

are established for such purposes and that have the following characteristics: (1) The classification of the accounts involved complies with the Board's Regulation D, 12 CFR 204.2(d)(2), (2) the consumer does not have direct access to the non-transaction subaccount that is part of the retail sweep program, and (3) the consumer's monthly statement shows the account balance as the combined balance in the subaccounts.

3◀[2]. *Additional balance.* The institution may disclose additional balances supplemented by funds that may be provided by the institution to cover an overdraft, whether pursuant to a discretionary overdraft service, a service subject to the Board's Regulation Z (12 CFR part 226), or a service that transfers funds from another account held individually or jointly by the consumer, so long as the institution prominently states that any additional balance includes these additional overdraft amounts. The institution may not simply state, for instance, that the second balance is the consumer's "available balance," or contains "available funds." Rather, the institution should provide enough information to convey that the second balance includes these amounts. For example, the institution may state that the balance includes "overdraft funds." Where a consumer ▶ has not opted into, or as applicable, ◀ has opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds [institutions] provided under that service. Where a consumer ▶ has not opted into ◀ [has opted out of] the institution's discretionary overdraft service for some, but not all transactions (e.g., the consumer has ▶ not opted into ◀ [opted out] overdraft services for ATM and ▶ one-time ◀ debit card transactions), an institution that includes ▶ these additional overdraft ◀ funds [from its discretionary overdraft service] in the ▶ second ◀ balance should convey that the overdraft funds are not available for all transactions. For example, the institution could state that overdraft funds are not available for ATM and ▶ one-time (or everyday) ◀ debit card transactions.▶ Similarly, if funds are not available for all transactions pursuant to a service subject to the Board's Regulation Z (12 CFR part 226) or a service that transfers funds from another account, a second balance that includes such funds should also indicate this fact.◀

* * * * *

By order of the Board of Governors of the Federal Reserve System, February 18, 2010.

Jennifer J. Johnson,
Secretary of the Board.

[FR Doc. 2010-3719 Filed 2-26-10; 8:45 am]

BILLING CODE 6210-01-P

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 Protest and Appeal Regulations

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) proposes to amend 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; clarify how a contracting officer assigns a NAICS code and size standard to a multiple award procurement; and make other changes to size status protest and appeal rules.

DATES: Comments must be received on or before March 31, 2010.

ADDRESSES: You may submit comments, identified by RIN: 3245-AF65, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, for paper, disk, or CD-ROM submissions:* Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416.
- *Hand Delivery/Courier:* Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Khem Sharma, Chief, Size Standards Division, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to khem.sharma@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Program Analyst, Size Standards Division, Office of Government Contracting, (202) 205-7189 or at carl.jordan@sba.gov.

SUPPLEMENTARY INFORMATION: SBA is proposing to delete the reference to other factors to be considered when assigning a NAICS code to a procurement in 13 CFR 121.402. SBA's regulations currently provide that a contracting officer should consider the principal purpose of the product or service to be acquired, and that a procurement is usually classified according to the component which accounts for the greatest percentage of contact value. SBA's regulations further provide that contracting officers may consider previous Government procurement classifications of the same or similar products or services and which classification would best serve the purposes of the Small Business Act. SBA believes these additional factors are unnecessary. A repeated error is not persuasive evidence, especially since such classifications are almost never reviewed or challenged. As discussed above, SBA receives very few NAICS code appeals because of the short appeal timelines. Further, it is unclear how a contracting officer can determine which NAICS code and size standard can best serve the purposes of the Small Business Act. Thus, we are proposing to delete reference to prior government classifications and the purpose of the Small Business Act. Each solicitation should be classified based on the principal purpose of that particular solicitation, and the contracting officer only needs to make a reasonable choice.

SBA is proposing to delete a provision in § 121.404 that requires a concern to recertify its size where a solicitation is modified so that initial offers are no longer responsive. Generally, a firm must be small at the time of initial offer,

