


U.S. Department of Justice
Justice Management Division
Management and Planning Staff

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MEMORANDUM FOR BUREAU PROCUREMENT CHIEFS

FROM: H.B. Myers 
Assistant Director
Procurement Policy and Review Group

SUBJECT: Very Small Business Set-Aside Pilot Program

The Small Business Administration (SBA) has issued the attached final rule to establish a pilot program for very small business concerns (VSBs). A very small business concern is defined as one that has 15 or fewer employees together with average annual receipts that do not exceed \$1 million. This program is applicable to procurements between \$2,500 and \$50,000 and only to the geographic area served by any of the 10 SBA district offices listed in paragraph 125.7(b)(1). The program was effective September 2, 1998 and will expire on September 30, 2000, unless further extended through legislation.

Paragraph 125.7(c)(1) makes a distinction between service and construction procurements from supply and manufactured item procurements. For service and construction procurements, only VSBs whose headquarters are located within the geographical area served by a designated SBA district office where the requirement will be performed are eligible for award. For supply and manufactured item procurements, only VSBs whose headquarters are located within the geographical area served by a designated SBA district office where the buying activity is located are eligible for award.

SBA does plan to initiate a web site on the Government Contracting Home Page (www.sba.gov/GC) to list VSBs that are interested in participating in this pilot program. This listing will be by applicable SIC codes. However, agencies efforts to locate compatible VSBs are not to be limited to the SBA web site. SBA has also added language to ensure that contracting officers do not give a preference to this VSB program over SBA's 8(a) Business Development program for small business concerns owned and controlled by socially and economically disadvantaged individuals.

If you have any questions on this SBA program, please call Larry Silvis on (202) 616-3754.

(b) Should patents, copyrights, inventions, and publications be developed through the use of funds collected by the Board under this subpart, and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions, and publications shall be determined by the agreement between the Board and the party contributing funds towards the development of such patent, copyright, invention, and publication in a manner consistent with paragraph (a) of this section.

Dated: August 26, 1998.

Michael V. Dunn,

Assistant Secretary, Marketing & Regulatory Programs.

[FR Doc. 98-23517 Filed 9-1-98; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 125

Small Business Size Regulations and Government Contracting Assistance Regulations; Very Small Business Concern

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: This rule amends the regulations pertaining to the Small Business Administration's (SBA) size and government contracting programs to incorporate the Very Small Business Set-Aside Pilot Program. It also defines what a "very small business concern" is for purposes of the SBA's small business set-aside program. Section 304 of the Small Business Administration Reauthorization and Amendments Act of 1994 (Public Law 103-403) authorized the SBA Administrator to establish and carry out a pilot program for very small business concerns. The Act defines a very small business concern as one that has 15 or fewer employees together with average annual receipts that do not exceed \$1 million. The Act established September 30, 1998, as the expiration date for this pilot.

DATES: This rule is effective on September 2, 1998.

FOR FURTHER INFORMATION CONTACT: Corinne Sisneros, Office of Government Contracting, at (202) 205-7624.

SUPPLEMENTARY INFORMATION:

I. Background

On January 21, 1997 (62 FR 2979), SBA published a proposed rule in the Federal Register to amend parts 121 and

125 of title 13 of the Code of Federal Regulations (CFR) in order to establish a pilot program for very small business (VSB) concerns. (See Pub. L. 103-403, Section 304.) The purpose of this pilot program is to improve access to Federal Government contract opportunities for concerns that are substantially below SBA's size standards by reserving certain procurements for competition among such VSB concerns. VSB concerns under this program that receive a VSB set-aside contract will also be eligible for loan application support and assistance under the prequalification component of the program. This pilot program will expire on September 30, 2000, unless further extended through legislation. See section 508 of Pub. L. 105-135, 111 Stat. 2606.

II. Summary and Analysis of Comments and SBA's Response

SBA received 11 timely comments to the January 21, 1997, proposed rule. These comments addressed several issues, each of which is discussed below.

Several commenters sought clarification as to how requirements under this program would be identified. Some commenters also requested that SBA clarify what is meant by "advertise" and provide guidance on synopsis and information dissemination requirements. SBA has not made any changes to the final rule in response to these comments. Procedures are already in place to address these issues regarding other set asides, which would cover this program as well. In addition to using SBA's existing automated reference system, procuring activities can rely on SBA district office personnel and procurement center representatives (PCRs) to identify VSB concerns likely to compete on a requirement. A procuring activity may elect to issue a "VSB sources sought" notice in the Commerce Business Daily. However, this rule does not require display or synopsis requirements in excess of those currently in the Federal Acquisition Regulation (FAR).

