

Small Business Administration

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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).

(4) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to § 121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small on a pending procurement or on an application for SBA assistance, the concern must immediately inform the officials responsible for the pending procurement or requested assistance of the adverse size determination.

(h) *Limited reopening of size determinations.* SBA may, in its sole discretion, reopen a formal size determination to correct an error or mistake, provided it is within the appeal period and no appeal has been filed with OHA. Once the agency has issued a final decision (either a formal size determination that is not timely appealed or an appellate

decision), SBA cannot re-open the size determination.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 47245, July 18, 2002; 69 FR 29207, May 21, 2004; 76 FR 5683, Feb. 2, 2011; 78 FR 38818, June 28, 2013]

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only. While it is a formal size determination, notice of recertification is required to be given only to the applicant.

APPEALS OF SIZE DETERMINATIONS AND NAICS CODE DESIGNATIONS

§ 121.1101 Are formal size determinations subject to appeal?

(a) Appeals from formal size determinations may be made to OHA. Unless

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an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.

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

[69 FR 29207, May 21, 2004, as amended at 76 FR 5683, Feb. 2, 2011]

§ 121.1102 Are NAICS code designations subject to appeal?

A NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a NAICS code designation may be sought in a court.

[67 FR 47245, July 18, 2002]

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

(a)(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (see part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.

(2) 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 a question relating to the size standard in effect at the time the solicitation was issued or amended.

(b) The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:

(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 any time before offers are due. OHA will summarily dismiss an untimely NAICS code appeal.

(2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.

(ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.

(3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

(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 date for the closing of receipt of offers;

(ii) Advise the public, by amendment to the solicitation or other method, of the existence of the NAICS code appeal and the procedures and deadline for interested parties to file and serve arguments concerning the appeal;

(iii) Send a copy of (or an electronic link to) the entire solicitation, including amendments, to OHA;

(iv) File and serve any response to the appeal prior to the close of the record; and

(v) Inform OHA of any amendments, actions or developments concerning the procurement in question.