SBC may enter into a joint venture with one or more qualified HUBZone SBCs, 8(a) participants, or WOBs for the purpose of performing a specific HUBZone contract. One commenter argued that SBA should allow qualified HUBZone SBCs to joint venture with large businesses because the ability to joint venture with "big business" will bring jobs to HUBZones more rapidly. SBA declines to accept this recommendation because the HUBZone program is intended to provide contracting assistance to small, not large, business. If qualified HUBZone SBCs joint venture with large businesses, then the benefits of the program would flow to large businesses in addition to small. Additionally, SBA has found that in recent history small businesses create more jobs annually than large businesses. Thus, SBA has not modified this section in the final rule. In the proposed rule, SBA specifically requested comments on whether HUBZone contract opportunities should be limited to certain types of contracts. For example, should HUBZone contracts only be available for industries that are considered "labor intensive"? Three commenters specifically addressed the issue. One commenter stated that, based on the intention of the program (creating jobs in HUBZones), restricting the types of contracts to labor intensive industries would be reasonable and would ensure that the HUBZone program is targeted at contracts with the greatest potential for creating jobs. However, the other commenters

adamantly opposed the idea. These commenters argued that such a limitation would exclude participation by small business concerns that Congress intended to include in the program. Further, the commenters stated that there appears to be no statutory justification for imposing any limit on the types of industries involved in the program. Finally, the commenters noted that the term “labor intensive” is subjective and such a limitation would be problematic both in administration of the program and enforcement. As a result, SBA has not included any such limitation in the final rule.

SBA also asked commenters to discuss whether HUBZone contract opportunities should be limited to those not now awarded to SBCs and to make suggestions for ways in which HUBZone implementation can better help government contracting activities meet their SDB and WOB goals. SBA received no comments specifically addressing these issues.

SBA has retained **Secs. 126.700 through 127.703**, as proposed. SBA received four comments on Sec. 126.700 which addressed the amount of subcontracting that is allowed by general construction and special trade contractors. Specifically, three commenters questioned the provisions in the proposed rule that requires general construction firms to spend at least 15 percent of the cost of contract performance for personnel on the concern's employees or the employees of other qualified HUBZone SBCs. Special trade contractors have the same requirement except that their performance percentage is 25 percent. Although these percentages are less than the standards applied for servicing and manufacturing firms, these standards represent conventional industry practices and, therefore, remain unchanged.

One commenter proposed that large firms be authorized to perform up to 75 percent of manufacturing as a subcontractor on contracts that are performed on Indian reservations. This proposal is inconsistent with the clear language of the HUBZone legislation which states that not less than 50 percent of the cost of manufacturing supplies (not including the cost of materials) will be incurred in connection with the performance of the contract in a HUBZone by one or more HUBZone small business concerns.

**Section 126.702** provides a process by which representatives of national trade or industry groups may request a change in subcontracting percentage for specific industry groups (as defined by two-digit major group industry codes). One commenter suggested that SBA revise

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**Sec. 126.702** to permit individual businesses to request changes in the subcontracting percentage limitations. SBA declines to accept this recommendation. SBA wants to insure that such requests reflect the views of a large number of businesses before invoking the procedures for changing the percentages. SBA received no comments regarding proposed Secs. 126.701 and 126.703; however, as stated above, SBA has eliminated the subcontracting percentage and has modified these sections accordingly.

**Section 126.800** addresses protests relating to a small business concern's HUBZone status. This section explains 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. One commenter recommended that the SDB language in the 8(a) program should be applied to the HUBZone program to forestall frivolous protests under Sec. 126.800. SBA has declined to accept this recommendation as unnecessary. Although the SDB and the HUBZone provisions in this title are organized differently, there is little substantive difference between them. Section 126.800(b) permits any “interested party” to protest a HUBZone SBC's status. As defined in Sec. 126.103, an “interested party” may be any of the same three entities which are listed in Sec. 124.603, the SDB provision. Although expressed differently, the effect of the two

provisions is the same. The difference between the SDB and HUBZone procedures lies in the fact that the HUBZone regulations separate out sole source procurements for different treatment. HUBZone regulations permit only the SBA or the contracting officer to file protests in those cases. The SDB protest procedures do not do so because there are no SDB sole source contracts. Three commenters urged that the protest procedures set forth in Sec. 126.800 should permit any small business that is prevented from competing for a sole source contract to protest the proposed awardee's qualified HUBZone status. (SBA changed "apparent successful offeror" to "proposed awardee" to more accurately reflect the fact that there is no competition in a sole source procurement.) SBA has retained the section as proposed. Third parties may not protest a sole source award because they have no stake in the contract, or "standing." In other types of procurements, a competitor who protests an award may have standing to get the award if its protest is successful. In sole source procurements, however, there are no "competitors" because of the nature of the procurement.