One commenter suggested establishing a web page, organized by region, of all VSBs and their applicable standard industrial classification (SIC) codes so that procurement offices could check to see if there were capable VSB vendors for a given requirement. A change to the proposed regulatory language is not needed to implement this recommendation. As such, SBA did not change the rule in response to this comment, but does plan to initiate a web site on the Government Contracting Home Page (www.sba.gov/GC) to list

VSB concerns (and their applicable SIC codes) that are interested in participating in this pilot program. Buying activities will be able to review the SBA web site to search for compatible VSB concerns. Their efforts should not, however, be limited to the SBA web site. Procuring activities should also try to identify VSB sources through media pursuant to FAR 5.101 as well as their agency-specific regulations and policies.

One commenter requested clarification regarding the types of procurement requirements that will be available through and the procuring activities that will be involved in the VSB program. Under the proposed rule, only those VSB concerns whose headquarters are located within the geographical area serviced by a designated SBA district office where the procurement is offered would be eligible for award. Upon further deliberation, SBA has changed the application of the VSB program for service and construction procurements. Under the final rule, any procurement requirement between \$2,500 and \$50,000 may be set aside for VSB concerns. A contracting officer must set aside for VSB concerns any such service or construction requirement that will be performed within the geographical boundaries served by a designated SBA district office if there is a reasonable expectation of obtaining fair and reasonable offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district. In the case of a procurement for supplies or manufactured items, a contracting officer must set aside any such requirement for VSBs if the buying activity is located within the geographical area served by a designated SBA district and there is a reasonable expectation of obtaining fair and reasonable offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district. SBA has made the distinction between service or construction requirements and requirements for supplies or manufactured items because of the size of VSB concerns and their limited ability to perform contracts outside of the geographic area where they are located. For a service or construction requirement, the place of performance is what is critical to a VSB, not the location of the buying activity. This is particularly true where more and more requirements are being procured on a consolidated basis by a number of buying activities, which are

geographically dispersed around the country. The VSB program is intended to give local smaller businesses a chance to perform local requirements. For a service or construction business, that means requirements that will be performed close to where the firm is located. Conversely, for a manufacturing firm or one that provides supply items, the place of ultimate delivery is not important. It is the location of the buying activity that matters to such a firm. Thus, SBA has adopted the proposed rule language, as clarified, in the final rule for requirements for supplies or manufactured items.

For purposes of the VSB program, SBA will treat the geographic areas served by the SBA Los Angeles and Santa Ana District Offices as one designated SBA district. As such, any VSB whose headquarters is located within the geographical area served by the Los Angeles or Santa Ana SBA District Offices will be eligible for a VSB set-aside that will be performed or in which the buying activity is located within the geographical area of either SBA district office.

One commenter also sought clarification on how SBA would achieve nationwide geographic coverage. SBA's plan to achieve nationwide geographical coverage by assigning this pilot program to widely dispersed district office pilot sites was already reflected in the proposed rule. Thus, SBA makes no changes to the rule in response to this comment.

One commenter asked what sort of data collection will take place under the VSB program. SBA will obtain a record of all contract awards under this program after advising the contracting agencies of the manner and frequency of such reporting. At a minimum, reports will include the date of solicitation, the date of an award, the contractor's name and address, the SIC code assigned to the procurement, and the dollar value of the award. Reporting requirements are necessary since the SBA must report to Congress on the results of the program. Without documentation of efforts and activity, SBA will be unable to comply with the law. However, the final rule makes no changes to reporting requirements because SBA presently collects this information.

Four commenters recommended that SBA provide guidance as to whether the procurement order of precedence would be changed for the purpose of the VSB program. The order of precedence was eliminated from the FAR in 1996. However, SBA proposed the VSB program as an extension of the small business set-aside program. Therefore, if a procurement requirement does not

meet the criteria for a small business set-aside, it cannot be set aside for VSBs. If a contracting officer determines that there is a reasonable likelihood that two or more VSB concerns will make offers which are competitive as to price, quality, and delivery, the contracting officer must complete the requirement as a VSB set-aside. SBA intends that the procedures in FAR 19.502-2 (as made applicable to simplified acquisitions by FAR 13.105) should apply. Where there is not a reasonable likelihood that there are two or more VSBs who will make offers which are competitive as to price, quality, and delivery, the contracting officer must then consider an award as a regular small business set-aside. In situations where the contracting officer does not agree with the recommendations of SBA's PCR, the procedures at FAR 19.505 will apply. The final rule reflects these clarifications. SBA has also added clarifying language to ensure that contracting officers do not give a preference to the VSB program over SBA's 8(a) Business Development program for business concerns owned and controlled by socially and economically disadvantaged individuals.

