

## Regulatory Procedures

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. NCUA considers credit unions having less than ten million in assets to be small for purposes of RFA. Interpretive Ruling and Policy Statement (IRPS) 87-2 as amended by IRPS 03-2. The rule clarifies and expands the lending rules to incorporate recent OGC opinions. NCUA has determined and certifies that this rule will not have a significant economic impact on a substantial number of small credit unions. Accordingly, NCUA has determined that a Regulatory Flexibility Analysis is not required.

### Paperwork Reduction Act

NCUA has determined that the rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget (OMB). NCUA currently has OMB clearance for § 701.21's collection requirements (OMB No. 3133-0139).

### Executive Order 12612

Executive Order 12612 requires NCUA to consider the effect of its actions on state interests. This rule applies to only federally chartered credit unions. NCUA has determined that the final rule does not constitute a "significant regulatory action" for purposes of the Executive Order.

### Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The rule applies only to federal credit unions. NCUA has determined that the amendments to the rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

### Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. NCUA submitted the rule to the Office of Management and Budget, which has determined that it is not major for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

### List of Subjects in 12 CFR Part 701

Credit unions, loans.

By the National Credit Union Administration Board on February 17, 2005.

**Mary Rupp,**

*Secretary of the Board.*

■ Accordingly, the National Credit Union Administration amends 12 CFR part 701 as follows:

### PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789.

■ 2. Amend § 701.21 by revising paragraphs (e), (f) and (g)(1) to read as follows:

#### § 701.21 Loans to members and lines of credit to members.

\* \* \* \* \*

(e) *Insured, Guaranteed and Advance Commitment Loans.* A loan secured, in full or in part, by the insurance or guarantee of, or with an advance commitment to purchase the loan, in full or in part, by the Federal Government, a State government or any agency of either, may be made for the maturity and under the terms and conditions, including rate of interest, specified in the law, regulations or program under which the insurance, guarantee or commitment is provided.

(f) *20-Year Loans.* (1) Notwithstanding the general 12-year maturity limit on loans to members, a federal credit union may make loans with maturities of up to 20 years in the case of:

(i) a loan to finance the purchase of a mobile home if the mobile home will be used as the member-borrower's residence and the loan is secured by a first lien on the mobile home, and the mobile home meets the requirements for the home mortgage interest deduction under the Internal Revenue Code,

(ii) a second mortgage loan (or a nonpurchase money first mortgage loan in the case of a residence on which there is no existing first mortgage) if the loan is secured by a residential dwelling which is the residence of the member-borrower, and

(iii) a loan to finance the repair, alteration, or improvement of a residential dwelling which is the residence of the member-borrower.

(2) For purposes of this paragraph (f), mobile home may include a recreational vehicle, house trailer or boat.

(g) *Long-Term Mortgage Loans.* (1) *Authority.* A federal credit union may make residential real estate loans to members, including loans secured by manufactured homes permanently affixed to the land, with maturities of up to 40 years, or such longer period as may be permitted by the NCUA Board on a case-by-case basis, subject to the conditions of this paragraph (g).

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 134

RIN 3245-AF25

### Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

**AGENCY:** Small Business Administration.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule amends the interim final regulations governing the Service-Disabled Veteran Owned Small Business Concern (SDVO SBC) Program. In particular, this rule clarifies the appeal procedures to the Office of Hearings and Appeals (OHA).

**DATES:** This rule is effective February 24, 2005. Comments must be received on or before March 28, 2005.

**ADDRESSES:** You may submit comments, identified by the RIN number, by any of the following methods: through the Federal rulemaking portal at <http://www.regulations.gov> (follow the instructions for submitting comments); through e-mail at [SDVOSBCProgram@sba.gov](mailto:SDVOSBCProgram@sba.gov) (include RIN number in the subject line of the message); or by mail to Dean Koppel, Assistant Administrator, Office of Policy and Research, 409 3rd Street, SW., Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Administrator, Office of Policy and Research, (202)

205-7322 or at  
SDVOSBCProgram@sba.gov.

