group or community, including any Alaska Native village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

* * * * *

Signed in Washington, DC, on October 25, 2006.

Thomas B. Hofeller,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. E6–19245 Filed 11–14–06; 8:45 am]

BILLING CODE 3410–05–P

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 124

RIN 3245–AF06

Small Business Size Regulations; Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations to address the time at which size is determined for the purposes of long-term federal contracts including Government-Wide Acquisition Contracts (GWACs), the General Services Administration (GSA) Multiple Award Schedule (MAS) contracts and multi-agency contracts (MACs). SBA is also amending its 8(a) Business Development regulations to address when a business concern may receive orders as an 8(a) program participant under GSA's MAS Program and other multiple award contracts. This final action is necessary to ensure that small business size status is accurately represented and reported over the life of these long-term Federal contracts.

DATES: *Effective Date:* This rule is effective June 30, 2007, and applies to solicitations and contracts issued after the effective date, as well as contracts and solicitations in existence at the time of the effective date.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research, Office of Government Contracting, (202) 205–7322 or at *dean.koppel@sba.gov.*

SUPPLEMENTARY INFORMATION: On April 25, 2003, SBA published in the **Federal Register**, 68 FR 20350, a proposed rule to address the time at which size is determined for purposes of GSA's MAS Program, including the Federal Supply Schedule (FSS), and MAS contracts awarded by other agencies under the authority granted by GSA, and other long-term contracts, including GWACs and multi-agency contracts. The contract types mentioned above will hereinafter be referred to as ''long-term contracts'' in this rule. With options, these contracts are longer than 5 years in duration—typically lasting 10 to 20 years. SBA also proposed to amend its 8(a) BD regulations to make those regulations consistent with the proposed rule. SBA established the Effective Date of this final rule after consideration of the public comments and after consultation with the General Services Administration (GSA), the Department of Defense (DoD) and the Office of Federal Procurement Policy (OFPP). SBA has been assured that this date reflects the amount of time required to: (1) Modify the Government's contract award database, the Federal Procurement Data System-NG (FPDS–NG), to capture changes in small business size status ''going forward'' from the date of re-certification; (2) permit agencies to revise their ''back office'' contract reporting systems that feed into FPDS-NG; and (3) implement the final rule in the Federal Acquisition Regulation (FAR). In addition, the final rule clarifies that re-certification does not affect the terms and conditions of the underlying contract.

Summary of Comments

SBA sought public comment on its proposed rule to amend § 121.404 by adding paragraph (c) to provide that, for purposes of multiple-award contracts, a concern must re-certify its size on an annual basis. The intent of the proposed rule was to require re-certification on long-term contracts. With options, these contracts are greater than 5 years in duration, typically 10 to 20 years. SBA has decided to limit applicability of the final rule to only long-term contracts. For long-term contracts, concerns will now be required to re-certify their small business size status prior to the sixth year of performance, and every time an option is exercised thereafter.

On April 25, 2003, SBA proposed to require re-certification on long-term contracts on an annual basis, but requested comments on requiring re-certification on an order-by-order basis or at least once every five years. 68 FR 20350. SBA received more than 600 comments both supporting and criticizing all three proposals. Status as a small business in the context of government contracting is primarily relevant for two distinct reasons: (1) Eligibility for set-aside contracts and (2) tracking whether Federal agencies meet their annual small business prime contracting goals. SBA's regulations generally provide that size is determined ''as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer * * * which includes price.'' 13 CFR 121.404(a). A firm that certifies itself as small as part of its offer for a contract is generally considered small for the life of the contract, even if it grows to be other than small during the life of the contract. 13 CFR 121.404(g). The Small Business Act requires procuring agencies to set annual small business prime contracting goals and annually report the ''number and dollar value of contracts awarded'' to small business concerns. 15 U.S.C. 644(h)(2)(D).

Over the past decade, Federal agencies have increasingly relied upon multiple award task or delivery order contracts to procure goods or services. Under these procurement vehicles, the quantity of goods or services to be purchased is not set at the time of contract award. Instead, goods or services are acquired by placing a task or delivery order with a contractor, often as a result of a competition among multiple contract holders. Task and delivery order contracts have been called ''hunting licenses'' or ''club memberships'' because the real competition, the actual purchase of goods or services, occurs at the order level. Federal agencies have also increasingly utilized task or delivery order contracts of other agencies to acquire goods or services, typically for an administrative fee. Many of these multiple-award contracts have potential durations that far exceed the typical five-year government contract. Agencies are increasingly using these vehicles to get credit towards their small business goals.

SBA has never had a specific rule in place to deal with these long-term contracts. Application of SBA's existing rule to these vehicles leads to unsatisfactory results, with contractors retaining their size status for decades, well after they have outgrown the size standard or merged with or been acquired by a large business concern. Thus, under existing rules an order awarded to a concern that has outgrown

its small business status is counted as a prime contract award to a small business. Moreover, these ''large businesses'' can compete for and win orders that are reserved for small business concerns.

Although SBA proposed requiring re-certification on an annual basis, it also specifically requested comments on requiring re-certification on an order-by-order basis, and every five years. After consideration of the comments and consulting with Federal agencies that would be affected by the annual re-certification requirement and OFPP, SBA has decided that re-certification will be required prior to the beginning of the sixth contract year, and then prior to each option thereafter. Moreover, SBA will give procuring agencies the discretion to request size certifications in connection with competitions for particular orders. When SBA proposed to require re-certification on an annual basis, it did not discuss the fact that such a rule would be contrary to the general rule, which allows a concern to retain its size status for the life of the contract, which is typically five years under traditional contracts with base terms of one-year with four one-year options. Second, SBA had not fully consulted with the procuring agencies that would be required to implement the proposed annual re-certification. After consideration of the comments and consulting with the various procuring agencies, including GSA and DoD, SBA has been told that the agencies do not have the resources to request, receive and process the expected influx of size certifications every year. In addition, many small businesses submitted comments suggesting that an annual re-certification requirement would not give them sufficient time to recoup proposal costs or to conduct long-range strategic planning.

SBA also proposed to amend 13 CFR 121.404 to require that contracting officers assign a North American Industry Classification System (NAICS) code to each order under a long-term contract vehicle. A concern's size is a function of the work to be performed. A concern may qualify as a small business for one type of work, but be considered a large business for a different type of work. In some cases, a contract will only have one NAICS code and size standard, so a requirement to assign a NAICS code and size standard to each order will not impose any difficulty on the contracting officer. However, in cases where a contract contains multiple NAICS codes and size standards, the assignment of a NAICS code and size standard is required in order to determine whether a concern is small for purposes of the work acquired under the order. Otherwise, orders awarded to firms that have never certified they are small for a particular type of work will be coded as an award to a small business.

