

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 124, 125, 126, and 134**

RIN 3245-AF65

Small Business, Small Disadvantaged Business, HUBZone, and Service-Disabled Veteran-Owned Business Status Protest and Appeal Regulations.**AGENCY:** U.S. Small Business Administration.**ACTION:** Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations to clarify the effect, across all small business programs, of initial and appeal eligibility decisions on the procurement in question; increase the amount of time that SBA has to render formal size determinations; require that SBA's Office of Hearings and Appeals (OHA) issue a size appeal decision within 60 calendar days of the close of the record, if possible; increase the amount of time that SBA has to file North American Industry Classification System (NAICS) code appeals; alter the NAICS code appeal procedures to comply with a Federal Court decision; clarify that contracting officers must reflect final agency eligibility decisions in Federal procurement databases and goaling statistics; and make other changes to size status protest and appeal rules.

DATES: *Effective date:* March 4, 2011. *Applicability date:* The amendments to 13 CFR 121.402(b), 121.404(a), and 121.407 apply to solicitations issued on or after March 4, 2011.

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SUPPLEMENTARY INFORMATION: On March 1, 2010, SBA published a proposed rule in the **Federal Register** (75 FR 9129) to clarify the effect, across all small business programs, of initial and appeal eligibility decisions on the procurement in question; increase the amount of time that SBA has to render formal size determinations; require that SBA's OHA issue a size appeal decision within 60 calendar days of the close of the record, if possible; increase the amount of time that SBA has to file NAICS code appeals; alter the NAICS code appeal procedures to comply with a Federal Court decision; clarify that contracting officers must reflect final agency eligibility decisions in Federal procurement databases and goaling

statistics; clarify how a contracting officer assigns a NAICS code and size standard to a multiple award procurement; and make other changes to status protest and appeal rules.

SBA received comments from four individuals or entities in response to the proposed rule. The comments, as well as SBA's response to them, are discussed below. For a section-by-section analysis of the revised Parts 121, 124, 125, 126, and 134, see the supplementary information published as part of the proposed rule (75 FR 9129).

Analysis of Comments Received

SBA received three supportive comments concerning its proposed removal of the second sentence of paragraph 121.404(a), which required recertification if a procuring agency modifies a solicitation to such an extent that original offers are no longer responsive. All three commenters maintained that it is unfair to disqualify a firm from consideration after the firm has spent a great deal of time and resources pursuing a contract opportunity that it was eligible for at the time of its initial offer including price. The commenters also noted that the current rule reduces competition by eliminating offerors, which is not necessarily in the best interests of the procuring agency. As we explained in the proposed rule, if a requirement changes so much that it is essentially new, the agency should cancel the solicitation and issue a new solicitation and open the competition up to all eligible offerors. In that case, size will be determined as of the date of the initial offer including price in response to the new solicitation. Consequently, SBA has adopted its proposed rule.

Two commenters supported SBA's proposed amendment of § 121.407 to address the assignment of NAICS codes and corresponding size standards to task or delivery order contracts with contract line item numbers (CLINs) for divergent goods and services. One commenter found the proposed rule confusing and suggested requiring NAICS codes and size standards for orders with a value above \$500,000. On September 27, 2010, Congress enacted the Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (Jobs Act), which contained several provisions addressing small business contracting in the context of multiple award contracts. Consequently, we have decided to address the issue of assignment of NAICS codes and size standards to multiple award contracts when we address all of the statutory provisions of the Jobs Act that pertain to multiple

award contracts, to ensure that multiple award small business contracting is addressed in a holistic manner.

Several commenters supported SBA's proposed amendment of § 121.1009 to allow itself more time to decide size protests. One commenter suggested that SBA use calendar days instead of business days. SBA has historically used business days to measure timeframes concerning protest filing and processing. Consequently, SBA has retained business days to measure status protest determination timeframes, and has not adopted the commenter's suggestion.

