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SMALL BUSINESS ADMINISTRATION
13 CFR Parts 121, 125, and 126

HUBZone Empowerment Contracting
Program AGENCY: Small Business Administration.
ACTION: Final rule.

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

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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 ownership 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 US 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 recertification 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
decertified
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 SBC's 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 reexamination. 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 contacting 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.

[[Page 31904]] 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