SBA proposed a size protest process for multiple-award contracts which required contracting officers to publish lists of recent size representations in the **Federal Register**, and provided that a size protest must be filed within 10 days of publication. Many procuring agencies objected to this additional increase in their workload, arguing that contracting personnel do not have the time or resources to comply with this requirement. Consequently, SBA will adopt its five day rule for size protests in connection with long-term contract awards, options, or orders. Thus, a size protest must be filed within 5 business days of receipt of notice of the identity of a proposed awardee or award of a contract or order, or within 5 business days of receipt of notice of the size certification made by a concern in connection with the exercise of an option. In the case of a negotiated acquisition, procuring agencies are sometimes required by law to provide unsuccessful offerors with written, pre-award notice of the identity of the apparent successful offeror(s). In other situations, such as where an order is being awarded or an option is being exercised, written notice is not required by law. Consequently, the protest ''clock'' with respect to long-term contracts, orders or options will not begin to run until notice is received, whether it is in writing, orally, or via electronic posting.

Size is a component of every small business program, *i.e.*, in order to be eligible for an 8(a), Historically Underutilized Business Zone (HUBZone), Small Disadvantaged Business (SDB) or Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) contract or benefit, a concern must be small for the size standard applicable to the particular contract. SBA's re-certification rule will apply to all small business programs, including the 8(a) BD program, on long-term contracts set aside for 8(a) concerns, concerns will have to re-certify their size prior to the beginning of the sixth year and prior to each option thereafter. In accordance with long-standing SBA policy, procuring agencies generally cannot take 8(a) credit on contracts that were not specifically set aside for exclusive competition among eligible 8(a) concerns. A Memorandum of Understanding (MOU) between SBA and GSA which allowed agencies to take 8(a) credit for orders awarded under full and openly competed MAS contracts expired in 2003. At this time procuring agencies should no longer be taking 8(a) credit for orders awarded under full and open MAS contracts. Thus, SBA's 8(a) BD program regulations will be amended to specifically delete language regarding size in the context of the MAS program, since SBA's size re-certification rule will apply uniformly across all small business programs.

Discussion of Comments on the Proposed Rule

The comment period for the proposed rule closed on June 24, 2003. SBA received 636 comments. Forty-six commenters requested a 90-day extension to the comment period. The request was considered. However no extension to the comment period was granted. Following is a synopsis of the approximately 83 substantive comments.

Re-Certification

SBA proposed to require re-certification on an annual basis, but also requested public comments on requiring re-certification every five years, as well as on an order-by-order basis. Several commenters urged SBA to explicitly limit applicability of the rule to long-term contracts. As stated earlier, it was not the intent of this rulemaking to affect contracts of less than five years in total duration. Most of the complaints and concerns that prompted this rulemaking have arisen in the context of long-term contracts. This rule applies to long-term (durations, including options, of more than five years) contracts, *e.g.*, GWACs, MAS and FSS contracts and to all contracting actions where an acquisition, merger or novation has taken place.

Several commenters also recommended that the proposed changes be limited to multi-agency contracts, *e.g.*, GWACs, MAS and FSS contracts. SBA is aware of procuring agencies creating their own long-term multiple award contracts with characteristics similar to contracts awarded under the MAS program, *e.g.*, open-ended solicitations with rolling admissions. While the majority of complaints and concerns that prompted this rule have arisen in the context of multi-agency contracts, applying the re-certification requirement to all long-term contracts will help avoid confusion among small business contractors as to their size status for various long-term contracts. Moreover, a different rule might create a disincentive for both agencies and contractors to enter into

multi-agency contracts, which is not the intent of this rule.

GSA, the Department of Energy, DoD, and the Department of State submitted comments arguing that an annual re-certification requirement would place an excessive burden on contracting agencies and personnel. GSA pointed out that there are approximately 12,000 MAS contracts, and no system exists to track the anniversary dates of these awards. GSA argued that the optimal and logical time to address re-certification for long-term contracts is prior to exercising an option, a requirement that GSA had already instituted for its contracts under GSA Acquisition Letter MV–03–01, ''Federal Acquisition Regulation Class Deviation—Size of Business Re-representation.'' The Departments of State and Energy cited GSA's approach as their preferred method for addressing the issue. OFPP also expressed its strong preference for requiring re-certification at the time an option is exercised, but at least every five years.

Many commenters pointed out that the SBA's Regulatory Flexibility Act Analysis indicated that approximately 6 to 12 concerns with multiple award contracts would grow from small to large on an annual basis. These commenters essentially argued that imposing an annual re-certification requirement on perhaps tens of thousands of concerns, to correct such a small number of improper awards, was contrary to the intent of the Regulatory Flexibility Act. Although we believe that the number of concerns that grow from small to large in a given year may be substantially higher, *supra*, we believe that our final approach is the least costly and burdensome way to address the issue of size in connection with long-term contracts.

Several commenters urged SBA to require re-certification when a small business concern is acquired by a large business, and OFPP expressed its support for such a requirement. SBA's rules currently require re-certification when a contract is novated or a change-of-name agreement is executed (13 CFR 121.404(i)). Thus, under the existing rule, a concern that simply wants to change its name must re-certify its size, but a firm that is acquired and operated as a subsidiary of a large business need not re-certify its size. SBA intended to require re-certification when a small business is acquired by a large business, but not if a firm simply grows beyond the size standard during performance and wants to change its name. Thus, this rule will require re-certification when a small business concern becomes other than small due to acquisition or merger, such as when the contractor is acquired and operated as a subsidiary of a large business or is merged with a large business. This particular rule will apply to all contracts, not just long-term contracts.

Approximately 553 of the 636 comments we received in support of the annual re-certification requirement were duplicative, and did not discuss the impact of the rule on procuring agencies or small businesses, or the general rule which provides that a concern that is small at the time of its offer is considered small for the life of the contract. On the other hand, numerous commenters, including contractors, trade groups, Federal agencies and Congressional responders, essentially argued that small businesses submitted their proposals and established their business plans in reliance on the continuation of their size status throughout the life of the contract. They contend that these contract holders need a reasonable amount of time to recoup their proposal costs and to plan their transition from small to other than small status. Many commenters argued that one year is not a reasonable amount of time.

Several commenters argued that the annual re-certification requirement would make procuring agencies reluctant to set aside larger, multi-year requirements because they would be unwilling to risk that small business awardees will grow beyond the size standard and be ineligible to service the contract within one year of award. Several commenters argued that the annual re-certification requirement would deter small businesses from pursuing long-term contracting opportunities because firms would be unlikely to expend time and resources creating a proposal for a long-term contract if there is a possibility that they would lose the contract after only one-year. We first note that contractors which had grown to be other than small would not be ''ineligible'' to receive further orders. They could continue to receive orders, but the procuring agency could not count those orders towards the fulfillment of its small business goals. If a procuring agency exercised an option with a concern that had grown to be other than small, subsequent orders would not count towards the procuring agencies small business prime contracting goals. On the other hand, if a procuring agency declines to exercise the option of a concern that had grown to be other than small, it would lead to a dwindling pool of competition, which is contrary to the intent and purpose of the statutory and regulatory multiple award contracting provisions. SBA does not want to provide agencies and contractors with a disincentive to enter into long-term contracts.

