

as of the date of a concern's initial offer on the MAS or other multiple award contract, not for each order issued pursuant to that contract. If a concern is small on that date, orders may be placed and considered to be awards to "small business" for the length of the MAS or other multiple award contracts. SBA understands that such contracts may have terms of five, ten, or more years, and can be amended to incorporate goods and services with varying size standards and unlimited quantities. Orders to concerns issued pursuant to a MAS or other multiple award contract would be deemed awards to small businesses even if a concern had grown to be large many years ago and even though the concern is not small with respect to the size standard corresponding to the work to be performed under a particular task order.

In determining how to address this issue, SBA considered first not amending the current regulation. However, SBA believes that if it does not address this issue, then awards will continue to be made to concerns that are not small businesses, yet agencies will get credit for making an award to a small business. SBA believes that this would harm legitimate small business concerns by reducing the number of opportunities and additional awards to them, either through the MAS program or otherwise. In addition, SBA has been contacted by several legitimate small businesses complaining that MAS orders are going to firms clearly not small, but that such awards are being counted as awards to small business. These businesses believe that their opportunities of receiving orders are reduced because agencies can go to large businesses and count the orders as awards to small businesses.

SBA also considered that, instead of determining size eligibility annually for purposes of orders issued pursuant to a MAS or other multiple award contract, it would determine size as of the date that a firm certifies that it is small for a particular order. Although this approach is appealing to SBA, SBA believes that some procuring agencies would oppose it. They could argue that such an approach would delay the procurement process, which is contrary to the intent of the MAS program. SBA also considered a longer time period, such as five years (one contract year plus four option years), in which the concern could be considered small. SBA decided not to propose this approach because it would not adequately address the perceived problem (*i.e.*, awards to other than small businesses would continue to be counted as small business awards for too long a period of

time and too often, since agencies are increasingly using multiple award and schedule contracts). SBA believes that a process which requires a concern to self-certify annually that it continues to be small for orders issued pursuant to a MAS or other multiple award contract represents little or no burden to the SBC or to the procurement process.

SBA also proposes a rule regarding time limits for size protests in the case of MAS procurements, including FSS contracts. The proposed rule would specifically authorize protests in connection with awards and orders issued under those contracts as well as multiple award contracts. SBA proposes that a protest relating to an individual order is timely so long as it is received anytime before the expiration of the contract period. SBA considered the fact that multiple award and schedule contracts are intended to be a fast and easy way for an agency to contract. SBA does not believe that a size protest would slow down the contracting process or delay performance because a size protest, in this instance, would likely relate to whether an agency can count the award as an award to a SBC, not to whether award can or should be made to a particular business entity. SBA specifically requests comments as to other options for these time limits.

(f) Conclusion

Based upon the foregoing, SBA has determined that this proposed rule may have a significant impact on a substantial number of small entities within the meaning of the RFA. SBA requests comments addressing any of the issues raised in this IRFA, including comments on the economic effect this rule could have on small entities.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Loan programs—business, 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 set forth in the preamble, SBA proposes to amend parts 121 and 124 of Title 13 of the Code of Federal Regulations, as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues 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. In § 121.404 add paragraph (c) to read as follows:

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

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(c) In order to be considered small for purposes of the General Services Administration's Multiple Award Schedule (MAS) Program, including the Federal Supply Schedule, and other multiple award contracts, including Governmentwide Acquisition Contracts (GWAC) and multi-agency contracts, a concern must qualify as small as of the date it submits a written self-certification to the procuring agency as part of its initial offer including price. The concern will be considered small with respect to any orders issued under the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it qualified for a period of one year from the date of its certification.

(1) A business concern awarded a MAS or other multiple award contract must annually re-certify to the contracting officer on the anniversary date of the contract award that it continues to qualify as a small business for the contract. Contracting officers will publish a list of the re-certifications received, within 10 days of receipt, on their agency's website, and may also publish it in the **Federal Register** or otherwise. SBA may review or request a formal size determination with respect to that re-certification, and any interested party may protest that re-certification pursuant to § 121.1004(a)(3)(iii). The business concern may be considered small with respect to any orders issued pursuant to the MAS or other multiple award contract having a NAICS code with the same or higher size standard as the one(s) under which it re-certified for a period of one year from the date of its re-certification.

(2) The contracting officer must assign an appropriate NAICS code to each order issued under a MAS or other multiple award contract to assist in determining whether a concern is small for a particular order.

(3) Time of size for a specific order relates back to the date of the initial written self-certification that it is small to the procuring agency for the award of