**SUPPLEMENTARY INFORMATION:** On May 5, 2004, the U.S. Small Business Administration (SBA or Agency) published in the **Federal Register**, 69 FR 25261, an interim final rule to implement that section of the Veterans Benefits Act of 2003 (VBA), which addressed procurement programs for small business concerns (SBCs) owned and controlled by service-disabled veterans. Specifically, the interim final rule defined the term service-disabled veterans, explained when competition may be restricted to SDVO SBCs, and established procedures for protesting and appealing the status of an SDVO SBC. SBA received 45 comments on the interim final rule. The majority of the commenters fully supported the regulatory amendments. SBA explained these comments in a final rule concerning the SDVO SBC regulations that is being issued simultaneously with this interim rule.

SBA received one comment asking for a clarification of the appeal procedures discussed in part 134. SBA has reviewed the OHA appeal procedures set forth in the interim final rule and agrees that further clarification is necessary. Consequently, SBA has amended the rule to include a separate subpart in 13 CFR part 134 to specifically address appeals of SDVO SBC protest determinations. SBA believes the procedures set forth in this subpart will be easier to follow and provide the necessary due process to protested SDVO SBCs and protesters.

As a result of this amendment to part 134, however, SBA has decided to issue the rule with respect to the OHA appeal procedures as an interim final rule with a request for comments. Thus, interested parties can comment on these new changes to the appeal procedures.

### **I. Justification for Publication as Interim Final Status Rule**

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act and SBA regulations, 5 U.S.C. 553 and 13 CFR 101.108. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish

an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without prior public participation. In this present case, the Agency notes that this procurement program for service-disabled veterans became effective upon enactment of the VBA. The purpose of this procurement program is to assist agencies in achieving the statutorily mandated 3% government-wide goal for procurement from service-disabled veteran-owned SBCs. When drafting the VBA, Congress found that agencies were falling far short of reaching this goal. Consequently, in the legislative history for that Act, Congress specifically urges SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement this procurement program.

Thus, SBA and the Federal Acquisition Regulations (FAR) Council have issued final rules governing the SDVO SBC Program. These final rules address SDVO SBC protest procedures. Because there are now protest procedures in place with respect to SDVO SBCs, it is necessary for SBA to have appeal procedures established as well.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to provide a mechanism to appeal the status of a SDVO SBC. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public interest, as it would delay the delivery of critical assistance to the Federal procurement community by a minimum of three to six months and would require SDVO SBCs to go to another tribunal (*e.g.*, district court) for an SDVO SBC appeal. This could be a financial burden for SDVO SBCs. Although this rule is being published as an interim final rule, comments are hereby solicited from interested members of the public. SBA will then consider these comments in making any necessary revisions to these regulations.

### **II. Justification for Immediate Effective Date of Interim Final Rule**

The APA requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except \* \* \* as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this final

rule effective the same day it is published in the **Federal Register**.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in Paragraph I, Justification of Publication of Interim Final Status Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA also believes, based on its contacts with interested members of the public, that there is strong interest in immediate implementation of this rule. SBA is aware of many procuring activities and business concerns that will be assisted by the immediate adoption of this rule.

### *Section-by-Section Analysis*

SBA has amended part 134 to add a new subpart E, which will specifically address SDVO SBC appeals from protest determinations issued by the Associate Administrator for Government Contracting (AA/GC). According to § 134.501, this will include appeals from determinations by the AA/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

Section 134.501 also explains that except where inconsistent, the provisions in subparts A and B apply to SDVO SBC appeals. This means, for example, that the provisions relating to a requirement for a signature on all submissions and representations in cases before OHA that apply to other types of appeals will also apply to SDVO SBC appeals.