including price. This rule provides procuring agencies and offerors with finality with respect to eligibility. Some procurements may drag on for several years due to a variety of reasons, including protests, discussions, funding issues, and changes in requirements. Disqualifying an offeror based on whether a procuring agency's requirement changes during the course of a protracted procurement unfairly punishes both the procuring agency and offerors that have expended time and resources pursuing the procurement. Reasonable people may disagree about whether a solicitation has been modified so that initial offers are no longer responsive. For example, in *Size Appeal of Continental Staffing, Inc.*, SBA No. SIZ-4808 (2006) the contracting officer did not request new size certifications and argued that its requirement had not changed so much that initial offers were no longer non-responsive. OHA disagreed and remanded, ordering the Area Office to determine the prospective awardee's size at the time of a revised offer submitted approximately five months after the initial offer, resulting in the firm being ineligible because a more recent year would be used to calculate the firm's size. In SBA's view, if a change in a requirement is drastic enough that all offers are non-responsive, the procuring agency will have to cancel the procurement and issue a new solicitation open to all potential offerors, not just offerors who responded to the now obsolete solicitation. Offerors would then have to submit size certifications along with their initial offer, including price, in response to the new solicitation. SBA recently finalized rules which require re-certification after award to ensure that contracts are properly counted for goaling and statistical purposes. 13 CFR 404(g). In SBA's view, the procurement community is better served if there is a clear bright line for purposes of determining eligibility for award.

SBA is proposing to amend § 121.407 to address how a NAICS code and size standard should be assigned to a multiple award procurement. Agencies frequently acquire diverse goods and services from multiple vendors under contracts awarded pursuant to a single solicitation. SBA's regulations require the contracting officer to assign the single NAICS code to the procurement that best describes the principal purpose of the acquisition. 13 CFR 121.402. The fact that multiple contracts will be awarded under a solicitation does not alter this fundamental principle. Generally, if all awardees will be

eligible to compete for orders, then, just like any other procurement, the solicitation should be assigned the single NAICS code that best describes the principal purpose of the acquisition. However, if a multiple award procurement is divided up into contract line item numbers (CLINs) or special item numbers (SINs), where only awardees under the CLIN or SIN will compete for orders, then each CLIN or SIN should be assigned the single NAICS code that best describes the principal purpose CLIN or SIN. This will ensure that firms that are actually small for the actual work receive the award, and ensure that procuring agencies only receive credit towards their goals for awards to firms that are small for the work to be performed.

SBA is proposing to amend § 121.1009 to provide SBA within 15 business days to decide a size protest. 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 Federal Acquisition Regulation (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).

Under current regulations, after SBA receives a size protest, it notifies the protested concern, and the protested concern is provided 3 business days to respond to the protest and provide information to SBA. Thus, by the time the SBA receives the protested concern's information, SBA generally has approximately 5 business days to write a formal size determination. However, in some cases, protested concerns ask for additional time to submit the required information, such as tax returns or payroll records, corporate organization documentation, and forms detailing ownership interests in other concerns. In some cases, the concern's submission raises additional issues, leading the size specialist to request additional information from the protested concern. Moreover, to draft a decision, size specialists sometimes have to read and analyze voluminous documentation. For example, if a size protest involves allegations of undue or excessive reliance on a subcontractor, a size specialist must thoroughly analyze

the protested concern's proposal and the solicitation to make a determination. Further, a size specialist also may have to conduct legal or other research before a decision can be drafted.

SBA conducted a survey of its six Government Contracting Area Offices and found that, on average, the Area Offices issued size determinations more than 10 business days after receipt 29% of the time. SBA's regulations currently provide SBA with 15 business days to decide other status protests, such as SDB, SDVO, and HUBZone protests. 13 CFR 124.1013(a), 125.27(d), 126.803(b). Formal size determinations are typically more complicated than other small business program eligibility determinations. Increasing the amount of time SBA has to make a size determination will also make SBA's regulations more consistent across all programs, which would be beneficial to all participants in the small business procurement community.

SBA is proposing to amend §§ 121.1009, 121.1013, 125.27 and 126.803 to clarify the effect of protest or appeal decisions on the procurement in question and make the effect more consistent and coherent across small business programs. SBA's size, small disadvantaged business (SDB), Service-Disabled Veteran-Owned (SDVO) and Historically Underutilized Business Zone (HUBZone) regulations contain varied and sometimes inconsistent explanations on how the protest or appeal decision applies to the procurement in question. 13 CFR 121.1004(c), 121.1009(g), 124.1013(h), 124.1014(f), 125.27(g), 126.803(d), 126.805(g), 134.504.

