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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 134

RIN 3245-AG82

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

AGENCY: U. S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending the rules of practice of its Office of Hearings and Appeals (OHA) to implement section 869 of the National Defense Authorization Act for Fiscal Year 2016 and section 1833 of the National Defense Authorization Act for Fiscal Year 2017. This legislation authorizes OHA to decide Petitions for Reconsideration of Size Standards (Size Standard Petitions or Petitions). This rule also revises the rules of practice for OHA appeals of agency employee disputes.

DATES:

Effective Date: This rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: Size Standard Petitions pertaining to size standards revised, modified, or established in a final rule published during the interval between November 25, 2015, and [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] shall be considered timely if filed within 30 calendar days of the latter date.

FOR FURTHER INFORMATION CONTACT: Linda (Lin) DiGiandomenico, Attorney Advisor, at (202) 401-8206 or OHA@sba.gov.

SUPPLEMENTARY INFORMATION: This rule amends the rules of practice for the SBA's Office of Hearings and Appeals (OHA) in order to implement section 869(b) of the National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, 129 Stat. 726, November 25, 2015 (NDAA 2016). This legislation added new paragraph 3(a)(9) to the Small Business Act, 15 USC 632(a)(9), to authorize OHA to hear and decide Petitions for Reconsideration of Size Standards (Size Standard Petitions or Petitions). A Size Standard Petition may be filed at OHA after SBA publishes a final rule in the Federal Register to revise, modify, or establish a size standard. This rule creates a new subpart I in OHA's regulations (13 CFR part 134) to set out detailed rules of practice for Size Standard Petitions, revises OHA's general rules of practice in subparts A and B of part 134 as required by the new legislation, and amends SBA's small business size regulations (13 CFR part 121) to include Size Standard Petitions as part of SBA's process for establishing size standards.

This rule also revises the rules of practice for OHA appeals of agency employee disputes in subpart H of part 134, to comport with SBA's revisions of its Standard Operating Procedure (SOP) 37 71, The Employee Dispute Resolution Process.

On October 7, 2016, SBA published in the Federal Register (81 FR 69723), a proposed rule to implement section 869(b) of NDAA 2016 and to revise procedures for OHA appeals of agency employee disputes. The proposed rule provided a 60-day comment period, with comments due on December 6, 2016. During the comment period SBA received three comments, each of which concerned the implementation of section 869(b). No comments were received concerning employee disputes.

On December 23, 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017, Public Law 114-328 (NDAA 2017). Section 1833(b) of NDAA 2017 added new subparagraph 3(a)(9)(E) to the Small Business Act, 15 USC 632(a)(9)(E). This provision authorizes OHA to accept Size Standard Petitions after SBA issues rules or guidance for processing these cases; SBA is issuing those procedural rules today, in this final rule. Until this final rule, SBA had no specific rules or guidance for processing Size Standard Petitions, and thus OHA dismissed without prejudice the Size Standard Petitions that were filed. This new statutory provision also provides that Size Standard Petitions pertaining to size standards revised, modified, or established in a final rule published during the interval between November 25, 2015, and the effective date of this final rule will be considered timely if filed within 30 calendar days of that effective date.

Summary of Comments and SBA's Response

A. Part 121

SBA proposed adding new paragraphs (e), (f), and (g) to § 121.102 to include Size Standard Petitions as part of SBA's process for establishing size standards. New paragraph (e) requires SBA to include instructions for filing a Size Standard Petition in any final rule revising, modifying, or establishing a size standard. There were no comments on it and SBA is adopting it exactly as proposed.

New paragraph (f) requires SBA to publish a notice in the Federal Register within 14 calendar days after a Size Standard Petition is filed. SBA received one comment on proposed new § 121.102(f). The commenter requested that SBA also have an online tracking system, preferably on the website regulations.gov, for Size Standard Petitions

filed at OHA. The same commenter also suggested that SBA include information on Size Standard Petitions in the record for the applicable revised, modified, or newly established size standard.