In § 134.502, SBA explains that the protested concern, the protester or the contracting officer (CO) may appeal a protest determination to OHA. SBA has limited the appeal process to those parties that were involved in the protest.

Section 134.503 states that such appeals must be filed within 10 business days after the appellant receives the SDVO SBC protest determination. As explained in § 134.204(b), filing is the receipt of pleadings and other submissions at OHA. SBA believes that 10 business days is ample time for an appeal to be filed, yet still allows for an expeditious appeal process.

In § 134.504, the regulation explains the effects of the appeal on the procurement at issue. For example, the filing of an appeal stays the procurement; however, the CO may award the contract after receipt of the appeal if the CO determines in writing

that an award must be made to protect the public interest. SBA believes that this provision is necessary. If COs did not stay the procurement pending the outcome of the appeal, the appeal process could lose its force and effect.

Section 134.505 sets forth the requirements for an appeal petition as well as who must be served the appeal petition. For example, the petition must state the basis of the appeal as well as other information relating to the procurement. This information is necessary so that the OHA Judge can decide whether the appeal is nonspecific or untimely.

Section 134.506 explains that the service and filing of all pleadings and submissions must meet the requirements of § 134.204, unless otherwise indicated. This keeps the filing and service requirements for OHA proceedings consistent with other appeals, such as size and NAICS appeals.

According to § 134.507, upon receipt of the appeal petition, the AA/GC will transmit the entire protest file to OHA. The protest file will generally contain the CO's referral letter, the protest, SBA's request to the protested concern for a response to the protest, the protested concern's response, and the final determination. The AA/GC will certify and authenticate the protest file. SBA believes that this is the information necessary for the OHA Judge to determine whether the AA/GC's decision was erroneous. SBA notes that the protest file will not be sent to the parties to the appeal because it typically contains confidential information that cannot be disclosed to other parties.

According to § 134.508, the standard of review is whether the AA/GC's protest determination was based on clear error of law or fact. SBA has decided to utilize this standard of review because it is the same standard used for size and North American Industry Classification System (NAICS) appeals and SBA believes that such appeals are similar to SDVO SBC appeals. For example, with respect to status determinations, the AA/GC will review documents from the U.S. Department of Veterans Affairs (VA), U.S. Department of Defense (DoD) and the U.S. National Archives and Records Administration (NARA) to determine whether the SBC owner meets the definition of service-disabled veteran set forth in 13 CFR 125.8. The AA/GC does not question the determination made by either the VA or DoD concerning an individual's status as a service-disabled veteran; rather, the AA/GC will ensure the owner has the appropriate documents from those agencies. The

protest file will contain any such documentation provided by the protested concern. Upon review, the OHA Judge will also look to see if the AA/GC reviewed the appropriate documents, and will not question the determinations made by the VA or DoD. Consequently, the clear error standard is more appropriate for this type of appeal.

Section 134.509 sets forth those instances when a dismissal of an appeal is warranted. That section provides that the OHA Judge will dismiss an appeal when it fails to allege facts that if proven to be true would warrant reversal of the protest determination; when the appeal petition does not contain all of the information required by § 134.505; the appeal has not been filed on time; or the matter has been decided or is the subject of adjudication before a court of competent jurisdiction.

Section 134.510 explains who may file a response to the appeal petition. The regulation provides that any person served with an appeal petition may file a response. This regulation does not require such parties to file a response; rather, it gives them the discretion to do so. However, if a party does decide to file a response, it must be filed within 7 business days after the service of the appeal petition. This 7-day deadline is necessary to expedite the appeal process. In addition, SBA believes that further time for the filing of a response is unnecessary because most of the issues will have already been addressed at the protest level.

Section 134.511 provides that an OHA Judge will not permit discovery and no oral hearings will be held. In a similar vein, § 134.512 provides that the Judge may not admit evidence beyond the written protest file. SBA believes that the appeal procedures should be quick, since the protest and appeal trigger a stay of the procurement. If discovery and further evidence were permitted, this would lengthen the appeal process. In addition, because the standard of review is clear error of fact or law, the OHA Judge only needs to review only the written protest file to make his or her determination on appeal.