Several commenters supported SBA's proposed amendment of §§ 121.1009, 124.1013, 125.27, 126.803, and 134.504 to address the effect of status determinations on the procurement in question. However, two commenters did not support the provision which addresses situations where a contracting officer withholds award, SBA finds the protested concern to be eligible, the procuring agency then awards to that concern, and the initial determination is subsequently overturned on appeal. In that circumstance, the contracting officer may take some action based on the appellate decision, but is not required to do so. One commenter also noted the possibility that a firm found to be ineligible as a result of a formal size determination could successfully challenge the decision on appeal, yet not be awarded the contract. Both of these outcomes are consistent with the regulatory framework which has been in place for many years. The existing framework provides contracting officers with an incentive to withhold award until SBA renders a formal size determination. If SBA issues a formal size determination finding an apparent successful offeror to be small, the agency may proceed with award, even if an appeal is filed. Similarly, if SBA finds an apparent successful offeror to be other than small, the agency may proceed with award to another offeror, even if an appeal is filed. Size appeals can take several months or more to resolve, and agencies typically cannot delay their procurements for months and await an appeal decision. Consequently, SBA has never required contracting officers to apply appellate decisions to the procurement in question when the contracting officer waited for SBA's formal size determination and awarded to a concern based on SBA's formal size determination. If in all cases the contracting officer was required to take some action based on an appellate decision, regardless of whether the contracting officer withheld award and

waited for SBA's formal size determination, contracting officers would likely award before SBA issues a formal size determination, which could result in an increase in the number of ineligible firms performing the base terms of set-aside contracts. Similarly, if SBA issues a formal size determination finding the apparent successful offeror to be other than small and the contracting officer awards to another concern, it would be costly for the Government to have to terminate the award to an eligible concern based on an appellate decision finding the initial successful offeror to be eligible. Thus, SBA is adopting the proposed rule without modification.

One commenter supported SBA's proposed amendment of § 134.316 to require OHA to issue a NAICS code appeal decision within 15 calendar days of the close of the record. However, after further internal review and discussion SBA decided to remove the NAICS code appeal decision deadline. OHA prioritizes NAICS code appeals and issues decisions as soon as practicable, because of the time sensitive nature of such an appeal.

One commenter objected to SBA's proposed amendment of § 134.304 to allow SBA to file a NAICS code appeal at any time before offers are due. The commenter recommended that SBA be allowed to file a NAICS code appeal up to 15 calendar days before offers are due. However, the commenter's proposal would extend the deadline for an SBA NAICS code appeal by only five days in many cases, since offers are often due 30 days after issuance of a solicitation and SBA currently must file a NAICS code appeal within 10 calendar days of issuance of a solicitation. As SBA stated in the preamble of the proposed rule, SBA often does not find out about egregious NAICS codes and/or size standard designations until well after the solicitation has been issued. SBA anticipates that it will file relatively few NAICS code and size standard appeals, but needs to be able to intervene to stop clear-cut abuses. Thus, SBA is adopting the proposed rule without modification.

One commenter suggested that SBA should require firms to recertify their size prior to award and on an annual basis. The commenter suggested that procuring agencies should not exercise any option with a firm that is other than small. This comment is beyond the scope of this rule. SBA considered these issues when it issued its recertification rule (71 FR 66434), and believes requiring such action could seriously disrupt the procurement process and result in unacceptable costs for

procuring agencies and contractors. SBA notes that recertification is required in all cases where there is an acquisition, merger or novation and, for long-term contracts, prior to the sixth year and prior to each option thereafter (see § 121.404(g)).

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

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To effectively assist the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates the responsibility for establishing small business definitions to SBA's Administrator. This act also provides SBA with the authority to determine which businesses are small businesses concerns (15 U.S.C. 637(b)(1)(G)(6)). The supplementary information section of the proposed and final rule explains SBA's reasons for revising the size protest and appeal timeframes and application of final decisions on size and other small business status determinations. SBA believes that these changes are needed to provide clarity to procuring agencies and contractors.