In response, SBA notes that OHA has no online tracking system as yet; however, systems already in place will enable the public to track Size Standard Petition cases. First, notices for Federal Register publication appear automatically on federalregister.gov, and the public may use that site's advanced search feature to locate them. Second, once issued, OHA's decisions are public and available at sba.gov/oha/decisions. Regarding the inclusion of information on Size Standard Petitions in the record for size standards rulemakings, SBA declines to add this requirement, leaving it up to SBA's Office of Size Standards to determine what to include in the rulemaking record for a particular rule. Thus, SBA is adopting the proposed § 121.102(f) as proposed, with one editorial change to the first sentence, where "announcing a size standard" is replaced with "announcing the size standard".

Proposed new paragraph (g) would require SBA to publish a document in the Federal Register where SBA grants a Petition for Reconsideration of a Size Standard that had been revised or modified. There were no public comments on this provision. SBA is changing this provision to clarify that OHA will remand the case to SBA's Office of Size Standards for further action.

B. Part 134, subparts A and B

SBA proposed to revise four sections contained in subparts A and B of part 134. These are §§ 134.101 (Definitions) and 134.102 (Jurisdiction of OHA) in subpart A; and §§ 134.201 (Scope of the rules in this subpart B) and 134.227 (Finality of decisions) in

subpart B. SBA received no comments on any of these sections. SBA added a definition to clarify that Step One and Step Two refer to the Employee Dispute Resolution Process described in SBA Standard Operating Procedure, 37 71, as denoted in § 134.801(a). All other revisions are exactly as proposed.

C. Part 134, subpart H

SBA proposed to revise §§ 134.801, 134.803, 134.804, 134.805, 134.807, 134.808, and 134.809 of subpart H. All of these sections concern OHA appeals of SBA employee disputes. SBA received no comments regarding the proposed revision of any of these sections, and is adopting these revisions exactly as proposed, with three minor changes. In § 134.805(d), the words “at his or her home address” are being removed as unnecessary since service is by email. In § 134.807(a), the words “it wishes” are being replaced with “SBA wishes” for clarity. In § 134.809(a), an official’s title is being corrected.

D. Part 134, subpart I

SBA proposed to add subpart I setting forth the rules of practice before OHA for Petitions for Reconsideration of Size Standards. SBA received no comments regarding the proposed new §§ 134.901 (Scope of the rules in this subpart I), 134.905 (Notice and order), 134.907 (Filing and service), 134.908 (The administrative record), 134.909 (Standard of review), 134.911 (Response to the Size Standard Petition), 134.912 (Discovery and oral hearings), 134.913 (New evidence), 134.914 (The decision), 134.915 (Remand), 134.917 (Equal Access to Justice Act), and 134.918 (Judicial review). SBA is adopting these new sections as proposed, with one minor change to the first sentence in § 134.914, where the second “the” is being deleted.

Proposed § 134.902 provides that any person “adversely affected” by a new, revised, or modified size standard has standing to file a Petition within 30 days from the date of publication of the final rule promulgating that size standard. Paragraph (b) provides that a business entity is not “adversely affected” unless it conducts business in the industry associated with the size standard being challenged, and it either qualified as a small business concern before the size standard was revised or modified, or it would qualify as a small business concern under the size standard as revised or modified.

SBA received two comments. One comment supported the proposed rule because it precludes businesses that are large under both the existing and the modified or revised size standard from filing Size Standard Petitions. The second comment opposed the proposed rule for that same reason, asserting that the statute does not limit the availability of an OHA review only to small or would-be small businesses, but was meant to include all adversely-affected businesses, including large businesses. The second commenter believes that it is adversely affected by a change in a size standard that favors its competitors, and asserts that concerns also should be able to request review on SBA’s decision in a rulemaking not to modify or revise a size standard, but to keep it the same.

SBA disagrees with the second comment. The statute provides that SBA’s OHA, in deciding Size Standard Petitions, “shall use the same process it uses to decide challenges to the size of a small business concern.” Small Business Act section 3(a)(9)(C), 15 U.S.C. 632(a)(9)(C). A challenge to a concern’s small business size status, also called a size protest, occurs when a competitive procurement or order has been restricted to or reserved for small businesses or a particular group of small businesses. The size protest, filed by either a disappointed offeror or the Government, is initially

decided by an SBA Area Office in a size determination which may be appealed to OHA. At both the protest (Area Office) and the appeal (OHA) stages, the process of deciding challenges to a concern's small business size status requires a non-Government person bringing the challenge to have standing as a small business offeror remaining in the competition and still eligible for award. See 13 CFR 121.1001(a)(1) ("Any offeror whom the contracting officer has not eliminated for reasons unrelated to size"), 13 CFR 134.302(a) ("Appeals from size determinations . . . may be filed with OHA by the following, as applicable: Any person adversely affected by a size determination"); Size Appeal of Straughan Environmental, Inc., SBA No. SIZ-5767, at 3 (2016), available at www.sba.gov/oha. Because the statute requires OHA to follow the process used in size challenges, and under the process used in size challenges only a small business has standing to file either a size protest or a size appeal, SBA believes it was the intent of Congress to allow only a small business to file a Size Standard Petition. Therefore, SBA is adopting new § 134.902 exactly as proposed.