The purpose of the protest and appeal process is to assure that contracts are awarded to eligible concerns. However, the process must be balanced so that it does not impede the procuring agency's ability to accomplish its mission. SBA's size regulations currently provide that a timely filed protest applies to the procurement in question, even if filed after award. 13 CFR 121.1004(c). SBA's regulations further provide that a contracting officer may apply an appellate size decision received after award to the procurement in question, but is not required to do so. SBA's size regulations do not address how a formal size decision or appellate decision applies for goaling purposes, but other program regulations, such as the SDVO regulations, do address the effect of protest and appeal decisions for goaling purposes. 13 CFR 125.27(g). Over the last several years, the U.S. Government Accountability Office (GAO) has sustained bid protests, and in many cases recommended termination, where

a firm was found to be other than small and the decision was received after award. See *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20; *ALATEC Inc.*, B-298730, Dec. 4, 2006, 2006 CPD ¶ 191; *Spectrum Security Services, Inc.*, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227; *Tiger Enterprises, Inc.*, B-293439, B-292815.3, Jan. 20, 2004, 2004 CPD ¶ 19; *Adams Industrial, Inc.*, B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56. In contrast, SBA's regulations specifically provide that a procuring agency need not terminate a contract based on an SDVO protest determination that is received after award. 13 CFR 125.27(g); see *Major Contracting Services, Inc.*, B-400616, Nov. 20, 2008, 2008 CPD ¶ 214; *Veteran Enterprise Technology Services, LLC*, B-298201.2, Jul. 13, 2006, 2006 CPD ¶ 108.

SBA is proposing to specifically address how initial and appellate decisions apply to the procurement in question across all small business programs, including for goaling purposes. If the SBA issues an initial decision that a concern is eligible, the procuring agency may make an award based on that decision, notwithstanding an appeal or notice of an appeal. If the initial decision is overturned on appeal, the procuring agency must apply the decision to the procurement in question for goaling purposes. If the appellate decision is received by the contracting officer after award, the contracting officer may take some action, such as terminating the contract or not exercising options, but will not be required to do so. On the other hand, if the SBA issues an initial decision that a concern is ineligible, award should not be made to that concern, unless and until the decision is overturned on appeal. If award has been made, the procuring agency must take some action if the initial decision is not overturned on appeal, such as terminating the award or not exercising the next option. Further, the contracting officer must apply the final Agency decision to the procurement in question for goaling purposes.

SBA is proposing to amend § 121.1009 to clarify when it will reopen a size determination. Currently, SBA may reopen a size determination to correct an administrative error or clear mistake of fact, provided an appeal has not been filed. If an appeal has been filed, SBA may intervene in the case or request a remand. SBA is proposing to clarify that once the Agency issues a final decision it cannot reopen that decision at a later time. SBA's issuance of its final decision starts the clock for purposes of challenging the final agency decision in a court of law. If SBA could

reopen a final agency decision then no decision could ever be considered final. Moreover, such an action would lead to due process challenges from the parties, who already litigated the matter and received a final agency decision. Thus, SBA is clarifying that if SBA issues a final agency decision and that decision is not timely challenged, that is the end of the matter.

SBA is proposing to amend § 121.1101(b), which prohibits a size appeal where the contract has been awarded and the issues raised in the appeal are contract-specific. SBA believes that an appellate decision should always apply for goaling purposes. In other words, if a firm that has been awarded a contract is found to be other than small, then SBA believes that the procuring agency should not be able to continue to take small business credit for purposes of its small business goals. Further, a contracting officer may take some action based on a negative appellate decision. Consequently, SBA is proposing that OHA accept all size appeals.

SBA is proposing to amend § 121.1103 to clarify that a NAICS appeal includes an appeal involving whether a procuring agency has assigned the correct corresponding size standard to a procurement. SBA is also proposing to increase the amount of time SBA has to file a NAICS code appeal. Currently, a NAICS code appeal must be filed within 10 calendar days after issuance of the initial solicitation. This 10-day time limit also applies to SBA. OHA receives very few NAICS code appeals. On average 10 NAICS code appeals are filed annually. SBA is proposing to amend its regulations to allow SBA to file a NAICS code appeal at any time before offers or bids are due. SBA occasionally receives notice of clearly inappropriate NAICS codes and size standards, but receives the notice well after the 10-day time limit. Size is a function of the work to be performed. A firm can be small in one industry but large in another. Legitimate small business concerns in the particular industry are harmed when a procurement is misclassified because they may not be able to successfully compete with a concern that is actually large for the work to be performed. Further, procurement misclassification degrades the Federal Government's procurement data, in terms of its small business prime contracting goals as well as the dollar value and contract action data for both the misclassified industry and the proper industry.