After considering all of the comments, SBA has determined that requiring re-certification prior to the beginning of the sixth contract year, and then prior to the exercise of each option thereafter, is the least burdensome and fairest approach of the three we proposed. This approach is consistent with the existing, long-standing general rule with respect to traditional contracts (a base term of one-year with four one-year options), where SBA considers a concern to be small throughout the life of the contract. Moreover, our approach will not penalize agencies and contractors that award, or are awarded, long-term contracts with base terms of one-year with several one-year options. It would be unfair to require re-certification after one year on performance simply because the total duration of the contract exceeds five years, when the same concern would be considered small for the life of a contract with a total duration of five years or less.

Many commenters requested that SBA address some of the ramifications of the re-certification requirement. Many commenters were concerned about whether options would be exercised on contracts that were set aside for small business concerns if the concern had grown to be large. The final rule does not prohibit a contracting officer from exercising an option, even where a concern has outgrown the applicable size standard on a small business set-aside contract, but it also does not require a contracting officer to do so. If the contracting officer chooses to exercise the option, the procuring agency would have to amend FPDS-NG so that orders awarded during the option period would not be counted towards the agency's small business prime contracting goals. Although we recognize that a procuring agency may decline to exercise an option with a firm that cannot re-certify that it is small because the agency will not receive small business credit for the continued performance of that firm, that is a decision that is best left to the discretion of the contracting officer, after taking into account the agency's small business contracting goals, the firm's past performance, the existing competitive mix, and other factors that go into that decision. To the extent some concerns will not be considered for orders under full and open contracts because they are no longer small, other small business concerns will benefit by being considered for, and receiving, those orders.

Several commenters asked for clarification on how re-certification would interact with the performance requirements applicable to set-aside contracts. See 13 CFR 121.406 (manufacturing requirements) and 125.6 (limitations on subcontracting). The Small Business Act provides that a concern ''may not be awarded a contract under subsection (a) as a small business concern'' unless the concern agrees to comply with specified performance requirements. 15 U.S.C. 644(o). The statute focuses on ''award'' of a contract. A contractor that is awarded a contract as a result of a small business set-aside must comply with the applicable performance requirements throughout the life of the contract, even if the concern grows to be large. Thus, on a long-term, small business set-aside contract where a concern cannot certify that it is small and the procuring agency exercises the option, the concern will still have to comply with the performance requirements that are applicable to all contract holders. In contrast, the performance requirements mentioned above do not apply to full and open contracts. Consequently, under current law a concern awarded an order under a full and open contract need not perform any specific portion of the work, even where competition for the order is limited to small business concerns. SBA did not propose to impose a performance requirement on an order-by-order basis, and thus has not imposed such a requirement as part of this final rule. SBA may consider such a requirement in the future as part of a separate rule-making.

Similarly, the statutory basis for the non-manufacturer rule (13 CFR 121.406) provides that a small business that complies with ''subparagraph (B) shall not be denied the opportunity to submit and have considered its offer for any procurement contract for the supply of a product'' under a small business or 8(a) set-aside. 15 U.S.C. 637(a)(17). The statute focuses on the time of offer and contract award. A concern that grows to be large during performance of a set-aside contract must still comply with the requirements of the non-manufacturer rule throughout the life of the contract. Consequently, where a concern cannot re-certify itself as small under a long-term, small business set-aside contract, the concern still must comply with the requirements of the non-manufacturer rule throughout the life of the contract.

Several commenters asked SBA to clarify the effect of re-certification on other small business programs, *i.e.*, SDB, SDVOSBC, HUBZone, and 8(a) BD. Commenters requested clarification on whether firms would have to also re-certify their SDB, HUBZone, 8(a) BD, SDVOSBC, or other status. Those issues are beyond the scope of this rulemaking action. The proposed rule addressed size for the purposes of specific contracts, including small business, HUBZone, 8(a), and SDVOSBC set-aside contracts, but only addresses size certifications. In general, firms receive small business program certifications based on their size for their primary industry, but certified HUBZone/SDVOSBC/SDB/8(a)BD firms must still meet the size standard applicable to a given procurement in order to be eligible for award. Thus, a size re-certification with respect to a particular contract will not affect a firm's status under any small business certification program. Those certification programs have rules that address when certified concerns must provide that SBA program office with information that could affect program eligibility. See 13 CFR 124.112, 124.1016(b), 126.501. However, if a concern is no longer small, orders awarded to that concern cannot be counted towards an agency's goals for any of the small business subgroups, *e.g.*, 8(a), SDB, HUBZone, SDVOSBC.

Several commenters asked for clarification on how re-certification would affect subcontracting plan requirements. The Small Business Act provides that the subcontracting plan requirements ''shall not apply to offerors or bidders who are small business concerns.'' 15 U.S.C. 637(d)(7). Thus, the concern's size status at time of offer or bid determines whether the subcontracting plan requirements are applicable to a particular contractor. Even where the subcontracting plan requirements are imposed as the result of a contract modification, it is the concern's size status at time of contract award that determines whether a subcontracting plan is required. Consequently, a concern's change in size status as a result of a re-certification requirement will have no effect on the subcontracting plan requirements that were imposed, or not imposed, at the time of contract award.

Several commenters also requested clarification concerning how re-certification would affect cost accounting standard requirements. The Cost Accounting Standards Board is responsible for implementing cost accounting standards. 41 U.S.C. 422. The Cost Accounting Board has exempted contracts and subcontracts with small business concerns from cost accounting standard requirements. FAR § 30.000; 48 CFR 9903.201–1(b)(3). The Cost Accounting Standards Board will have to determine what effect, if any, re-certification will have on the applicability of the cost accounting standard requirements. In our view, the re-certification requirement should have no effect on the terms and conditions of a contract.

In sum, a change in size status for reporting purposes will not affect in any way the terms and conditions of the initial contract. If the performance of work requirements (§ 125.6) or non-manufacturer rule (§ 121.406) apply to a contract because a firm was deemed to qualify as small at the time of contract award, they will continue to apply if the firm becomes other than small at some point during contract performance. Similarly, if a firm was exempt from having a subcontracting plan at the time of award because it qualified as a small business, it will not be required to have a subcontracting plan if it becomes other than small at some time during contract performance.

Several commenters asked whether subcontractors would be required to re-certify their size for purposes of subcontracting plans. That issue is also beyond the scope of the proposed rule, and this rule does not impose any re-certification requirement at the subcontractor level. SBA may consider such a requirement in the future as part of a separate rule-making.