The proposed rule limited the program to requirements of \$50,000 or less that could be set aside for small business. Two commenters raised concerns that since the exception to the non-manufacturer rule applies only to procurements where the anticipated cost will not exceed \$2,500 this could result in confusion to some buyers and vendors for processing requirements between \$2,500 and \$50,000. One commenter recommended an extension to \$50,000 of the exception to the non-manufacturer rule for VSB set-aside requirements. SBA will not raise the exception threshold to the non-manufacturer rule. SBA believes that the non-manufacturer rule provides important protections to small businesses by limiting the instances in which the intent of a small business set-aside is subverted through a subcontract with a large business. Moreover, SBA disagrees that the \$50,000 threshold to the VSB program will be confused with the \$2,500 exception threshold to the non-manufacturer rule. The processing of VSB set-asides in the \$2,500-\$50,000 range will be no different than the processing of small business set-asides in that range being done presently.

Another commenter suggested raising the VSB set-aside limit from \$50,000 to \$100,000. SBA has elected to maintain the \$50,000 threshold. Again, this is a pilot program. If experience shows that the dollar value of requirements

reserved for VSBs should be raised, SBA will address that issue at that time.

Two commenters expressed concern that without reserving a class of procurements for the VSB program, SBA will be unable to require agencies to contract with VSB concerns. SBA has changed the regulatory language to reserve the class of requirements in the \$2,500-\$50,000 range for VSB concerns which meet the criteria of the requirement.

Two commenters were concerned about the effect the pilot program may have on the Small Business Competitiveness Demonstration Program (Demonstration Program). One of the two comments recommended that the SBA exclude agencies that are participating in the Demonstration Program from this pilot program since under the Demonstration Program set-asides for small business are prohibited in the four designated industry groups. SBA was also asked to consider the impact this program may have on emerging small businesses. The Demonstration Program makes requirements in four designated industry groups ineligible for small business set-asides. The VSB program applies to requirements that are eligible to be set-aside for small business. Thus, any requirement which cannot be set aside because it is excluded by the Demonstration Program is also ineligible for the VSB program. Therefore, SBA has not changed the rule in response to this comment.

The proposed rule stated that only VSBs whose headquarters are located within the geographical area served by a designated SBA district office where the procurement is offered are eligible for award of a contract under the pilot program. As noted above, the final rule distinguishes service and construction procurements from supply and manufactured item procurements. For service and construction procurements, only VSBs whose headquarters are located within the geographical area served by a designated SBA district office where the buying activity is located are eligible for award. For supply and manufactured item procurements, only VSBs whose headquarters are located within the geographical area served by a designated SBA district office where the buying activity is located are eligible for award. One comment requested clarification as to who will be responsible for determining whether the VSB concern has its headquarters located within an appropriate designated SBA district. The determination will fall within the jurisdiction of the cognizant SBA Government Contracting Area Office

and will be included as part of any formal size determination (see 13 CFR § 121.1001-121.1009).

One commenter asked how businesses would be certified as VSB concerns. There is no "certification" process under the VSB program. As with other procurements requiring concerns to be small, concerns will represent themselves to be VSB concerns for any procurement reserved as a VSB set-aside. As with any other representation as to size, absent information to the contrary, a contracting officer may accept such a self-representation and award a contract. If the size of a concern representing itself to be a VSB is protested on a VSB set-aside, the contracting officer will forward the protest to SBA as he or she would any other size protest in accordance with 13 CFR part 121. SBA will determine whether the concern qualifies as a VSB by using the statutorily imposed 15-employee and \$1 million in average annual receipts size standard. Because those regulations are already in place, no change to the proposed rule is required in response to this comment.

One commenter asked what value the proposed rule would add to SBA's commitment to serve small businesses. The program will improve access to Federal contract opportunities by reserving certain procurements for competition among VSB concerns. Businesses receiving awards will also be eligible for loan application support and assistance under the pre-qualification component of the program.