SBA is also proposing to amend § 121.1103 to require contracting officers to notify the public of the filing

of a NAICS code appeal to ensure that all prospective offerors or bidders have an opportunity to submit evidence or arguments concerning the appropriate NAICS code and size standard. Under SBA's current regulations, if a NAICS code appeal is filed SBA's decision is final, even though prospective offerors other than the appellant may not have received notice of the appeal, and therefore may not have had an opportunity to be heard. In *Advanced Systems Technology, Inc. v. U.S.*, 69 Fed. Cl. 474 (2006) the U.S. Court of Federal Claims enjoined the procuring agency from proceeding with its acquisition after SBA issued a NAICS code appeal decision that a prospective offeror had not known about, and after SBA dismissed the prospective offeror's subsequent NAICS code appeal. This change will ensure prospective offerors are provided due process.

SBA is proposing to amend § 124.1013(d) to correct a typographical error. In addition, as discussed above SBA is proposing to amend §§ 124.1013 and 124.1014 to make the effect of an SDB status and appeal determination consistent with other small business programs.

As discussed above, SBA is proposing to amend §§ 125.27, 125.28 and 134.504 to make the effect of an SDVO status and appeal determination consistent with other small business programs. In addition, SBA is proposing to amend § 125.27 to clarify that a firm found to be ineligible must demonstrate to SBA that it has overcome the reason the firm was found to be ineligible before it can represent itself as an SDVO SBC.

As discussed above, SBA is proposing to amend §§ 126.803 and 126.805 to make the effect of a HUBZone status and appeal determination consistent with other small business programs.

SBA is proposing to amend § 134.304 to require that all size appeals be filed within 15 calendar days after receipt of the formal size determination. Currently, SBA's regulations require a size appeal to be filed within 15 calendar days if the procurement is "pending," and 30 calendar days if the size appeal does not involve a "pending" procurement. The term "pending" is ambiguous and is therefore subject to interpretation, which in turn leads to litigation. It is SBA's view that 15 calendar days is sufficient for any party to file a size appeal.

SBA is proposing to amend § 134.316 to require OHA to issue size appeal decisions within 60 calendar days of the close of the record, if possible. Currently, there are no time limits applicable to rendering size appeal decisions. In a size appeal, the record

generally closes 15 calendar days after the Judge notifies the parties that an appeal has been received, but may be extended at the Judge's discretion. 13 CFR 134.309(b). Since an appellate decision may affect contract award or continued performance, appellate decisions need to be rendered in a timely fashion. SBA is also proposing to amend § 134.316 to require OHA to render a NAICS code appeal decision within 15 calendar days of the close of the record, if possible, to minimize delay to the procurement. Currently, there are no time limits for rendering NAICS code appeal decisions.

SBA is proposing to delete § 134.504 and amend redesignated § 134.513 because the effect of an SDVO status appellate determination is set forth in § 125.27. SBA is proposing to amend redesignated § 134.508 to clarify when OHA will dismiss an SDVO appeal. Finally, SBA is proposing to amend redesignated § 134.514 to make a change to the nomenclature.

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 proposed 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 assist effectively 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 this proposed 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 and NAICS 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 proposed provisions may have cost implications associated with delays to the contracting process. Contracting officers may have to wait an additional 5 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 HUBZone, SDB, or 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.

SBA recognizes that its proposal to assign a NAICS code to each line item of a multiple award contract will require reprogramming of the Federal Procurement Data System-NG (FPDS-NG). Although contracting officers may already be designating NAICS codes to task orders, FPDS-NG only records one NAICS code for the overall contract. However, revisions to FPDS-NG to incorporate NAICS codes by task order may have already begun in response to the November 15, 2006, recertification rule. SBA does not have an estimate of the costs but it believes that they will not be significant because this requirement affects only one field within the database, especially if reprogramming for this feature has already started. Nonetheless, SBA strongly believes the benefits of accurately reflecting small business awards for multiple award contract vehicles that now account for over \$35 billion in federal contracting dollars annually greatly outweighs the programming costs associated with implementing this policy.