Several commenters were concerned about the affect of re-certification on ''teaming.'' If a team in the form of a joint venture is awarded a contract, the joint venture as combined must meet the applicable size standard. The same rules would apply to a joint venture as would apply to a stand-alone entity. Thus, the joint venture, as combined, would have to be small at the time of re-certification in order to retain its small business size status. Likewise, under SBA's 8(a) BD mentor-protégé program, an 8(a)protégé can form a joint venture with its large business mentor and qualify as a small business for a particular contract, as long as the protégé qualifies as small for the particular procurement. If the protégé is no longer small at the time of re-certification, then the joint venture cannot certify itself as small under either a set-aside or a full and open contract. Similarly, if a joint venture qualifies as small based on other exclusions from affiliation (13 CFR 121.103 (h)(3)), the joint venture would not be considered small if at the time of re-certification the joint venture does not meet the applicable requirements for the exclusion (*e.g.*, a joint venture between three firms that individually met the applicable size standard and

qualified the joint venture as small under § 121.103(h)(3)).

Several commenters requested that SBA clarify how the rules will affect Blanket Purchase Agreements (BPA) or orders with options, and multi-year orders. A BPA is not a contract. When a BPA is utilized, goods and services are not actually purchased until an order is issued. Consequently, a concern's size at the time a BPA is awarded is irrelevant, and the regulations have been amended to make this clear. The issue of size for purposes of options on orders and multi-year orders is beyond the scope of this rule. We would like to see whether this rule solves the issues that prompted this rulemaking before we consider whether this issue needs to be addressed.

Several commenters requested that SBA clarify whether the rule would apply to existing contracts, and some recommended that contracts already awarded be ''grandfathered'' in under existing rules. We disagree. The problems this rule addresses primarily arose when GSA modified all of its existing MAS contracts to give them base terms of five years with three five-year options, for a total duration of twenty years. We are not aware of anything that would prevent GSA from modifying all of its MAS contracts in the future to add additional five-year option periods. Moreover, many GSA MAS solicitations are open-ended, and admission to the MAS is done on a rolling basis. Thus, if this rule applied only to solicitations issued after the effective date, it would not apply to existing GSA MAS contracts or other long-term contracts currently being performed. Thus, this rule must apply to existing contracts, but, for the reasons stated above, will not cause any firm to lose a long-term contract as a result of growing to be other than small.

Several commenters asserted that current regulations adequately protect small business interests and prevent awards from being issued to large companies masquerading as small businesses. We strongly disagree with the assertion that existing rules adequately prevent orders awarded to large business concerns from being counted as awards to small business concerns for goaling purposes. There are numerous reports, studies, and articles documenting cases where order awards to large businesses are counted as awards to small businesses (*e.g.*, SBA Advocacy, ''Analysis of Type of Business Coding for the Top 1,000 Contractors Receiving Small Business Awards in FY 2002'', December 2004; GAO, ''Contract Management: Reporting of Small Business Contract Awards Does Not Reflect Current Business Size'' (Report #GAO–03–704T, May 7, 2003, *http://www.gao.gov*).

Several commenters asserted that problems in the current system can be solved through better training. We disagree. Many of these practices were legal under the current system. Several commenters argued that criminal prosecution for false size certifications would solve the apparent problems. Again, we disagree. The Small Business Act contains criminal penalties for false size certifications (15 U.S.C. 645), but many of the actions in question did not involve criminal conduct. Instead, a number involved human error, and others involved taking advantage of legal loopholes under the existing regulatory system, which was created before the advent of long-term multiple award task and delivery order contracts.

Some Congressional responders recommended allowing firms to retain their size status if they are within a certain percentage of the relevant size standard, arguing that this approach will allow a concern to grow and benefit from the multi-year contracts they have been successful in winning. The issue of changing or altering size standards is beyond the scope of this rule. SBA has requested and received comments concerning size standards, and may address this issue as part of a separate rule-making.

Several commenters requested clarification on what would happen if a concern that was large at the time of its initial offer for a contract became small during the course of a contract. The vast majority of cases that SBA is aware of involved companies that outgrew their size, not the reverse. Nevertheless, we believe on a long-term contract a concern should be able to change its size status from other than small to small on an unrestricted procurement for statistical purposes. The final rule amends the regulations to allow an other than small firm to certify its small business size status in connection with the exercise of an option.

Several commenters argued that if periodic re-certification is adopted, SBA should specifically limit the authority of a contracting officer to obtain a size certification for a particular order under a multi-award contract. We disagree. First, a significant number of commenters supported requiring size certifications on an order-by-order basis. Agencies are increasingly conducting complex multi-year, multi-million dollar procurements as competitions for orders under the MAS program, where offerors submit ''quotes'' that exceed, in terms of volume and complexity, proposals. Allowing procuring agencies to request size certifications in connection with particular orders is consistent with the purposes of the Small Business Act (procurements meant for small businesses should be awarded to small businesses) and has been upheld by the GAO and the Court of Federal Claims. *See LB&B Associates, Inc.* v. *U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005); *CMS Information Services, Inc.*, B–290541, Aug 7, 2002, 2002 CPD ¶ 132. The final rule gives contracting officers the discretion to request size certifications for individual orders, but does not require them to do so. One commenter asserted that under the 8(a) BD or the HUBZone Program, eligibility must be met at the time of award of a task or delivery order contract and for each order. We disagree. SBA's 8(a) BD and HUBZone program regulations do not require concerns to meet HUBZone or 8(a) eligibility requirements on an order-by-order basis.

One commenter recommended that SBA use the term ''representation'' instead of ''certification'' when referring to matters concerning size status for contracts. SBA's regulations provide that size will be determined as of the date a concern submits a written self-certification of size, but the self-certification occurs when an offeror represents that it is small as part of its offer or by submitting an offer. FAR Clauses 52.219–1, 52.204–8. Thus, those terms have been used interchangeably in the context of determining status as a small business concern, and are used in that manner throughout this rule.

One commenter recommended that SBA consider requiring firms to re-certify their size status prior to contract award. We disagree. First, the majority of the problems that prompted this rule did not involve firms that grew large prior to award. Instead, many of the problems revolved around firms that were small at contract award but substantially exceeded the applicable size standard when orders were awarded several years later. Second, the general rule provides finality to concerns and procuring agencies and appears to be working well.

Several commenters argued for a three-year re-certification rule, since a firm's size under an annual revenue size standard is calculated by averaging annual revenue for the three most recently completed fiscal years. While this approach has some merit, we believe five years is more appropriate, because it is consistent with how long a firm retains its size status under traditional five-year contracts.

Many comments concerning re-certification were beyond the scope of the rule. These comments included

suggestions that procuring agencies should be prohibited from awarding small businesses contracts with values that will far exceed the applicable size standard, and requests that the re-certification rule apply to the Small Business Innovative Research (SBIR) and financial assistance programs.