Section 134.903(a) reiterates the statutory 30-day deadline for filing a Petition, requires dismissal of an untimely Petition, and clarifies that the days counted are calendar days. Section 134.903(b) requires dismissal as premature a Petition filed in response to a proposed rule. The retention of an existing size standard is not considered to be the revision, modification, or establishment of a size standard and is not subject to these procedures, and so § 134.903(c) requires OHA to dismiss a petition challenging the retention of an existing size standard.

There were two comments. One comment expressed support for the 30-day deadline and summary dismissal provisions. The second comment requested a process

whereby one may comment on and request a review of a size standard change at any time, not just within 30 days of the change, so long as the change has produced a negative financial impact on businesses. SBA notes, with respect to the second comment, that the 30-day deadline for filing a Petition is statutory and thus SBA may not change it. As for opportunities to comment on size standards, there is a public comment period each time SBA publishes a proposed rule, and during this public comment period any person may submit a comment for SBA to consider and address in formulating the final rule. During the public comment period, commenters need not demonstrate standing, and may comment on any size standard being proposed, regardless of whether the proposed rule would modify or revise that size standard. Outside of public comment periods, persons may address their concerns about any size standard at any time to SBA's Size Standards Office pursuant to § 121.102(d). SBA is adopting new § 134.903 exactly as proposed.

Section 134.904 sets out the requirements for a Size Standard Petition. Among these, the Petition must include any public comments the Petitioner had submitted during the rulemaking on the challenged size standard, and the Petitioner also must demonstrate standing for each challenged size standard. One commenter suggested an additional requirement, that the Petitioner must actually have submitted a public comment during the rulemaking. The same commenter also noted its support for the requirement to demonstrate standing for each challenged size standard. SBA disagrees with the suggestion to require the Petitioner to have submitted a public comment during the rulemaking, because this additional requirement would be overly restrictive. Thus, SBA is adopting new § 134.904 as proposed, with the deletion of the unnecessary mail code in § 134.904(d)(1).

Section 134.906 permits interested persons with a direct stake in the outcome of the case to intervene and obtain a copy of the Petition, under a protective order if necessary. One commenter requested SBA to change this provision to require potential intervenors to meet the same standing requirement as petitioners, in order to prevent large businesses from having a “back door” into the size standard review process. SBA disagrees with this comment. The proposed rule requires only “a direct stake in the outcome” and the OHA Judge will make that determination on a case-by-case basis. SBA is adopting new § 134.906 exactly as proposed.

Section 134.910 requires OHA to dismiss a Petition under four scenarios. One commenter stated support for dismissal under those scenarios. SBA is adopting new § 134.910 exactly as proposed.

Section 134.916 sets out the effects of OHA’s decision in a Size Standard Petition case. Paragraph (a) provides that if the challenged size standard is a modified or revised size standard, and OHA grants the Size Standard Petition, SBA will rescind the challenged size standard and restore the prior size standard, which will remain in effect until SBA issues a new size standard. If the challenged size standard is newly established, and OHA grants the Size Standard Petition, the challenged size standard remains in effect. Paragraph (b) provides that if OHA denies a Size Standard Petition, the challenged size standard remains in effect.

One commenter requested clarification of the effect that OHA’s grant of a Size Standard Petition would have on procurement actions. The commenter posed the hypothetical of a concern that is a small business under the revised size standard but is not a small business under the prior size standard. The concern self-certifies as small

under the revised size standard with its initial offer including price. Later, OHA grants a Size Standard Petition and SBA rescinds the revised size standard, restoring the prior size standard, under which that concern is not a small business. Would contract award to that concern as a small business be valid even though the prior size standard has been restored?