3. *What are the alternatives to this proposed rule?*

SBA considered as an alternative completing size determinations within 10 days of receiving all requested information from the protested concern. Although this would also achieve the objective of the proposal, it will create uncertainty as to when a size determination would actually be rendered. If the necessary information requested of a business is received within the 3-day period requested by

SBA, a size determination would be completed within 13 days. However, if the protested concern submits incomplete information, the size determination period would 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 proposed 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 rule, if adopted in final form, would not impose new reporting requirements and would not require new recordkeeping requirements. The proposed rule provides additional time in order for SBA to make its formal size determinations. The proposed rule will impose a 60-day timeframe for issuing size appeal decisions (from the date of close of the record) and a 15-day timeframe for issuing NAICS code appeals (from the date of the close of the record). The rule will also require that all size appeals be filed within 15 calendar days.

Regulatory Flexibility Act

SBA has determined that this proposed rule, if adopted in final form, 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 an Initial Regulatory Flexibility Act (IRFA) analysis addressing the proposed regulation.

IRFA

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 IRFA considers these points and the impact the proposed regulation concerning initial status determinations and appeal decisions 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 3 business days to respond to the protest. Thus, SBA generally has only 5 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.

SBA's regulations provide SBA with 15 business days to decide other 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 draft 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 proposing to amend its regulations to require OHA to issue size appeal decisions within 60 calendar days of the close of the record, if possible, and render NAICS code appeal decisions within 15 calendar days of the close of record, if possible.

The proposed 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 proposed rules, if adopted. 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, the proposed regulation (like the regulation currently in effect) will not impact small organizations or small governmental jurisdictions.

The proposed rule will not directly negatively affect 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 proposed 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 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Total Determinations Requested	356	409	348	459	593	459	374
Cases Dismissed	110	101	95	122	139	110	121
Determined Small Business	161	170	149	190	219	186	225
Determined Other Than Small	85	122	71	115	163	117	123
Cases in Process/Other Determinations	0	16	33	0	72	46	43

There are more than 330,000 concerns listed as small business concerns in the Dynamic Small Business Search of the Central Contractor Registration database. In fiscal year 2008, there were over 8 million small business contract actions. SBA processes an average of 428 size protests each fiscal year resulting in approximately 43 percent being determined to be small and 27 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

290 per year, which is statistically insignificant when compared to the number of small business concerns in the Federal Government marketplace (330,000) or the number of small business contract actions per year (8 million). 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 proposed rule would not impose a new information collection

requirement on small businesses. SBA does not believe that this provision imposes any new record keeping requirements. This proposed 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 proposed rule should not result in a significant economic impact on small entities. This proposed rule will extend the timeframe SBA has for determining size of an entity resulting from a size protest. The addition of the 5 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 proposed rule will not have a significant impact on a substantial number of small entities with the meaning of the RFA. SBA requests comments addressing any of the issues raised in this IRFA, including comments in the economic effect this rule could have on small entities.

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 proposes to amend parts 121, 124, 125, 126, and 134 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

Subpart A—Size Eligibility Provisions and Standards

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637, 644, 662(5) and 694a; Public Law 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

§ 121.402 [Amended]

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

§ 121.404 [Amended]

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

4. Revise § 121.407 to read as follows:

§ 121.407 What are the procedures for multiple award procurements?

(a) Except as set forth in paragraphs (b) and (c) of this section, a solicitation to award multiple task or delivery order contracts should be assigned the single NAICS code and size standard which best describes the principal purpose of the acquisition (*See* § 121.402).

(b) A solicitation to award multiple task or delivery order contracts may be assigned more than one NAICS code or size standard if the solicitation is divided into contract line item numbers (CLINs) where orders will only be awarded or competed amongst concerns that have been awarded contracts for those CLINs. In such a case, the contracting officer must assign to each CLIN the single NAICS code and size standard that best describes the principal purpose of the goods or services acquired under that CLIN. (*See* § 121.402). A concern must meet the applicable size standard to be eligible for award as a small business concern.

(c) A solicitation to award multiple contracts for separate and distinct items, where a bidder may submit an offer on some or all of the items, may be assigned multiple NAICS codes and size standards. In such a case, the contracting officer must assign to each CLIN the single NAICS code and size standard that best describes the principal purpose of the item to be acquired under the CLIN. A concern must meet the applicable size standard to be eligible for award as a small business concern.

5. 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 Area Office will issue a formal size determination within 15 business days, if possible.

(2) If SBA does not issue its determination within the 15-day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision, and may only 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 harm the public interest (*see* paragraph (g) of this section for the effect of a formal size determination or appellate decision).

(3) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to

prevent significant harm to the public interest (*see* paragraph (g) of this section for the effect of a formal size determination or appellate decision).