NAICS Code

Several commenters asserted that a business could be small for a particular order but not for its underlying contract. If a concern has not submitted a written self-certification that it is small along with its offer (including price) for the underlying contract, then the only way such a concern could be considered small for the order is if the ordering agency requests size certifications in connection with a solicitation for the order. Otherwise, the concern is large and the order will not count as an award to a small business.

GSA questioned the need for NAICS codes for all orders and solicitations for orders, arguing that ordering agencies are interested in acquiring total solutions which may be provided under different MAS contracts, with different NAICS codes and size standards. However, for MAS orders, the FAR currently provides that ''For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed.'' FAR § 8.405–5(a). The only way to determine whether an awardee meets a size standard that corresponds to the work to be performed is by assigning a specific size standard to the order. As a result of the comments received, we have decided that a NAICS code and corresponding size standard will be required for each and every order. For contracts where there is only one NAICS code and size standard, the order will contain the same NAICS code and size standard. For contracts with multiple NAICS codes and size standards, the order will contain the NAICS and size standard from the underlying contract that best corresponds to the work to be performed, and only concerns that have certified that they are small for that same or lower size standard will be deemed to be small for that particular order.

One commenter stated that the proposed regulations should provide guidance as to how to determine the appropriate NAICS code, and should indicate if a small business can or should aggregate the size standards of multiple NAICS codes when determining whether it qualifies for a procurement. SBA's regulations already adequately address how NAICS codes are assigned to procurements. 13 CFR 121.402. SBA's regulations do not allow size standards to be aggregated. One commenter requested clarification on how size standards based on number of employees are distinguished from size standards based on average annual receipts, which is also already adequately addressed in SBA's regulations. 13 CFR 121.104, 121.106, 121.201.

Finally, we have decided that for purposes of a size re-certification in connection with an option period, the appropriate size standard to use is the size standard in effect at the time the size re-certification is requested, and not the size standard that was in effect when the contract was originally solicited. The final rule will enable the Government to get more accurate small business government contracting statistics and allow concerns to take advantage of increases in size standards that occur due to inflation adjustments or other periodic reviews.

Size Protests

Several comments were received concerning the size protest process, and SBA has modified the final rule in response to these comments. Many government agencies objected to the proposed public notice requirement, which would have required contracting agencies to post on a website or publish in the **Federal Register** a list of concerns that had submitted size re-certifications. We have essentially adopted the existing five business day rule for size protests in connection with long-term contract awards, options, and orders. Because written notice is not required in many instances, *e.g.*, in connection with an order competition or when an option is exercised, unsuccessful offerors will be required to file protests within five days of receipt of notice, whether the notice is received in writing, orally or via electronic posting.

The effect of a negative protest decision will depend on the type of contract and the certification that is being protested. Under existing rules, if a firm is found to be other than small with respect to a full and open contract, the procuring agency will change the concern's status from ''small'' to ''other than small,'' but the concern does not lose its contract. If a size protest is filed with respect to an initial size certification for a small business set-aside contract and the firm is found to be other than small, the contract should not be awarded, or if it was awarded, the contract would have to be terminated, since eligibility for award was based on the initial size certification. For size protests concerning representations made for options under a contract, if a firm is found to be other than small, a contracting officer will have to alter the firm's status in FPDS–NG. Whether the procuring agency exercises the option, or continues to place orders under the contract, is at the discretion of the contracting officer. SBA's regulations do not prohibit a contracting officer from exercising an option in such a case. With respect to size protests in connection with a size certification for a particular order, if a concern is found to be other than small the concern is not eligible for award of the order.

One commenter stated that SBA does not have jurisdiction to permit size protests with respect to orders under multiple award contracts, citing 41 U.S.C. 253j(d). We disagree. The statutory provision cited above applies to protests concerning the procurement process. The statute does not specifically reference size status protests, and there is no evidence in the legislative history to support the proposition that Congress intended to bar size status protests with respect to particular orders. GAO and the Federal Courts have upheld a procuring agency's authority to request size certifications with respect to particular orders. *See LB&B Associates, Inc.* v. *U.S.,* 68 Fed. Cl. 765 (Fed. Cl. 2005); *CMS Information Services, Inc.,* B–290541, Aug 7, 2002, 2002 CPD ¶ 132.

Several commenters requested that SBA clarify whether there are any consequences if a party files a size protest and the protest is found to be without merit. Penalizing parties for filing protests would have a devastating impact on the integrity of the procurement system, which is based on self-policing by the procurement community. Moreover, unsubstantiated, non-specific protests are routinely dismissed without requiring any action by the protested concern.

Several commenters questioned whether SBA has any process in place to verify business size other than the protest procedures. SBA does review questionable size representations that are made by firms in the Government's Central Contractor Registration (CCR) system which contains small business data in the Dynamic Small Business Search (DSBS) engine. CCR is also linked to the Government's On-line Representations and Certifications Application (ORCA) which contains small business size status data relating to offers submitted for Federal contracting opportunities. However, size status for procurement purposes is a function of the work to be performed. A

concern can be small for one type of work and large for another type of work. The size protest process is the only feasible and practicable way to resolve issues in reference to a concern's size with respect to a specific contract or order.

One commenter recommended that SBA conduct on-site visits. We disagree. The size protest process as it exists now has worked well for decades. The problems and complaints that prompted this rule did not involve any failure within the size protest process.

8(a) BD Program

Several commenters argued that the proposed rule would harm concerns that are transitioning out of the 8(a) BD program. However, SBA's rule does not prohibit procuring agencies from exercising options on 8(a) contracts where 8(a) concerns have grown to be large. Moreover, concerns begin transitioning out of the 8(a) BD program in their fifth year of program participation, and are supposed to be able to compete in the open marketplace when their term of participation in the program ends, not several years after they leave the program. The size rules should apply uniformly across small business programs.

Several commenters asked whether the final rule supercedes the 8(a) BD MOU between SBA and GSA concerning the MAS program. The MOU between SBA and GSA with respect to the MAS program expired in 2003. Traditionally, procuring agencies have only been allowed to take credit towards their 8(a) contracting goals for sole source contract awards and contracts awarded pursuant to competition limited exclusively to 8(a) concerns. Orders issued under full and openly competed MAS contracts, where an 8(a) firm competes with non-8(a) small firms and large firms, does not satisfy the 8(a) statutory requirement that competition for an 8(a) award must be limited to eligible 8(a) firms. Thus, procuring agencies can no longer take 8(a) credit for orders awarded to 8(a) firms under full and open MAS contracts.

One commenter argued that a firm that is no longer in the 8(a) BD program should no longer receive orders as an 8(a) small business. The Small Business Act provides that a concern that is an eligible 8(a) concern at the time specified in the solicitation for the receipt of initial offers may be awarded a competitive 8(a) contract, even if the concern exits the program prior to award. 15 U.S.C. § 637(a)(1)(B). Consequently, task or delivery orders issued under such a contract would be counted as orders to an 8(a) concern. On a long-term 8(a) contract, if a firm is no longer small at the time an option is exercised, a procuring agency can exercise the option, but orders issued during that option period will not count as 8(a) awards.