2. What are the potential benefits and costs of this regulatory action?

SBA believes that more realistic timeframes for filing and rendering decisions on size protest and NAICS code appeal cases will improve the functioning of the size protest and size determination processes. Small businesses will have a sufficient time in which to raise size and NAICS classification issues and SBA will have more time, if needed, to prepare thorough decisions.

The final provisions may have cost implications associated with delays to the contracting process. Contracting officers may have to wait an additional five business days in some cases before SBA renders a size determination.

However, contracting officers are already generally required to withhold award for 15 days for a Historically Underutilized Business Zone (HUBZone), Small Disadvantaged Business (SDB), or Service-Disabled Veteran-Owned (SDVO) status protest. SBA believes that the potential costs associated with delays in the contracting process are relatively minor and are significantly outweighed by the benefits to the integrity of small business procurement programs and the intended beneficiaries.

3. What are the alternatives to this final rule?

SBA considered as an alternative completing size determinations within 10 business days of receiving all requested information from the protested concern. Although this would also achieve the objective of this final rule, it would create uncertainty as to when a size determination would actually be rendered. If the necessary information requested of a business is received within the three-day period requested by SBA, a size determination will be completed within 13 days. However, if the protested concern submits incomplete information, the size determination period will vary depending on the circumstances. SBA believes a 15-day period is sufficient in most cases and provides a degree of certainty to contracting officers. It also reinforces the importance of promptly providing information to SBA.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this final rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government, as specified in the order. As such, it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this final rule will not impose new reporting requirements nor will require new recordkeeping requirements.

Regulatory Flexibility Act

SBA has determined that this final 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 this final rule.

FRFA

When preparing a Regulatory Flexibility Analysis, an agency shall address all of the following: the need for, and objectives of, the rule; the estimated number of small entities to which the rule may apply; the projected reporting, recordkeeping and other compliance requirements; steps taken to minimize the significant economic impact on small entities. This FRFA considers these points and the impact this final rule may have on small entities.

a. Need for, and Objectives of, the Rule

Under the Small Business Act, SBA is authorized to determine the size of a business entity. 15 U.S.C. 632. SBA’s standards and definitions relating to formal size determinations and NAICS code designation for small business concerns are set forth in 13 CFR part 121. The rules for procedures governing cases before OHA are set forth in 13 CFR part 134.

SBA’s regulations currently provide that SBA will issue a formal size determination within 10 working days of its receipt of a size protest, “if possible.” 13 CFR 121.1009(e). The FAR currently provides that a contracting officer should withhold award for 10 business days after SBA’s receipt of a size protest, after which time the

contracting officer may proceed with award if “further delay would be disadvantageous to the Government.” FAR 19.302(h)(2). The FAR further provides that a contracting officer need not withhold award if he or she determines in writing that award must be made to protect the public interest. FAR 19.302(h)(1).

After SBA receives a size protest it notifies the protested concern, and the protested concern is provided three business days to respond to the protest. Thus, SBA generally has only five business days to draft a formal size determination. In some cases, protested concerns ask for additional time to submit the requested information. In other cases, the information submitted by the protested concern leads the size specialist to request additional information. Size specialists typically have to sift through voluminous documentation before reaching a decision.

Current regulations provide SBA with 15 business days to decide socio-economic status protests, such as HUBZone, SDB and SDVO. 13 CFR 124.1013(a), 125.27(d), 126.803(b). Increasing the amount of time SBA has to make a size determination will allow size specialists adequate time to perform a thorough review and prepare a carefully constructed determination. Increasing the amount of time SBA has to render a formal size determination will also make SBA’s regulations consistent and coherent across programs.

SBA’s regulations currently do not address the amount of time OHA has to render a decision in connection with a size or NAICS code appeal. SBA is amending its regulations to require OHA to issue size appeal decisions within 60

business days of the close of the record, if possible, and render NAICS code appeal decision as soon as practicable.