Although other concerns may not "protest" an award, they may notify SBA if they have information that a HUBZone SBC is not qualified for any reason. SBA, in its sole discretion, may pursue a program examination of that concern pursuant to Sec. 126.402. Although that course of action might not halt an award, third parties with pertinent information about a proposed awardee also are encouraged to notify the contracting officer or SBA directly to urge that a formal protest be filed.

**Section 126.801** sets forth the procedure for submitting a protest of a HUBZone SBC's status. Three commenters asked whether a protestor may combine concurrent size and status protests in a single letter and rely upon SBA to divide up the protests procedurally. SBA has added a phrase to make clear that existing size regulations require a protestor to file a size protest with the contracting officer. Protestors must direct protests relating to HUBZone status to SBA.

One commenter suggested replacing the phrase "unsuccessful offeror" in Sec. 126.801(c)(1) with the phrase "interested party" to conform to the language used in Sec. 126.800. SBA accepts this recommendation and makes this change. SBA notes that Sec. 126.800(b) authorizes "any interested party" to protest the status of a qualified HUBZone SBC. SBA believes it is internally consistent as well as substantively correct to change "unsuccessful offeror" to "interested party" in Sec. 126.801(c)(1).

**Section 126.802** states who decides a HUBZone status protest. SBA received no comments on this section and has decided to keep the section as proposed. SBA received one comment on Sec. 126.803, which explains SBA's processing of protests. The commenter suggested that SBA define "public interest" and that the award decision should be made, or approved, at a higher level than contracting officer. SBA based this section on the FAR (Secs. 12.302(h)(1) and 19.505(f)) and it is consistent with the recently proposed SDB protest procedures. As a result, SBA declines to accept this recommendation.

**Section 126.804** notes that SBA will decide all protests not otherwise dismissed and **Sec. 126.805** sets forth the appeal rights that are available. SBA received no comments on either of these sections and has retained them as proposed.

**Section 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. SBA received one comment which observed that HUBZone SBCs would not be penalized under Sec. 126.900 during the year they are certified. This commenter stated

further that SBA appeared to have no ability to halt contract performance by a HUBZone SBC losing its certification during the year. SBA has retained the section as proposed. This section allows the imposition of substantial penalties on a concern at any time that SBA discovers the concern has made misrepresentations about its status as a qualified HUBZone SBC. In addition, SBA has authority to notify a contracting agency that a HUBZone SBC is no longer qualified but SBA does not have authority to require that agency to terminate the contract. Contract termination (whether for convenience or default) is governed by the FAR. 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 rule is a major rule within the meaning of Executive Order 12866, and has 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 rule is a major rule and has 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 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. There is a statutory requirement that HUBZone SBCs receive three percent of contract dollars. SBA received no additional information from the public during the comment period on the impact of the proposed rule on all small businesses. The  
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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. The Paperwork Reduction Act aspect of this certification is that each concern will be able to complete the certification application in one hour or less.

The HUBZone program is different from existing government contracting programs because it focuses on job creation in high unemployment and poverty-level communities. Commenters requested that SBA discuss the impact of the HUBZone program on other contracting/procurement assistance programs. One commenter specifically raised the issue of the interaction between the HUBZone program and the previously proposed Empowerment Contracting program by the Department of Commerce in May 1997. The Department of Commerce did not and will not publish a final rule which would implement the empowerment contracting program. Two commenters raised the issue of the competition between HUBZone concerns and 8(a) participants owned by Community Development Companies. These 8(a) participants will be treated as any other 8(a) participant.

The small entities affected by this rule 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 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 five 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. While PRO-Net is not a perfect measure of businesses that may be interested in contracting with the government, it is the most accurate measure currently available to SBA. 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. SBA believes that there are 310 Indian reservations and 217 Alaska Native villages. 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.

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 of all SBCs) will be both interested in Federal procurement and located in HUBZones. However, as stated above, the number of concerns registered on PRO-Net may not reflect the entire universe of small businesses that are interested in contracting with the government. The incentives available through participation in the program could, moreover, result in additional SBCs 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 that are either now HUBZone SBCs or will become HUBZone SBCs as a result of these incentive effects will apply for certification. As discussed above, these 30,000 HUBZone SBCs will be spread over about 7000 census tracts, about 900 non-metropolitan counties, 310 Indian reservations and 217 Alaska Native villages.