Section 134.513 explains that the record will close when all pleadings have been submitted. This means the record closes when all responses to the appeal have been filed in accordance with § 134.510. This is important because according to § 134.514, the Judge will issue a decision within 15 business days after the close of the record.

Section 134.515 explains the effects of the Judge's decision. All decisions by the OHA Judge are final and binding on the parties. In addition, in accordance

with § 125.28, if the contract has already been awarded and on appeal the OHA Judge affirms that the SDVO SBC does not meet a status or ownership and control requirement set forth in these regulations, then the procuring agency cannot count the award as an award to an SDVO SBC and therefore must revise the contract award data to reflect the appropriate status of the awardee. Further, the protested concern cannot self-represent its status as an SDVO SBC for another procurement until it has cured the eligibility issue. If a contract has not yet been awarded and on appeal the OHA Judge affirms that the protested concern does not meet the status or ownership and control requirement set forth in these regulations, then the protested concern is ineligible for that specific SDVO SBC contract award.

Section 134.515 also provides that the Judge may reconsider his or her decision and any party who has appeared in the proceeding (e.g., submitted a protest or other pleading to OHA) or SBA (even if SBA has not appeared in the proceeding) may request a reconsideration. The request for reconsideration must show an error of fact or law material to the decision. SBA has allowed for a reconsideration process because one exists for other types of appeals and SBA believes that it provides SBCs another opportunity for administrative recourse.

In addition, § 134.515 explains that the Judge may remand a proceeding to the AA/GC for a new SDVO SBC status protest determination if the latter fails to address issues of decisional significance sufficiently, does not address all the relevant evidence provided during the protest procedures or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed.

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

SBA has determined that this final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

This action meets applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

This regulation will not have substantial direct effects on the States,

on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA determines that this final rule has no federalism implications warranting preparation of a federalism assessment.

Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act analysis.

OMB has determined that this rule constitutes a "significant regulatory action" under Executive Order 12866. The regulatory impact analysis is set forth below.

## Regulatory Impact Analysis

### A. General Considerations

#### 1. Is There a Need for the Regulatory Actions?

Yes. SBA is statutorily authorized to administer the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program. The SDVO SBC Program is established pursuant to Public Law 108-183, the Veterans Benefits Act of 2003. Section 308 of that law amended the Small Business Act to establish a procurement program for SBCs owned and controlled by service-disabled veterans. This procurement program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs if certain conditions are met. The VBA also provides that SBA may verify the eligibility of any SDVO SBC.

SBA has issued regulations implementing this procurement program for service-disabled veterans. Those regulations address protest procedures, which is how SBA has decided to verify eligibility for SDVO SBCs. The regulations issued today will implement the appeal procedures to provide protesters and protested concerns an administrative avenue in which to appeal a protest determination. Consequently, SBA believes that this regulation is necessary and that it must be implemented as quickly as possible.

#### 2. Alternatives

SBA must implement this appeal procedures program through regulations. There are no practical alternatives to the implementation of this rule. Issuance of policy directives, for example, which are not generally published material like regulations, would hinder a SBC's access to this needed information. In addition, all of SBA's appeal procedures are set forth by regulation in part 134 and there is no

reason why appeals for SDVO SBCs should be located in any other place.