The final rule will require the contracting officer to update Federal procurement databases to reflect final agency status determinations.

b. 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 entities that may be affected by the final 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 apply only to for-profit business concerns. Therefore, this final rule (like the regulation currently in effect) will not impact small organizations or small governmental jurisdictions.

The final rule will have no direct negative impact on any small business concern, since it is aimed at preventing other than small concerns from receiving or performing contracts set aside for small business concerns. The final rule will indirectly benefit small business concerns by preventing awards to ineligible concerns, or shortening the length of time other than small concerns perform small business set-aside contracts. SBA maintains an internal database of all size protest processed by the agency and the following table was constructed to illustrate the number of protest processed in the last five fiscal years.

Size protests	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Total Determinations Requested	459	593	451	493	488
Cases Dismissed	122	139	131	104	146
Determined Small Business	190	219	193	200	207
Determined Other Than Small	115	163	119	115	128
Cases in Process/Other Determinations	32	72	8	74	7

There are more than 330,000 concerns listed as small business concerns in the Dynamic Small Business Search of the Central Contractor Registration database. Based on data for fiscal years 2005–2009, SBA processes an average of nearly 500 size protests each fiscal year, resulting in 41 percent being determined to be small and 26 percent determined to be other than small. The rest are dismissed on procedural grounds. Thus, the number of concerns

affected by this rule, regardless of size, will be approximately 330 per year, as compared to 330,000 small business concerns that are active in the Federal Government marketplace. The number of protests in other small business programs is significantly less than the numbers of size protests received.

c. Projected Reporting, Recordkeeping and Other Compliance Requirements

This final rule would not impose any new information collection requirement on small businesses. This final rule will require contracting officers to update Federal procurement databases to reflect final agency status decisions. Contracting officers should currently be updating these databases, and this rule will make it clear that this must be done.

d. Steps Taken to Minimize the Significant Economic Impact on Small Entities

This final rule should not result in a significant economic impact on small entities. This final rule will extend the timeframe SBA has for determining size of an entity resulting from a size protest. The addition of the five business days will allow SBA more time to adequately review the documentation needed to render a decision and will make SBA's regulations consistent across programs. The timeframe imposed on OHA for rendering decision resulting from appeals should minimize the economic impact on small entities by providing a decision in a timely manner.

e. Conclusion

Based on the foregoing, SBA has determined that this final rule will not have a significant impact on a substantial number of small entities with the meaning of the RFA.

List of Subjects in 13 CFR Parts 121, 124, 125, 126, and 134

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

For the reasons stated in the preamble, SBA amends parts 121, 124, 125, 126, and 134 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, 634(b)(6), 636(b), 637(a), 644, 662(5) and 694a; Public Law 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

Subpart A—Size Eligibility Provisions and Standards

§ 121.402 [Amended]

■ 2. Amend § 121.402(b) by removing the third sentence.

§ 121.404 [Amended]

■ 3. Amend § 121.404(a) by removing the second sentence.

■ 4. Amend § 121.1009 by revising paragraphs (a), (g)(1), (g)(2), (g)(3), and (h) to read as follows:

§ 121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* (1) After receipt of a protest or a request for a formal size determination, the SBA Area Office will

issue a formal size determination within 15 business days, if possible.

(2) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(3) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

* * * * *

(g) * * *

(1) A contracting officer may award a contract to a protested concern after the SBA Area Office has determined either that the protested concern is an eligible small business or has dismissed all protests against it. If OHA subsequently overturns the Area Office's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the Area Office has determined is not an eligible small business for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the size determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency size decision (the formal size determination if no appeal is filed or the appellate decision).

* * * * *

(h) *Limited reopening of size determinations.* SBA may, in its sole discretion, reopen a formal size determination to correct an error or mistake, provided it is within the appeal

period and no appeal has been filed with OHA. Once the agency has issued a final decision (either a formal size determination that is not timely appealed or an appellate decision), SBA cannot re-open the size determination.