Because the HUBZone program is new, SBA also cannot estimate precisely the economic impact the 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 federal procurement.

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 one percent of all federal prime contracts with a gradual increase to three percent by the year 2003. Thus, by 2003, assuming the participating agencies reach the three percent contracting

goal, HUBZone SBCs may be awarded approximately \$6 billion in federal contract actions (three percent of the approximately \$200 billion procurement budget).

Contracts for the purchase of Federal Government goods and services under the HUBZone program would operate in the following three ways: (1) a contract award to a qualified HUBZone small business concern can be made by a procuring agency if a contracting opportunity exists and it determines that two or more qualified HUBZone small business concerns will submit offers for the contract and the award can be made at a fair market price; (2) consistent with other criteria, a contracting officer can award a sole source contract to a qualified HUBZone small business concern if it submits a reasonable and responsive offer and is determined by the appropriate agency contracting officer to be a responsible contractor. Sole-source contracts cannot exceed \$5 million for manufacturing contracts and \$3 million for all other contract opportunities; and (3) a 10 percent Price Evaluation Preference in full and open competition can be made on behalf of the Qualified HUBZone small business concern if its offer is not more than 10 percent higher than the other offeror, so long as it is not a small business concern.

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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, and 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. SBA 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).

While it is at least possible that increased competition from HUBZone SBCs will cause competing concerns, it is useful to perform an informal sensitivity analysis on the possible implications for increased Federal Government contracting costs that derive from the description of contracting procedures under the HUBZone program. Calculations here assume that the program is fully in effect in the year 2003 and that HUBZone contracts are at the level (from above) of \$6 billion. If all HUBZone contracts are awarded to qualified HUBZone SBCs in competitions in which two or more qualified HUBZone SBCs submit offers and the award is made at a fair market price, then the additional cost to the Federal Government could be close to zero. But, as noted above, there are expected to be about 30,000 HUBZone SBCs competing for contracts and they are expected to be spread over about 7000 census tracts and about 900 non-metropolitan counties, so the likelihood of this always happening is not large. The second possibility is that all HUBZone contracts would be awarded as sole source contracts to qualified HUBZone SBCs that submit reasonable and responsive offers and are determined by the

appropriate contracting officer to be responsible contractors. (The sole-source contracts could not exceed \$5 million for manufacturing contracts and \$3 million for all other contract opportunities.) The extra costs to the Federal Government in this case would be the additional costs over competitive awards to the Federal Government that are usually associated with sole source contracting. The third possibility is that all HUBZone contracts would be awarded at a 10 percent Price Evaluation Preference in full and open competition. One could assume that the SBC offer is exactly 10 percent higher than other (non SBC) offers. In this unlikely case, the additional cost to the Federal Government is \$600 million per year or 10 percent of \$6 billion, the amount by which the SBC offer would exceed other non-SBC offers that did not receive preference.

Under all of these circumstances, SBA has determined that this final rule is a major rule within the meaning of E.O. 12866, and has 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 final rule imposes new reporting or recordkeeping requirements on concerns applying to be certified as qualified HUBZone SBCs. The 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 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 Subjects13 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 businesses.

Accordingly, for the reasons set forth above, SBA amends 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.

Sec. 121.401 [Amended]

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:

Sec. 121.1001 Who may initiate a size protest or a request for formal size determination?

(a) 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:

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Sec. 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 125.2 is amended by revising the second sentence in paragraph (a)(1) to read as follows:

Sec. 125.2 Prime contracting assistance.

(a) \* \* \*

(1) \* \* \* PCRs review all acquisitions not set aside for small businesses, including HUBZone small business concerns, to determine whether a set-aside would be appropriate. \* \* \*  
\* \* \* \* \*

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

Sec. 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 concerns in obtaining subcontracts.

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

PART 126--[ADDED]

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

PART 126--HUBZONE PROGRAM

Subpart A--Provisions of General Applicability

126.100 What is the purpose of the HUBZone program?

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

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

126.103 What definitions are important in the HUBZone program?

Subpart B--Requirements to be a Qualified Hubzone SBC

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

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

126.202 Who does SBA consider to control a HUBZone SBC?

- 126.203 What size standards apply to HUBZone SBCs?
- 126.204 May a qualified HUBZone SBC have affiliates?
- 126.205 May WOBs, 8(a) participants or SDBs be qualified HUBZone SBCs?
- 126.206 May non-manufacturers be 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 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?
- 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?
- 126.604 Who decides if a contract opportunity for HUBZone set-aside competition 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 qualified HUBZone SBCs?

