

§ 125.5

13 CFR Ch. I (1-1-04 Edition)

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) Sales of surplus real and personal property.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this chapter.

§ 125.5 Certificate of Competency Program.

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract. The COC Program is applicable to all Government procurement actions. For purposes of this Section, the term "United States" includes its territories, possessions, and the Commonwealth of Puerto Rico.

(2) A contracting officer must, upon determining an apparent low small business offeror to be nonresponsible, refer that small business to SBA for a possible COC, even if the next low apparently responsible offeror is also a small business.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. To be eligible for the COC program, a firm must meet the following criteria:

(i) It must qualify as a small business concern under the size standard applicable to the procurement. Where the solicitation fails to specify a size standard or Standard Industrial Classification (SIC) code, SBA will assign the appropriate size standard to determine COC eligibility. SBA determines size

eligibility as of the date described in § 121.404 of this chapter.

(ii) A manufacturing, service, or construction concern must demonstrate that it will perform a significant portion of the proposed contract with its own facilities, equipment, and personnel. The contract must be performed or the end item manufactured within the United States.

(iii) A non-manufacturer making an offer on a small business set-aside contract for supplies must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter for either the type of product being procured or the specific contract at issue.

(iv) A non-manufacturer making an offer on an unrestricted procurement or a procurement utilizing simplified acquisition threshold procedures with a cost that does not exceed \$25,000 must furnish end items manufactured in the United States to be eligible for a COC.

(v) An offeror intending to provide a kit consisting of finished components or other components provided for a special purpose, is eligible if:

(A) It meets the Size Standard for the SIC code assigned to the procurement;

(B) Each component comprising the kit was manufactured in the United States; and

(C) In the case of a set-aside, each component comprising the kit was manufactured by a small business under the size standard applicable to the component provided. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the "Parties Excluded From Federal Procurement Programs" section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in the Procurement section of the list due to matters not directly related to the concern itself,

Small Business Administration

§ 125.5

responsibility will be determined in accordance with paragraph (f)(2) of this section.

(3) An eligibility determination will be made on a case-by-case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA.* (1) A contracting officer who determines that an apparently successful offeror that has certified itself to be a small business with respect to a specific Government procurement lacks any element of responsibility (including competency, capability, capacity, credit, integrity or tenacity or perseverance) must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. The referral must include a copy of the following:

- (i) Solicitation;
- (ii) Offer submitted by the concern whose responsibility is at issue for the procurement (its Best and Final Offer for a negotiated procurement);
- (iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;
- (iv) Preaward survey, where applicable;
- (v) Contracting officer's written determination of nonresponsibility;
- (vi) Technical data package (including drawings, specifications, and Statement of Work); and
- (vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of 15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's

negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications.* If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the case without issuing a COC and will notify the contracting officer and the concern with a declination letter.

(f) *Reviewing an application.* (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(2) A small business will be rebuttably presumed nonresponsive if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part 9, subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any

§ 125.5

13 CFR Ch. I (1–1–04 Edition)

of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

(g) *Decision by Area Director (“Director”).* After reviewing the information submitted by the applicant and the information gathered by SBA, the Area Director will make a determination, either final or recommended as set forth in the following chart:

Contracting actions	SBA official or office with authority to make decision	Finality of decision; options for contracting agencies
\$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures.	Director may approve or deny	Final. The Director will notify both applicant and contracting agency in writing of the decision.
Between \$100,000 and \$25 million	(1) Director may deny (2) Director may approve, subject to right of appeal and other options.	(1) Final. (2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section.
Exceeding \$25 million	(1) Director may deny (2) Director must refer to SBA Headquarters recommendation for approval.	(1) Final. (2) Contracting agency may proceed under paragraph (j) of this section.

(h) *Notification of intent to issue on a contract with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer has the following options:

- (1) Accept the Director’s decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or
- (2) Ask the Director to suspend the case for one of the following purposes:
 - (i) To forward a detailed rationale for the decision to the contracting officer for review within a specified period of time;
 - (ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file;
 - (iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or
 - (iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.
 - (i) *Appeals of Area Director determinations.* For COC actions with a value exceeding \$100,000, contracting agencies

may appeal a Director’s decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

- (1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.
- (2) SBA Headquarters will furnish written notice to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level of the procuring agency (with a copy to the contracting officer), that the case file has been received and that an appeal decision may be requested by an authorized official at that level. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by

Small Business Administration

§ 125.6

both agencies) after SBA receives the request for a formal appeal.

(3) The SBA Associate Administrator for Government Contracting (AA/GC) will make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds \$25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (l) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either directly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, where an award of the contract has not occurred, and one of the following circumstances exists:

(i) The COC applicant submitted false or omitted materially adverse information;

(ii) New materially adverse information has been received relating to the current responsibility of the applicant concern; or

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the firm's current circumstances).

(2) Where SBA reconsiders and reaffirms the COC the procedures under paragraph (h) of this section do not apply.

(m) *Effect of a COC.* By the terms of the Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility.

(n) *Effect of Denial of COC.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA will monitor contractor performance.

[61 FR 3312, Jan. 31, 1996; 61 FR 7987, Mar. 1, 1996]

§ 125.6 Prime contractor performance requirements (limitations on sub-contracting).

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the