One alternative SBA did consider for SDVO SBCs was proposing a certification program, similar to its 8(a) Business Development and HUBZone Programs. The statute implementing those programs discusses certain certification and program procedures. SBA did not believe such a certification program was necessary to implement the VBA or was required by the VBA. Rather, the SDVO SBC will be able to self-represent its status to the contracting activity as part of its offer. The contracting officer, SBA, or other SDVO SBCs may protest this representation. If the protest is specific, SBA will review the protested firm to determine whether it meets the program's requirements. SBA uses a similar protest procedure for small business set-asides. SBA believes that it is necessary to provide the parties with the appeal process set forth in this rule. This appeal process will allow for an administrative means to appeal the protest decision. The alternative to not having an administrative appeal process is to have the parties appeal the decision to a court of competent jurisdiction. However, because it is typically less costly to use the administrative appeal process rather than going to court, SBA has issued regulations on an appeal process for SDVO SBCs.

### B. Potential Benefits and Costs of This Regulation

SBA does not have sufficient data to establish a baseline to measure the costs and benefits of their rule. SDVO SBCs will be the primary beneficiaries of this rule. Specifically, 15 U.S.C. 664(g), (502(b), Pub. L. 106-50, August 17, 1999), established a 3 percent prime contracting and subcontracting goal for SDVO SBCs for Federal contracting. This statutory provision did not, however, establish a procurement mechanism to encourage contracting activities to award contracts to SDVO SBCs. On December 16, 2003, Pub. L. 108-183, the VBA, was signed into law by the President. Section 308 of the VBA revised the Small Business Act to add new section 36 (15 U.S.C. 657f), a procurement program for SDVO SBCs. This program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs if certain conditions are met. SBA cannot accurately determine how many concerns will be competing for SDVO SBC contract awards because there is insufficient data on SDVO SBCs ready and able to perform on a government contract to support a reasonable

estimate. However, a review of the data available from several different sources evidences the following.

According to the VA, there were 2.5 million veterans with a service connected disability. (See <http://www.va.gov/vetdata/demographics/index.htm>.) However, the data does not tell us how many of those veterans own a small business concern that would qualify for the program. Thus, SBA looked at data available from the state of California, the only state that has a similar SDVO SBC Program. (See <http://www.ca.gov>.) In Fiscal Year (FY) 2001, California awarded contracts to 832 Disabled Veteran Business Enterprises (DVBEs). In FY 2002, California awarded 2.8% of all State contract actions to 973 DVBEs. The dollar value of contract awards for 2001 and 2002 was not readily available. In FY 2003, California awarded \$142,670,222, or 2.7% of all State contract actions to DVBEs. California requires DVBE Program participants to be a disabled veteran. SBA could not determine how many DVBEs were small business concerns. SBA welcomes comments discussing other State-level DVBE Programs.

In addition, SBA reviewed the 1992 Economic Census data reported under "Characteristics of Business Owners," the most recent data available. (See <http://www.census.gov>.) This data revealed that disabled veterans represented 1.8% of all businesses, or approximately 310,557 businesses. The U.S. Bureau of the Census did not distinguish between small and large businesses or whether the veteran's disability status was based on a "service-connected" disability as defined in 38 U.S.C. 101. Therefore, SBA also reviewed information contained in the U.S. Department of Defense's Central Contractor Registration (CCR) database. There are 4,825 SDVO SBCs registered in CCR. This represents a small portion, 15.9% of the 30,434 veteran-owned businesses registered in CCR. Again, it is not known what percentage of the service-disabled veterans based their representation on the "service-connected" disability as defined by 38 U.S.C. 101.

Finally, SBA reviewed data from the Federal Procurement Data System. In FY 2001, there were 9,142 contract actions awarded to SDVO SBCs in the amount of \$554,167,000. This represented .25% of all Federal contracts awarded. In FY 2002, 7,131 contract actions were awarded to SDVO SBCs in the amount of \$298,901,000. This represented .13% of all Federal contracts awarded. Although there are over 2 million

service-disabled veterans, only a small portion own small businesses. However, it is assumed that the establishment of a sole source and set-aside procurement vehicle for SDVO SBCs will attract more of these entities to the Federal procurement arena. In addition, according to the data set forth above, few contracts were awarded to SDVO SBCs in the Federal and State arenas. This number could increase as a result of the implementation of the VBA through this regulation. Thus, there is a relatively small percentage of SDVO SBCs (2.4%) registered in the CCR (4,852), as compared to the total number of SBCs (201,742). Consequently, SBA believes that this rule concerning appeal procedures for SDVO SBCs will not have a major impact on SBCs in the Federal procurement arena.