126.608 Are there HUBZone contracting opportunities below the simplified acquisition threshold?

126.609 What must the contracting officer do if a contracting 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?

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126.614 How does a contracting officer treat a concern that is both a qualified HUBZone SBC and an SDB 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--Contract Performance Requirements

126.700 What are the subcontracting percentages requirements under this program?

126.701 Can these subcontracting percentages requirements change?

126.702 How can the subcontracting percentages 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 file 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

Sec. 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.

Sec. 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).

Sec. 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 Sec. 125.3 of this title.

Sec. 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 Secs. 121.105(a) and (b) of this title.

Contract opportunity means a situation in which a requirement for a procurement exists, none of the exclusions from Sec. 126.605 applies, and any applicable conditions in Sec. 126.607 are met.

County means the political subdivisions recognized as a county by a state or commonwealth or which is an equivalent political subdivision such as a parish, borough, independent city, or municipio, where such subdivisions are not subdivisions within counties.

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 D.C. 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW, Washington D.C. 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 Sec. 126.203, is exclusively owned and controlled by persons who are United States citizens, and has its principal office located in a HUBZone.

HUBZone 8(a) concern means a concern that is certified as an 8(a) program participant and which is also a qualified HUBZone SBC. Indian reservation has the meaning used by the Bureau of Indian Affairs in 25 CFR 151.2(f). This definition refers

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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.

Lands within the external boundaries of an Indian reservation includes all lands within the outside perimeter of an Indian reservation, whether tribally owned and governed or not. For example, land that is individually owned and located within the outside perimeter of an Indian reservation is "lands within the external boundaries of an Indian reservation." By contrast, an

Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not "lands within the external boundaries of an Indian reservation."

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 D.C. 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 of the 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 D.C. 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 of the 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, D.C. 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

Sec. 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 Sec. 126.103; and

(b) At least 35 percent of the concern's employees must reside in a HUBZone, and the HUBZone SBC must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract it receives. 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.

and

(c) The HUBZone SBC must certify that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in Sec. 126.700.

Sec. 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.

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Sec. 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.

Sec. 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 Sec. 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.

Sec. 126.204 May a qualified HUBZone SBC have affiliates?

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

Sec. 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.

Sec. 126.206 May non-manufacturers be qualified HUBZone SBCs?

Yes. Non-manufacturers (referred to in the HUBZone Act of 1997 as "regular dealers") may be certified as qualified HUBZone SBCs if they meet all the requirements set forth in Sec. 126.200 and they can demonstrate that they can provide the product or products manufactured by qualified HUBZone SBCs. "Non-manufacturer" is defined in Sec. 121.406(b)(1) of this title.

Sec. 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

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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 Sec. 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 as set forth in Sec. 126.700.

(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. In cases where BIA is unable to verify whether the business is located within the external boundaries of an Indian reservation, applicants should contact the AA/HUB and SBA will assist them.

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

Sec. 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.

Sec. 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

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concern and automatically enter it on the List described in Sec. 126.307.

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

Sec. 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).

Sec. 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.

Sec. 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 currently eligible.

#### Subpart D--Program Examinations

##### Sec. 126.400 Who will conduct program examinations?

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

##### Sec. 126.401 What will SBA examine?

(a) Eligibility. Examiners will verify that the qualified HUBZone SBC met the requirements set forth in Sec. 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, the employee percentage requirements, and the concern's attempt to maintain this percentage. 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.

##### Sec. 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 Sec. 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 Sec. 126.800.

##### Sec. 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 Sec. 126.900.

Sec. 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 from the date that it receives notification to respond.

(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. The AA/HUB's decision is the final agency decision.

Sec. 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

Sec. 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. (b) Concerns wishing to remain in the program without any interruption must self-certify their continued eligibility to SBA within 30 calendar days after each annual 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 Secs. 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.

Sec. 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 Sec. 126.900. If the concern later becomes eligible for the program, the concern must apply for certification pursuant to Secs. 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 Sec. 126.306.

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

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 Secs. 126.200, 126.500, and 126.501.

Sec. 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 Sec. 126.900. An adverse finding in the resolution of a protest also may result in de-certification and removal from the

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List, and the imposition of penalties pursuant to Sec. 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 Sec. 126.900.