Compliance With Executive Orders 12612, 12788 and 12866, the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and the Paperwork Reduction Act (44 U.S.C. Chapter 3501 et seq.)

SBA certifies that this rule will not be a significant rule within the meaning of Executive Order 12866. The value of procurements awarded under the VSB program is expected to be less than \$100 million since the program is being implemented as a pilot program in only 10 locations and is targeted to businesses that have historically experienced limited participation in the Federal market. This rule does not impose costs upon the businesses which might be affected by it. The rule should have no effect on the amount or dollar value of any contract requirement or the number of requirements reserved for the small business set-aside program, since it is administered within and is a component of the small business set-aside program. Therefore, it would not have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a

significant adverse effect on competition or the United States economy.

As required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, SBA prepared a regulatory flexibility analysis of this rule. This analysis has been submitted to the Chief Counsel for Advocacy of the Small Business Administration, and is available upon request.

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule will not impose new reporting or record keeping requirements, other than those required of SBA.

For purposes of Executive Order 12612, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

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

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

13 CFR Part 125

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

Accordingly, for the reasons set forth above, SBA hereby amends 13 CFR as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c), and 662(5); and Sec. 304, Pub. L. 103-403, 108 Stat. 4175, 4188.

2. Revise § 121.401 to read as follows:

§ 121.401 What procurement programs are subject to size determinations?

The requirements set forth in §§ 121.401 through 121.413 cover all procurement programs for which status as a small business is required, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, the Small Business Subcontracting program authorized under section 8(d) of the Small Business Act, the Federal Small Disadvantaged Business (SDB) programs, the HUBZone program, and the Very Small Business (VSB) program.

3. Add § 121.413 to support A to read as follows:

§ 121.413 What size must a concern be to be eligible for the Very Small Business program?

A concern is a very small business (see § 125.7 of this chapter) if, together with its affiliates, it has no more than 15 employees and its average annual receipts do not exceed \$1 million.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

4. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637, and 644; 31 U.S.C. 9701, 9702; and Sec. 304, Pub. L. 103-403, 108 Stat. 4175, 4188.

5. Add § 125.7 to read as follows:

§ 125.7 What is the Very Small Business program?

(a) The Very Small Business (VSB) program is an extension of the small business set-aside program, administered by SBA as a pilot to increase opportunities for VSB concerns. Procurement requirements, including construction requirements, estimated to be between \$2,500 and \$50,000 must be reserved for eligible VSB concerns if the criteria in paragraph (c) of this section are met.

(b) **Definitions.** (1) The term *designated SBA district* means the geographic area served by any of the following SBA district offices:

- (i) Albuquerque, NM, serving New Mexico;
- (ii) Los Angeles, CA, serving the following counties in California: Los Angeles, Santa Barbara, and Ventura;
- (iii) Boston, MA, serving Massachusetts;

- (iv) Louisville, KY, serving Kentucky;

- (v) Columbus, OH, serving the following counties in Ohio: Adams, Allen, Ashland, Athens; Auglaize, Belmont, Brown, Butler, Champaign, Clark, Clermont, Clinton, Coshocton, Crawford, Darke, Delaware, Fairfield, Fayette, Franklin, Gallia, Greene, Guernsey, Hamilton, Hancock, Hardin, Highland, Hocking, Holmes, Jackson, Knox, Lawrence, Licking, Logan, Madison, Marion, Meigs, Mercer, Miami, Monroe, Montgomery, Morgan, Morrow, Muskingum, Noble, Paulding, Perry, Pickaway, Pike, Preble, Putnam, Richland, Ross, Scioto, Shelby, Union, Van Wert, Vinton, Warren, Washington, and Wyandot;

- (vi) New Orleans, LA, serving Louisiana;

- (vii) Detroit, MI, serving Michigan;

- (viii) Philadelphia, PA, serving the State of Delaware and the following

counties in Pennsylvania: Adams, Berks, Bradford, Bucks, Carbon, Chester, Clinton, Columbia, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Philadelphia, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York;

(ix) El Paso, TX, serving the following counties in Texas: Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Pecos, Presidio, Reeves, and Terrell; and

(x) Santa Ana, CA, serving the following counties in California: Orange, Riverside, and San Bernardino.

(2) The term very small business or VSB means a concern whose headquarters is located within the geographic area served by a designated SBA district and, together with its affiliates, has no more than 15 employees and has average annual receipts that do not exceed \$1 million. The terms concerns, affiliates, average annual receipts, and employees have the meaning given to them in §§ 121.105, 121.103, 121.104, and 121.106, respectively, of this chapter.