SBA welcomes comments discussing the potential number of concerns that could become eligible under this rule and which could protest and appeal the SDVO SBC status of an apparent awardee.

With respect to who will benefit from this regulation, SBA notes that it believes currently eligible SDVO SBCs will benefit immediately since they are ready and able to tender an offer for a Federal procurement and can therefore protest and appeal an awardee's SDVO SBC status.

SBA estimates that the Federal government will require no additional appropriations for agencies to implement this program. SBA's Office of Government Contracting will handle the protests and SBA's Office of Hearings and Appeals will handle the appeals.

#### List of Subjects in 13 CFR Part 134

Administrative practice and procedure, Claims, Lawyers, Organization and functions (Government agencies).

■ For the reasons set forth in the preamble, amend part 134 of title 13 of the Code of Federal Regulations as follows:

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

■ 1. The authority citation for 13 CFR part 134 continues to read as follows:

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

■ 2. Amend Part 134 by redesignating §§ 134.501 through 134.518 as §§ 134.601 through 134.618 and by redesignating subpart E as subpart F.

■ 3. Add a new subpart E to read as follows:

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

Sec.

- 134.501 What is the scope of the rules in this subpart E?
- 134.502 Who may appeal?
- 134.503 When must a person file an appeal from an SDVO SBC protest determination?
- 134.504 What are the effects of the appeal on the procurement at issue?
- 134.505 What are the requirements for an appeal petition?
- 134.506 What are the service and filing requirements?
- 134.507 When does the AA/GC transmit the protest file and to whom?
- 134.508 What is the standard of review?
- 134.509 When will a Judge dismiss an appeal?
- 134.510 Who can file a response to an appeal petition and when must such a response be filed?
- 134.511 Will the Judge permit discovery and oral hearings?
- 134.512 What are the limitations on new evidence?
- 134.513 When is the record closed?
- 134.514 When must the Judge issue his or her decision?
- 134.515 What are the effects of the Judge's decision?

#### § 134.501 What is the scope of the rules in this subpart E?

(a) The rules of practice in this subpart E apply to all appeals to OHA from formal protest determinations made by the Associate Administrator for Government Contracting (AA/GC) in connection with a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) protest relating to the status or ownership or control of the SDVO SBC, as set forth in § 125.26 of this chapter. This includes appeals from determinations by the AA/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of Subpart A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by Subpart C of this part.

#### § 134.502 Who may appeal?

Appeals from SDVO SBC protest determinations may be filed with OHA by the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

#### § 134.503 When must a person file an appeal from an SDVO SBC protest determination?

Appeals from an SDVO SBC protest determination must be commenced by filing and serving an appeal petition within 10 business days after the appellant receives the SDVO SBC protest determination (*see* § 134.204 for filing and service requirements). An untimely appeal will be dismissed.

#### § 134.504 What are the effects of the appeal on the procurement at issue?

The filing of an SDVO SBC appeal with OHA stays the procurement. However, the contracting officer may award the contract after receipt of an appeal if the contracting officer determines in writing that an award must be made to protect the public interest. A timely filed appeal applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the appeal.

#### § 134.505 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

- (1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;
- (2) A statement that the petition is appealing an SDVO SBC protest determination issued by the AA/GC and the date the petitioner received the SDVO SBC protest determination;
- (3) A full and specific statement as to why the SDVO SBC protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and
- (4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

- (1) The AA/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205-6390;
- (2) The contracting officer responsible for the procurement affected by an SDVO SBC determination;
- (3) The protested concern (the business concern whose SDVO SBC status is at issue) or the protester; and
- (4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205-6873.