Subpart F--Contractual Assistance

Sec. 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.

Sec. 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) of this section separately under its own name.

(d) A qualified HUBZone SBC which is a non-manufacturer may submit an offer on a contract for supplies if it meets the requirements under the non-manufacturer rule as defined in Sec. 121.406(b) of this title and if the small manufacturer is also a qualified HUBZone SBC.

Sec. 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

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 Sec. 126.600. Enforcement of this paragraph will be the responsibility of SBA, which will monitor the requirement in accordance with Secs. 126.400 through 126.405.

Sec. 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.

Sec. 126.604 Who decides if a contract opportunity for HUBZone set-aside competition exists?

The contracting officer for the contracting activity makes this decision.

Sec. 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 section 8(a) program; or

(c) The requirement is at or below the micropurchase threshold.

Sec. 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 section 8(a) program will not be adversely affected. The SBA official authorized to grant such consent is the AA/8(a)BD.

Sec. 126.607 When must a contracting officer set aside a requirement for qualified HUBZone SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting pursuant to Sec. 126.605.

(b) The contracting officer must identify qualified HUBZone 8(a) concerns and other 8(a) concerns. The contracting officer must give first priority to qualified HUBZone 8(a) concerns.

(c) After determining that neither paragraph (a) or (b) of this section apply, the contracting officer must set aside the requirement for competition restricted to qualified HUBZone SBCs if the contracting officer:

(1) Has a reasonable expectation, after reviewing SBA's list of qualified HUBZone SBCs that at least two responsible qualified HUBZone SBCs will submit offers; and

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

Sec. 126.608 Are there HUBZone contracting opportunities below the simplified acquisition threshold?

Yes. If the requirement is below the simplified acquisition threshold, the contracting officer should set-aside the requirement for consideration among qualified HUBZone SBCs using simplified acquisition procedures.

Sec. 126.609 What must the contracting officer do if a contracting opportunity does not exist for competition among qualified HUBZone SBCs?

If a contract opportunity for competition among qualified SBCs does not exist under the provisions of Sec. 126.607, the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set-aside procedures, 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 another appropriate contracting method.

Sec. 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.

Sec. 126.611 What is the process for such an appeal?

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

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(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.

Sec. 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 when the contracting officer determines that:

- (a) None of the provisions of Secs. 126.605 or 126.607 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.

Sec. 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 \$98; 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 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. If the HUBZone SBC offer were \$101, the award would go to the large business at \$93. If the HUBZone SBC will not benefit from the preference, the preference is not applied to change an offer.

Sec. 126.614 How does a contracting officer treat a concern that is both a qualified HUBZone SBC and an SDB in a full and open competition?

A concern that is both a qualified HUBZone SBC and an SDB must receive the benefit of both the HUBZone price evaluation preference described in Sec. 126.614 and the SDB price evaluation preference described in 10 U.S.C. 2323 and the Federal Acquisition Streamlining Act, section 7102(a)(1)(B), Public Law 103-355, in a full and open competition.

Sec. 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 contract performance requirements set forth in Sec. 126.700.

Sec. 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) Size of concerns. A joint venture of at least one qualified HUBZone SBC and an 8(a) participant or a woman-owned small business concern may submit an offer for a HUBZone contract so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(1) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; and (2) 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 Sec. 126.700.

#### Subpart G--Contract Performance Requirements

Sec. 126.700 What are the subcontracting percentages requirements under this program?

(a) Subcontracting percentage requirements. A qualified HUBZone SBC prime contractor 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 concerns' employees or the employees of other qualified HUBZone SBCs; and

(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 Sec. 125.6 of this title.

Sec. 126.701 Can these subcontracting percentages 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.

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Sec. 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.

Sec. 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

Sec. 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 proposed awardee's qualified HUBZone SBC status.

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

Sec. 126.801 How does one file 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 and must be filed in accordance with that part. If a protester protests both the size of the HUBZone SBC and whether the concern meets the HUBZone qualifying requirements set forth in Sec. 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 interested party other than a contracting officer or SBA 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.

Sec. 126.802 Who decides a HUBZone status protest?

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

Sec. 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 Sec. 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 Sec. 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.

Sec. 126.804 Will SBA decide all HUBZone status protests?

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

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Sec. 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 five-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

Sec. 126.900 What penalties may be imposed under this part?

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

(b) Civil penalties. Persons or concerns are subject to 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 section 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 section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

Dated: June 5, 1998.

Aida Alvarez,  
Administrator.

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