* * * * *

(g) * * *

(1) A contracting officer may award the contract to a protested concern after the Area Office either has determined 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 may not award the 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 agency decision (either a formal size determination that is not timely appealed or an appellate decision), SBA cannot re-open the size determination.

6. 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 calendar 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 anytime before offers or bids 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 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. Amend paragraph (a) by removing second sentence;
 - 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) If SBA does not issue its determination within the 15-day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision, and may only 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 harm the public interest (*see* paragraph (h) of this section for the effect of an SDB status determination or appellate decision).

(2) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to prevent significant harm to the public interest (*see* paragraph (h) of this section for the effect of an SDB status determination or appellate decision).

* * * * *

(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 it 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 the contract to a protested concern after the DC/SDBCE either has determined that the protested concern is an eligible

SDB or has dismissed all protests against it. If the AA/GC&BD subsequently overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.

(2) A contracting officer may not award the 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/GC&BD 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/GC&BD).

(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 AA/SDBCE, without an appeal, or by the AA/GC&BD 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).

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) If SBA does not issue its determination within the 15-day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision, and may only 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 harm the public interest (*see* paragraph (g) of this section for the effect of an SDVO status size determination or appellate decision).

(2) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to prevent significant harm to the public interest (*see* paragraph (g) of this section for the effect of an SDVO status determination or appellate decision).

* * * * *

(g) *Effect of determination.* (1) A contracting officer may award the contract to a protested concern after the Director, Office of Government Contracting (D/GC) either has determined 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 may not award the 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) and redesignating paragraph (d) as (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) If SBA does not issue its determination within the 15-day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision, and may only 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 harm the public interest (*see* paragraph (d) of this section for the effect of a HUBZone status determination or appellate decision).

(3) The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to prevent significant harm to the public interest (*see* paragraph (d) of this section for the effect of a HUBZone status determination or appellate decision).

* * * * *

(d) * * *

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

(3) A contracting officer may not award the 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/GC&BD 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/GC&BD).

(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/GC&BD).

§ 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. 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), 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 appeal at anytime 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).

§ 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, insofar as practicable, within 15 calendar days after close of the record.

* * * * *

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

§ 134.504 [Removed]

19. Remove § 134.504.

§§ 134.505 through 134.515
[Redesignated as §§ 134.504 through 134.514]

20. Redesignate §§ 134.505 through 134.515 as §§ 134.504 through 134.514, respectively.

21. Amend newly redesignated § 134.508 by revising paragraph (a) to read as follows:

§ 134.508 When will a Judge dismiss an appeal?

(a) The Judge shall dismiss an appeal if:

(1) The appeal is untimely filed pursuant to § 134.503.

(2) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

* * * * *

§ 134.513 [Amended]

21. Amend newly redesignated § 134.513 by removing the second sentence.

§ 134.514 [Amended]

22. Amend newly redesignated § 134.514(b) by removing the word “service” in the second sentence and adding in its place the word “issuance”.

Dated: October 21, 2009.

Karen Mills,
Administrator.

[FR Doc. 2010–3613 Filed 2–26–10; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA–2010–0173; Directorate Identifier 2009–NM–076–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. The existing AD currently requires repetitive inspections to find cracks, fractures, or corrosion of each carriage spindle of the left and right outboard mid-flaps, and corrective action if necessary. The existing AD also currently requires repetitive gap checks of the inboard and outboard carriage of the outboard mid-flaps to detect fractured carriage spindles, and corrective actions if necessary. This proposed AD would require any new or serviceable carriage spindle installed per the requirements of the existing AD to meet minimum allowable diameter measurements taken at three locations. This proposed AD also would require new repetitive inspections, measurements, and overhaul of the carriage spindles, and applicable corrective actions. In addition, this proposed AD would require replacing any carriage spindle when it has reached its maximum life limit. This proposed AD results from reports of fractures that resulted from stress corrosion and pitting along the length of the spindle and spindle diameter, and additional reports of corrosion on the outboard flap carriage spindles. We are proposing this AD to detect and correct cracked, corroded, or fractured carriage spindles, and to prevent severe flap asymmetry, which could result in reduced control or loss of controllability of the airplane.

DATES: We must receive comments on this proposed AD by April 15, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2010–0173; Directorate Identifier 2009–NM–076–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On November 24, 2003, we issued AD 2003–24–08, Amendment 39–13377 (68 FR 67027, December 1, 2003), for all Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. That