■ 5. Amend § 121.1101 by revising paragraph (b) to read as follows:

§ 121.1101 Are formal size determinations subject to appeal?

* * * * *

(b) OHA will review all timely appeals of size determinations.

■ 6. Amend § 121.1103 as follows:

- a. Revise the section heading;
- b. In paragraph (a), add a new sentence after the first sentence and before the second sentence;
- c. Revise paragraph (b)(1);
- d. Remove paragraphs (b)(4), and (b)(5); and
- e. Add new paragraph (c).

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

(a) * * * A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code or there is a question as to the size standard in effect at the time the solicitation was issued or amended.

* * *

(b) * * *

(1) An appeal from a contracting officer's NAICS code or size standard designation must be served and filed within 10 business days after the issuance of the solicitation or amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due. OHA will summarily dismiss an untimely NAICS code appeal.

* * * * *

(c) *Procedure after a NAICS code appeal is filed and served.*

(1) Upon receipt of the service copy of a NAICS code appeal, the contracting officer shall:

- (i) Stay the solicitation;
- (ii) Advise the public, by amendment to the solicitation or other method, of the existence of the NAICS code appeal and the procedures and deadline for interested parties to file and serve arguments concerning the appeal;
- (iii) Send a copy of (or an electronic link to) the entire solicitation, including amendments, to OHA;
- (iv) File and serve any response to the appeal prior to the close of the record; and
- (v) Inform OHA of any amendments, actions or developments concerning the procurement in question.

(2) Upon receipt of a NAICS code appeal, OHA shall:

(i) Notify the appellant, the contracting officer, the SBA and any other known party of the date OHA received the appeal and the date the record will close; and

(ii) Conduct the appeal in accordance with part 134 of this chapter.

(3) Any interested party may file and serve its response to the NAICS code appeal.

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

■ 7. The authority citation for part 124 continues to read as follows:

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. 100–656, Pub. L. 101–37, Pub. L. 101–574, and 42 U.S.C. 9815.

Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs

■ 8. Amend § 124.1013 as follows:

- a. Remove the second sentence in paragraph (a);
- b. Revise paragraph (b);
- c. Revise paragraph (d)(1);
- d. Revise paragraphs (h)(1) and (h)(2); and
- e. Add new paragraphs (h)(3) and (h)(4).

§ 124.1013 How does SBA make disadvantaged status determinations in considering an SDB protest?

* * * * *

(b) *Award of contract.* (1) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (h) of this section apply to the procurement in question.

(2) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (h) of this section apply to the procurement in question.

* * * * *

(d) * * *

(1) Except with respect to a concern which is a current Participant in SBA's 8(a) BD program and is authorized

under § 124.1013(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protested concern, SBA or others.

* * * * *

(h) * * *

(1) A contracting officer may award a contract to a protested concern after the DC/SDBCE has determined either that the protested concern is an eligible SDB or has dismissed all protests against it. If the AA/GCBD subsequently overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the DC/SDBCE has determined is not an eligible SDB for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If the AA/GCBD affirms the initial determination finding that the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency SDB decision (the decision of the AA/SDBCE if no appeal is filed or the decision of the AA/GCBD).

(4) A concern found to be ineligible is precluded from applying for SDB certification for 12 months from the date of the final agency decision (whether by the DC/SDBCE, without an appeal, or by the AA/GCBD on appeal). A concern found to be ineligible is also precluded from representing itself as an SDB for a subcontract unless it overcomes the reasons for the protest (e.g., it changes its ownership to satisfy the definition of an SDB set forth in § 124.1002).

§ 124.1014 [Amended]

■ 9. Amend § 124.1014 by removing paragraph (f) and redesignating paragraphs (g) through (i) as paragraphs (f) through (h), respectively.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 10. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644 and 657(f).