(c) *Certificate of Service*. The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

**§ 134.506 What are the service and filing requirements?**

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

**§ 134.507 When does the AA/GC transmit the protest file and to whom?**

Upon receipt of an appeal petition, the AA/GC will send to OHA a copy of the protest file relating to that determination. The AA/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

**§ 134.508 What is the standard of review?**

The standard of review for an appeal of a SDVO SBC protest determination is whether the AA/GC's determination was based on clear error of fact or law. With respect to status determinations on whether the owner is a veteran, service-disabled veteran, or veteran with a permanent and severe disability, the Judge will not review the determinations made by the U.S. Department of Veteran's Affairs, U.S. Department of Defense, or such determinations identified by documents provided by the U.S. National Archives and Records Administration.

**§ 134.509 When will a Judge dismiss an appeal?**

(a) The Judge selected to preside over a protest appeal shall dismiss the appeal, if:

(1) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination;

(2) The appeal petition does not contain all of the information required in § 134.505;

(3) The appeal is untimely filed pursuant to § 134.503 or is not otherwise filed in accordance with the requirements of this subpart or the requirements in Subparts A and B of this part; or

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

(b) Once Appellant files an appeal, subsequent initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

**§ 134.510 Who can file a response to an appeal petition and when must such a response be filed?**

Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. If a person decides to file a response, the response must be filed within 7 business days after service of the appeal petition. The response should present argument.

**§ 134.511 Will the Judge permit discovery and oral hearings?**

Discovery will not be permitted and oral hearings will not be held.

**§ 134.512 What are the limitations on new evidence?**

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto.

**§ 134.513 When is the record closed?**

The record will close when the time to file a response to an appeal petition expires pursuant to 13 CFR 134.510.

**§ 134.514 When must the Judge issue his or her decision?**

The Judge shall issue a decision, insofar as practicable, within 15 business days after close of the record. If OHA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has agreed to wait for a final determination from the Judge.

**§ 134.515 What are the effects of the Judge's decision?**

(a) A decision of the Judge under this subpart is the final agency decision and is binding on the parties. For the effects of the decision on the contract or procurement at issue, please see 13 CFR 125.28.

(b) The Judge may reconsider an appeal decision within 20 calendar days after service of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within 20 calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(c) The Judge may remand a proceeding to the AA/GC for a new SDVO SBC determination if the latter fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new SDVO SBC determination.

Dated: December 1, 2004.

Hector V. Barreto,  
Administrator.

[FR Doc. 05-3445 Filed 2-23-05; 8:45 am]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 522**

**Implantation or Injectable Dosage Form New Animal Drugs; Euthanasia Solution**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an original abbreviated new animal drug application (ANADA) filed by Med-Pharmex, Inc. The ANADA provides for use of an injectable solution of pentobarbital sodium and phenytoin sodium for humane, painless, and rapid euthanasia of dogs.

**DATES:** This rule is effective February 24, 2005.

**FOR FURTHER INFORMATION CONTACT:** Lonnie W. Luther, Center for Veterinary Medicine (HFV-104), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301-827-8549, e-mail: [lonnie.luther@fda.gov](mailto:lonnie.luther@fda.gov).

**SUPPLEMENTARY INFORMATION:** Med-Pharmex, Inc., 2727 Thompson Creek Rd., Pomona, CA 91767-1861, filed ANADA 200-280 that provides for use of EUTHANASIA III (pentobarbital sodium and phenytoin sodium) Solution for humane, painless, and rapid euthanasia of dogs. Med-Pharmex, Inc.'s EUTHANASIA-III Solution is approved as a generic copy of Schering-Plough Animal Health Corp.'s BEUTHANASIA-D Special, approved under NADA 119-807. The ANADA is approved as of February 3, 2005, and the regulations are amended in 21 CFR 522.900 to reflect the approval. The