Compliance With Executive Orders 13132, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule constitutes a significant regulatory action under Executive Order 12866.

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA determined that the rule imposes a new reporting requirement. Small business concerns are required by this rule to re-certify their size status prior to the end of the fifth year, and at the time each option is exercised thereafter. Specifically small businesses are required to recertify their size status for the NAICS code and size standard contained in the applicable contract. SBA has submitted this information collection to OMB for review.

Three comments raised concerns regarding additional paperwork associated with a re-certification on long-term contracts and the possible costs. In particular, these commenters identified a new requirement to provide additional reporting of their small business status as time consuming and costly. In addition, they expressed concern that they may have to provide information in response to protests of their small business status.

SBA does not agree that this rule will impose any significant burden on small businesses. Businesses must prepare and keep information on their size in the course of business with the Federal Government as both prime contractors and as subcontractors to other prime Federal contractors. Businesses rely on that information to self-certify that they are a small business but do not need to provide the information for the Government's review unless a size protest challenging that self-certification is filed with the contracting officer. Since the publication of the proposed rule, the Federal Government has implemented ORCA to collect data in reference to offers placed against specific solicitations. Small business size status for the NAICS code contained in the specific solicitation is one data element collected. Small businesses are required to verify and update that data in ORCA on an annual basis. The information used to re-certify small business status is the same as that already being provided on a regular basis and is no different from the information used for self-certifications currently provided in ORCA by businesses during the solicitation period.

Executive Order 12988

This final rule meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity and reduce burden to the extent practicable.

Executive Order 13132

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

Regulatory Flexibility Act

SBA has determined that this rule could have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Therefore, SBA has prepared a Final Regulatory Flexibility Act (FRFA) analysis addressing the proposed regulation.

The RFA provides that when preparing a FRFA, an agency shall address all of the following: a statement of the need for, and objectives of, the rule; a summary of the significant issues raised by the public in response to the initial regulatory flexibility analysis (IFRA); a description of the estimate of the number of small entities to which the rule will apply; a description of the projected reporting, recordkeeping and other compliance requirements; and a description of the steps taken to minimize the significant economic impact on small entities. This FRFA considers these points and the potential impact of the proposed regulation concerning multiple award or schedule contracts on small entities.

(a) Need for, and Objectives of, the Rule

Under the Small Business Act, SBA is authorized to specify detailed definitions and size standards by which an entity may be determined to be a small business concern. 15 U.S.C. 632(a)(2). SBA's definitions and size standards relating to SBCs are set forth in 13 CFR part 121. Pursuant to SBA's

current regulations (13 CFR 121.404(g)), a concern's size status for a particular contract is determined as of the date that it submits its initial offer, including price, for the contract. This includes GWACs, FSS and MAS contracts. If a concern is small as of that date, it is generally considered small for the life of the contract and for all orders issued pursuant to that contract. With options, these long-term contracts have durations of 10–20 years or longer. Under current policy, a concern that certified itself as small to receive a long-term contract, could still be considered small for subsequent orders issued pursuant to the contract even if the business concern is no longer small. Agencies are then able to count, for small business goaling purposes, an order as an award to a small business even though the concern may have grown to be other than small or may have merged with or been acquired by a large business. Unfortunately, this means that Federal agencies that meet their SBC goals by counting awards to former SBCs do so at the expense of SBCs that currently meet SBA's small business criteria, because those agencies may not seek other procurement opportunities with the present universe of SBCs, believing that they have met their SBC goal through orders to concerns that are no longer small. As a result of the increasing use of these long-term contracts, SBA believes it is necessary to amend its regulations and address these size eligibility issues for orders issued pursuant to long-term contracts.

(b) Summary of Significant Issues Raised by the Public in Response to the Initial RFA

SBA received 17 comments on the IRFA. These comments focused on several issues that are discussed below.

One issue concerned the impact and significance of the proposed rule considering the small number of small businesses affected. According to two commenters, SBA indicated that it expected that an annual re-certification would result in only 6–12 businesses each year reporting a change in size status. If all 12 companies are assumed to receive average annual orders in line with the average value of orders received by individual small businesses ($1.5 million), then the total impact of this ''erroneous'' classification equates to only .13% of total FSS dollars. Even if the average value of dollars obligated annually ($50 million) by the four companies that grew to be large is considered to be representative of the problem, then the impact increases to only .98% of total FSS dollars. In their view, it is not practicable or reasonable to institute an annual re-certification requirement for all small businesses to correct a problem that appears to involve only a very few companies.

One commenter also stated that the SBA calculation that led to its conclusion is based on data that is in some cases 6 to 10 years old, and includes figures for all small businesses in the U.S., not just those that actually participate in the Federal Government contracting that would be covered by this proposed rule. The commenter stated that from this generic data, SBA concludes: (i) only 6 to 12 businesses a year will be affected by the proposed rule; and (ii) that the actual number will be greater than this estimate, although this figure is also unknown to the Agency. According to the commenter, this unknown impact on the small business economy warrants that additional time be given to properly analyze how many small businesses will be affected. The commenter recommends that a formal survey of the estimated 6,000 contract holders should be taken in order to get a realistic estimate of the number of concerns affected, and the number of jobs that will be lost by this proposed rule.

SBA has re-estimated the potential impact of the re-certification policy based on current data from the DSBS database contained in the CCR and FPDS. The next section of this FRFA discusses the new analysis, which estimates a larger number of small businesses, initially 2,300 concerns and approximately 250 annually thereafter, will be affected by this rule. While the actual impact is difficult to ascertain, SBA believes the updated analysis in this rule more realistically describes the potential impact on small businesses. SBA also believes that the accuracy of reporting Federal small business awards in determining the achievement of Federal agencies in meeting their small business goals and the subsequent implications on potential contracting opportunities for small businesses unquestionably supports the need to address the issue of small business certification on long-term contracts.

Two commenters expressed concern about the extent of SBA's consideration of minimizing burdens on small businesses. One commenter stated that SBA had performed an analysis in accordance with the RFA, but there remains a question as to whether the law was, in fact, followed. The commenter believed that the SBA violated the spirit of the RFA which attempts to minimize costly and burdensome regulation on small businesses, while rejecting other, less burdensome, choices. Another commenter stated that this change will require every small business owner to fill out additional paperwork each year on each contract they hold. This information will then have to be collected, analyzed, verified and then stored in a new information system for use. This information would likely be subject to an increased number of FOIA requests from competitors, requiring further paperwork and Government resources.