Subpart D—Protests Concerning SDVO SBCs

■ 11. Amend § 125.27 by revising paragraphs (e) and (g) to read as follows:

§ 125.27 How will SBA process an SDVO protest?

* * * * *

(e) *Award of contract.* (1) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(2) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

* * * * *

(g) *Effect of determination.* (1) A contracting officer may award a contract to a protested concern after the Director, Office of Government Contracting (D/GC) has determined either that the protested concern is an eligible SDVO or has dismissed all protests against it. If OHA subsequently overturns the D/GC's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the D/GC has determined is not an eligible SDVO for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the D/GC's determination finding the protested concern ineligible, the contracting

officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency decision (the D/GC's decision if no appeal is filed or OHA's decision).

(4) A concern found to be ineligible may not submit an offer as an SDVO SBC on a future procurement unless it demonstrates to SBA's satisfaction that it has overcome the reasons for the protest (e.g., it changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8) and SBA issues a decision to this effect.

■ 12. Revise § 125.28 to read as follows:

§ 125.28 What are the procedures for appealing an SDVO status protest?

The protested concern, the protester, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter.

PART 126—HUBZONE PROGRAM

■ 13. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), and 657a.

Subpart H—Protests

■ 14. Amend § 126.803 by revising paragraphs (b)(2) and (b)(3), redesignating paragraph (d) as paragraph (d)(1), and adding new paragraphs (d)(2), (d)(3), (d)(4) and (d)(5) to read as follows:

§ 126.803 How will SBA process a HUBZone status protest?

* * * * *

(b) * * *

(2) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (d) of this section apply to the procurement in question.

(3) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (d) of this section apply to the procurement in question.

* * * * *

(d) * * *

(2) A contracting officer may award a contract to a protested concern after the D/HUB has determined either that the protested concern is an eligible HUBZone or has dismissed all protests against it. If the AA/GCBD subsequently overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.

(3) A contracting officer shall not award a contract to a protested concern that the D/HUB has determined is not an eligible HUBZone for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If the AA/GCBD affirms the initial determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(4) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency HUBZone decision (the D/HUB's decision if no appeal is filed or the decision of the AA/GCBD).

(5) A concern found to be ineligible is precluded from applying for HUBZone certification for 12 months from the date of the final agency decision (the D/HUB's decision if no appeal is filed or the decision of the AA/GCBD).

§ 126.805 [Amended]

■ 15. Amend § 126.805 by removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 16. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 637(m), 648(1), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart C—Rules of Practice for Appeals From Size Determinations and NAICS Code Designations

■ 17. Revise § 134.304 to read as follows:

§ 134.304 Commencement of appeals from size determinations and NAICS code designations.

(a) Size appeals must be filed within 15 calendar days after receipt of the formal size determination.

(b) NAICS code appeals must be filed within 10 calendar days after issuance of the solicitation, or amendment to the solicitation affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers or bids are due.

(c) An untimely appeal will be dismissed.

■ 18. Amend § 134.316 by redesignating paragraphs (a), (b), (c), and (d) as paragraphs (c), (d), (e) and (f), respectively, and adding new paragraphs (a) and (b) to read as follows:

§ 134.316 The decision.

(a) The Judge shall issue a size appeal decision, insofar as practicable, within 60 calendar days after close of the record.

(b) The Judge shall issue a NAICS code appeal decision as soon as practicable after close of the record.

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Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

§ 134.504 [Removed and Reserved]

■ 19. Remove and reserve § 134.504.

§ 134.514 [Amended]

■ 20. Amend § 134.514 by removing the second sentence.

§ 134.515 [Amended]

■ 21. Amend § 134.515(b) by removing the word "service" in the second sentence and adding in its place the word "issuance."

Dated: January 25, 2011.

Karen Mills,
Administrator.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2011-0036]

Drawbridge Operation Regulation; Bayou Tigre, Vermillion Parish, LA

AGENCY: Coast Guard, DHS.