

## § 121.1102

## 13 CFR Ch. I (1–1–23 Edition)

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.