In the proposed rule, SBA did consider the paperwork burden on small businesses of an additional requirement to re-certify small business status. Because businesses must maintain up-to-date information on their size, the burden to re-certify on a more frequent basis should be minimal. Furthermore, since the publication of the proposed rule, the Federal Government has implemented ORCA, which requires small businesses placing offers on Federal contracts to electronically certify their small business size status for the specific NAICS code contained in the solicitation. In addition, the small business must review and update the data, at the minimum, on an annual basis. Thus, although SBA has adopted a five year re-certification requirement for long-term contracts, small businesses are not being asked to provide information that is not otherwise being provided on at least an annual basis.

Several commenters raised issues concerning the implications of an annual re-certification on small businesses opportunities. According to one commenter, the proposed rule is overly broad and would make it financially infeasible for small businesses to bid on multiple award contracts or the agencies to issue them. If SBA's proposal were enacted, argue these commenters, small businesses could invest in the upfront establishment of its office and personnel only to become ineligible after a year because it exceeded the size standard. They contend that it would be impossible to recoup the costs expended upfront to get the work. Overall, these commenters took the position that the proposed rule ignored the reality of pursuing business, pointing out that there is an upfront investment that can only be recouped over time.

More specifically, one commenter stated that annual re-certification would have a negative impact on their progress payment reimbursement rate, from 90 percent to 75 percent. One commenter stated that small businesses, particularly in the services industry, which are trying to maintain a prescribed size standard to insure continued performance on existing contracts, will

be unable to develop a long-term marketing strategy under the proposal. This commenter also noted that they will also be confronted with significant employee issues, as their ability to hire and retain qualified employees will be diminished given the limited growth opportunities for employees.

One commenter stated that the proposed regulation discourages businesses from taking on new projects or hiring additional workers in order to avoid losing eligibility under the annual re-certification process. In the view of this commenter, a small concern must therefore choose whether to turn down work from other sources so it will be small when called upon to fulfill a task order, or to risk being unable to re-certify the next year.

One commenter stated that most small businesses require several years to adequately adjust in the marketplace to compete with large businesses, adding that crossing a dollar threshold does not make a company well positioned to realistically compete with multi-billion dollar a year full and open competitors.

Another commenter stated that the proposed rule will have two results: (1) A company considering acquiring an emerging small business will lower the price tag of the business, and (2) sources of capital (banks and venture capitalist), because of the increased risk on their investment, will increase the cost of capital. A five-year Federal contract has a predictable rate of return as opposed to a Federal contract that could lose its preferential status as a result of its success. According to the commenter, this proposed rule increases ''risk'' and this ''risk'' will have to be considered by owners and investors in making investment decisions. In the end, stated the commenter, emerging small businesses will be unable to develop a long-term marketing and growth strategy.

Still another commenter stated that the proposed annual re-certification requirement will impose substantial uncertainty and new costs on small business. In particular, argues the commenter, the requirement threatens to penalize those small business companies that successfully compete and obtain long-term contracts. Such companies may achieve a short-term temporary increase in receipts and growth in business, but this would be quickly followed by loss of small business status and disqualification from those types of contracts. This, in turn, would lead to loss of MAS contracts, resulting in lost receipts, employee layoffs and other cutbacks. While the company might as a result regain small business status, states the commenter, this would not be until after a delay of at least a few years, when MAS contracts would not be included in the years used to calculate annual receipts.

As explained above, SBA took into consideration these and other comments to the proposed rule and has revised the final rule to require re-certification prior to the sixth year and prior to each option thereafter. SBA believes that the longer time period allowed on these contracts before re-certification alleviates many of the valid concerns raised by these comments.

Five commenters stated that size protests are an expensive and disruptive process. The commenters suggested small businesses will be forced to expend limited financial capital defending themselves against a protest, many of which are likely to be frivolous, which they consider an especially onerous change. The proposed requirement would cause small business to regard long-term contracts as an unreliable source of temporary business only, which would put a company at great risk or cause uncontrollable and unplanned business disruption. One commenter stated that for those companies already awarded GSA MAS contracts, the proposed change would drastically affect contract terms since companies would be required to put extra time into reporting their small business size status. This extra reporting requirement to GSA and SBA does have pricing implications. One commenter stated that protests will bring contracting to a halt and the Administration's budget for construction will not be obligated and projects will not be finished on time.

Issues related to size protests were discussed in the supplemental information section and modifications to the proposed rule have been adopted. Size protests on long-term, multi-agency contracts are needed to preserve the integrity of the procurement system and small business reporting. SBA's size protest procedures do not unduly burden contractors or procuring agencies. Furthermore, frivolous protests that provide no basis for an allegation are routinely dismissed by SBA. Size protests accepted by SBA are usually processed within 10 business days and do not delay the contracting process. Moreover, for full and open long-term contracts, a size determination by SBA with respect to a concern's certification for its contract or option period would not prevent that business from obtaining an order, and would only affect how the Federal Government reports the size status of the business for statistical purposes.

(c) Estimate of the Number of Small Entities to Which the Rule May Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rule. The RFA defines ''small entity'' to include ''small businesses'', ''small organizations'', and ''small governmental jurisdictions.'' SBA's programs do not apply to ''small organizations'' or ''small governmental jurisdictions'' because they are non-profit or governmental entities and do not qualify as ''business concerns'' within the meaning of SBA's regulations. SBA's programs generally apply only to for-profit business concerns. Therefore, the regulation (like the regulation currently in effect) will not impact small organizations or small governmental jurisdictions.

Small businesses that participate in Federal Government contracting are the specific group of small entities affected most by this rule. While there is no precise estimate for the number of SBCs that will be affected by this rule, there are approximately 368,000 SBCs registered in the CCR's DSBS database (formerly known as PRO-Net). The DSBS contains profiles of SBCs that includes information from SBA's files and CCR. Second, SBA notes that this rule would likely affect those small businesses having long-term contracts that were small at the time of the initial contract award, are no longer small, and those SBCs that become large over time as a result of business growth. The number of SBCs awarded long-term contracts are much less than the DSBS figure, and those that have grown to be, or later become, other than small from the time of the award of their long-term contract is even smaller. Therefore, this rule will not impact all of the SBCs with long-term contracts, but, as described below, would impact approximately 250 businesses each year.

According to the FPDS, in fiscal year (FY) 2003, 13,981 concerns held long-term contracts, of which 8,740 were reported as SBCs. To estimate the number of SBCs that could lose small business status as a result of recertifying their status, SBA estimated the proportion of SBCs that could exceed the small business category if they received the average amount of long-term contracts and applied that proportion to the number of SBCs currently holding those contracts. For FY 2003, FPDS reported 243,462 actions issued for $42.6 billion pursuant to long-term contracts of $25,000 or more. Of these actions, 8,740 SBCs received 100,646 actions valued at $14.2 billion.