(c)(1) A contracting officer must set aside for VSB concerns each procurement that has an anticipated dollar value between \$2,500 and \$50,000 if:

(i) In the case of a procurement for manufactured or supply items:

(A) The buying activity is located within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms of market prices, quality and delivery; or

(ii) In the case of a procurement for other than manufactured or supply items:

(A) The requirement will be performed within the geographical area served by a designated SBA district, and

(B) There is a reasonable expectation of obtaining offers from two or more responsible VSB concerns headquartered within the geographical area served by that designated SBA district that are competitive in terms of market prices, quality and delivery.

(2) The geographic areas served by the SBA Los Angeles and Santa Ana District Offices will be treated as one designated SBA district for the purposes of this section.

(3) If the contracting officer determines that there is not a reasonable

expectation of receiving at least two responsible offers from VSB concerns headquartered within the geographic area served by the applicable designated SBA district, he or she must include in the contract file the reason(s) for this determination, and solicit the procurement pursuant to the provisions of 48 CFR 19.502-2. SBA may appeal such determination using the same procedure described in 48 CFR 19.505.

(4) If the contracting officer receives only one acceptable offer from a responsible VSB concern in response to a VSB set-aside, the contracting officer will make an award to that firm. If the contracting officer receives no acceptable offers from responsible VSB concerns, he or she will withdraw the procurement and, if still valid, must resolicit it pursuant to the provisions of 48 CFR 19.502-2.

(d) Where a procurement is set aside for VSB concerns, only those VSB concerns whose headquarters are located within the geographic area served by the applicable designated SBA district are eligible to submit offers in response to the solicitation.

(e) Nothing in this section shall be construed to alter in any way the procedures by which procuring activities award contracts under the SBA's 8(a) Business Development Program (see 13 CFR part 124).

(f) This pilot program terminates on September 30, 2000. Any award under this program must be made on or before this date.

Dated: July 28, 1998.

Aida Alvarez,
Administrator.

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BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

Disaster Loan Program

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: Under this final rule SBA amends its regulations to conform the eligibility criteria for disaster loans to those applicable in SBA's business loan program. Under the final rule, a business can not obtain a physical disaster loan if it is engaged in any illegal activity, if it is a government owned entity (other than one owned or controlled by a Native American tribe); or if it engages in products or services of a prurient sexual nature. Under the final rule, a business is not eligible for an economic injury disaster loan if more

than one-third of its revenues are from legal gambling operations or from packaging SBA loans; if it is principally engaged in teaching or indoctrinating religion; or if it is primarily engaged in political or lobbying activities.

DATES: This rule is effective September 2, 1998.

FOR FURTHER INFORMATION CONTACT:

Bernard Kulik, 202-705-6734.

SUPPLEMENTARY INFORMATION: On April 23, 1998, SBA published a notice of proposed rulemaking (63 FR 20140) to amend section 123.201 of its regulations so that an applicant would not be eligible for a physical disaster business loan if it is engaged in any illegal activity; if it is a government owned entity (other than a business owned or controlled by a Native American tribe); or if the business (1) presents live performances of a prurient sexual nature, or (2) derives directly or indirectly more than *de minimis* gross revenue from activities of a prurient sexual nature. The proposed rule was intended to codify SBA's existing policy of using the same ineligibility criteria for SBA's disaster and business loan programs. Thus, a business that would not be eligible to receive an SBA guaranteed business loan because it met these criteria, would also not be eligible to obtain a physical disaster loan.

SBA also proposed to amend section 123.301 of its regulations so that a business would not be eligible for an economic injury disaster loan if: (1) derived more than one-third of its gross annual revenue from legal gambling activities; (2) earned more than one-third of its gross annual revenue from packaging SBA loans; (3) was principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting; or (4) primarily engaged in political or lobbying activities. These proposed changes were intended to codify SBA's existing policy of using the same ineligibility criteria for its economic injury disaster and business loan program. Thus, if a business is not eligible, because of these criteria, for an SBA guaranteed loan under the business loan program, it would not be eligible for an economic injury disaster loan.

SBA received one comment. The commenter was concerned that if the proposed economic injury amendments were finalized, SBA would not be able to assist non-profit entities which provide community services and derive more than one third of their revenue from legal gambling activities. Under SBA's rules, non-profit entities presently do not qualify for economic