On average, an SBC obtained 11.5 actions (100,646/8,740 = 11.5) valued at $1.6 million (($14,174,943,960/8740 = $1,621,847). Based on the DSBS, SBA estimates that approximately 11,200 SBCs could exceed the applicable size standard if they received the average size long-term contract. This estimate was derived by identifying the number of small businesses in the DSBS that are below the most widely used size standards by $1.6 million. That is, SBA examined SBCs between the size range of $4.9 million to $6.5 million, 475 to 500 employees, and $21.4 million to $23 million (limited to the information technology services industries). These SBCs represent 3.0% of all SBCs in the DSBS (11,200/368,000 = 0.0304). Assuming that the size distribution of SBCs on the DSBS is the same as the distribution of SBCs with these contracts, 266 SBCs could outgrow their small business status as a result of receiving orders under multiple award contracts ($8,740 \times 0.0304 = 265.7$).

This estimate of the number of SBCs may be higher or lower depending on two factors. First, orders may be concentrated among a limited number of SBCs, resulting in awards for those businesses much higher in value than the average long-term contract. Second, revenues from other business activities may cause a SBC to exceed its size standard. The estimate calculated above provides a picture of the relative impact that could occur if orders were equally distributed to all SBCs. Although it is impossible to estimate the actual impact of the rule with any degree of certainty, it serves to illustrate the point that a relatively small proportion of SBCs would likely experience a change in small business status.

Based on the number of potential SBCs outgrowing small business status and the $1.6 million average SBC award, $431 million of long-term contracts could be held by concerns changing status from an SBC to a large business ($1,621847 \times 266 = $431.4 million). The net impact of SBCs changing size status is unpredictable. One of two outcomes may result. First, future orders would be made to the former SBCs and reported as large business awards. Second, contracting officers could decide to place orders with currently defined SBCs, resulting in a redistribution of orders away from the former SBCs. Only a limited number of orders placed against long-term contracts are reserved for SBCs. However, SBA believes that in many instances contracting officers have sought out SBCs to help fulfill their agency's small business goals. SBA has no way of knowing to what extent contacting officers would continue to utilize the former SBCs because they fulfill the requirements being sought or would decide to seek out other SBCs.

SBA estimates that the number of concerns affected in the first year of this final rule to be 2,300 businesses. SBA examined FY 2003 orders issued under Federal schedule contracts and multiple award contracts to SBCs. The small business status of 8,600 contractors was compared to the information contained in the DSBS to identify which contractors are currently small and which are currently not listed as small. The comparison showed that approximately 6,300 contractors are listed in the DSBS as SBCs and almost 2,300 contractors are not.

Most businesses holding multiple award contracts affected by this rule have not had to certify their size status since their award contract, which could be as long as 8 years ago in a few cases. Over time, some SBCs have grown beyond the small business size standards criteria or were merged or acquired by large businesses. In some instances, data input on a task order or contract was incorrectly reported as an award to an SBC or the contractor did not accurately report its small business status.

SBA also examined the value of contracts received by small businesses and those contractors currently identified as not small. Of $14.2 billion in multiple award contracts reported to SBCs in FY 2003, approximately $3.78 billion, or 26.6%, were in the name of one of the 2,300 contractors not listed as small in the DSBS. As discussed above, it is impossible to predict how this final rule will affect the future distribution of contracts. In many cases, SBA expects that contracting officers will seek out and make award orders to currently defined SBCs. In other cases, the same contractor would receive the order because of the nature of the requirement or how the order is competed.

(d) Projected Reporting, Recordkeeping and Other Compliance Requirements

This final rule imposes a new reporting requirement on small businesses. Specifically, small business concerns are now required to recertify their size status prior to the end of the fifth year of a contract, and thereafter, prior to exercising any options. However, SBA does not believe that this provision imposes any new recordkeeping requirements. SBCs have always been required to keep records pertaining to their size and to certify as to their size status to receive Federal benefits. The information needed to recertify under this rule is the same information small business concerns currently submit for Government contracts to receive a preference or for an agency to count the award as one to a small business. In addition, the information is based on records that are generally kept in the ordinary course of business, such as Federal income tax returns. Finally, as noted above, the Federal Government's implementation of ORCA in January 2005 requires businesses with Federal contracts to update on an annual basis the information that they submitted at solicitation, including information on their small business status. Thus, small businesses are not being asked to provide information that they do not already need to maintain.

(e) Steps Taken To Minimize the Significant Economic Impact on Small Entities

SBA has decided to require re-certification prior to the beginning of the sixth year and prior to each option thereafter. As discussed in the preamble, SBA believes this policy minimizes the impact on small businesses for long-term contracts.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Loan programs—business, Individuals with disabilities, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

■ For the reasons stated in the preamble, the Small Business Administration amends parts 121 and 124 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

Subpart A—Size Eligibility Provisions and Standards

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); and, Pub. L. 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

■ 2. Amend § 121.404 as follows:
■ a. Add a sentence at the end of paragraph (g).
■ b. Add new paragraphs (g)(1), (2) and (3).
■ c. Remove paragraph (i).

§ 121.404 When does SBA determine the size status of a business concern?

* * * * *

(g) * * * However, the following exceptions apply:

(1) Within 30 days of an approved contract novation, a contractor must recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.

(2) In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(3) For the purposes of contracts with durations of more than five years (including options), including Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs) and Government-wide Acquisition Contracts (GWACs), a contracting officer must request that a business concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. If the contractor certifies that it is other than small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business prime contracting goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(i) A business concern that certified itself as other than small, either initially or prior to an option being exercised, may recertify itself as small for a subsequent option period if it meets the applicable size standard.

(ii) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(iii) A request for a size re-certification shall include the size standard in effect at the time of re-certification that corresponds to the NAICS code that that was initially assigned to the contract.

(iv) A contracting officer must assign a NAICS code and size standard to each order under a long-term contract. The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract. A concern will be considered small for that order only if it certified itself as small under the same or lower size standard.

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

(vi) A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA.

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■ 3. Amend § 121.1004 by revising paragraph (a)(3) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(3) *Long-Term Contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs), and Government-wide Acquisition Contracts (GWACs):

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern.

(A) A contracting officer is not required to terminate a contract where a concern is found to be other than small pursuant to a size protest concerning a size certification made for an option period.

(B) [Reserved]

(iii) Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

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

Subpart A—8(a) Business Development

■ 4. The authority citation for part 124 continues to read:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, and 42 U.S.C. 9815.

■ 5. Amend § 124.503 to revise paragraph (h) to read as follows:

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

* * * * *

(h) *Task and Delivery Order Contracts.* If a task or delivery order contract was previously offered to and accepted into the 8(a) BD program, task and delivery orders under the contract are not to be offered to or accepted into the 8(a) BD program. See § 121.404(g)(3) for rules concerning size re-certifications in connection with long-term contracts.

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Dated: November 7, 2006.

Steven C. Preston,

Administrator.

[FR Doc. E6–19253 Filed 11–14–06; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2006–25243; Airspace Docket No. 06–AWP–11]

Revocation of Class D Airspace; Elko, NV

AGENCY: Federal Aviation Administration (FAA), DOT.