SBA responds to this comment by stating that the contract award to that concern as a small business is valid despite SBA's rescission of the revised, higher size standard. This result is consistent with the general rule, stated in § 121.404(a), that a concern's small business eligibility is determined on the self-certification date and is based on the size standard in effect at that time. Thus, the procuring agency may count the award toward its small business goals. On the other hand, if the procuring agency amends the solicitation and requires new self-certifications, those self-certifications will be based on the size standard in effect on the day they are made. SBA is revising the text of § 134.916(a) to clarify the intended effect of an OHA decision granting a Size Standard Petition in light of this public comment, and also to provide that, on remand, SBA may take any appropriate action to rescind the challenged revised or modified size standard. Compliance with Executive Orders 12866, 12988, 13175 and 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

OMB has determined that this rule does not constitute a "significant regulatory action" under Executive Order 12866. This rule is also not a major rule under the Congressional Review Act, 5 U.S.C. 800. This rule establishes the procedures for Petitions for Reconsideration of Size Standards at SBA's Office of Hearings and Appeals

(OHA) and revises procedural rules at OHA for agency employee disputes. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Executive Order 12988

This action meets applicable standards set forth in section 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.

Executive Order 13175

For the purposes of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA has determined that this final rule will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, SBA determines that this final rule does not require consultations with tribal officials or warrant the publication of a Tribal Summary Impact Statement.

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 levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This final rule revises the regulations governing cases before SBA's Office of Hearings and Appeals (OHA), SBA's administrative tribunal. These regulations are procedural by nature. Specifically, the final rule establishes rules of practice for Petitions for Reconsideration of Size Standards (Size Standard Petitions), a new type of administrative litigation mandated by 869(b) of the National Defense Authorization Act for Fiscal Year 2016. This legislation provides a new statutory right to challenge a size standard revised, modified, or established by the SBA through a final rule. Further, this legislation requires OHA to hear any Size Standard Petitions that are filed. This final rule

merely provides the rules of practice for the orderly hearing and disposition of Size Standard Petitions at OHA. While SBA did not anticipate that this final rule would have a significant economic impact on any small business, we did request comments from any small business setting out how and to what degree this final rule would affect it economically. No comments were received regarding RFA issues.

The Small Business Size Regulations provide that persons requesting to change existing size standards or to establish new size standards may address these requests to SBA's Office of Size Standards. 13 CFR 121.102(d). Over the past five years, fewer than ten letters concerning size standards have been submitted per year, supporting SBA's belief that this final rule will not affect a substantial number of small entities. Further, a business adversely affected by a final rule revising a size standard has always had (and would continue to have) the option of judicial review in Federal court, yet the SBA knows of no such lawsuit ever having been filed.

In addition to establishing rules of practice for Size Standard Petitions, this rule revises OHA's rules of practice for SBA Employee Disputes. This rulemaking is procedural, would impose no significant additional requirements on small entities, and would have minimal, if any, effect on small entities.

Therefore, the Administrator of SBA certifies under 5 U.S.C. 605(b) that this final rule does not have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

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

13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and functions (Government agencies).

For the reasons stated in the preamble, the U.S. Small Business Administration amends 13 CFR parts 121 and 134 as follows:

PART 121--SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. Amend § 121.102 by adding paragraphs (e), (f), and (g) to read as follows:

§ 121.102 How does SBA establish size standards?

* * * * *

(e) When SBA publishes a final rule in the Federal Register revising, modifying, or establishing a size standard, SBA will include in the final rule, an instruction that interested persons may file a petition for reconsideration of a revised, modified, or established size standard at SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after publication of the final rule in accordance with 15 U.S.C. 632(a)(9) and part 134, subpart I of this chapter. The instruction will provide the mailing address, facsimile number, and email address of OHA.

(f) Within 14 calendar days after a petition for reconsideration of a size standard is filed, unless it appears OHA will dismiss the petition for reconsideration, SBA will

publish a document in the Federal Register announcing the size standard or standards that have been challenged, the Federal Register citation of the final rule, the assigned OHA docket number, and the date of the close of record. The document will further state that interested parties may contact OHA to intervene in the dispute pursuant to § 134.906 of this chapter.

(g) Where OHA grants a petition for reconsideration of a size standard that had been revised or modified, OHA will remand the case to SBA’s Office of Size Standards for further action in accordance with § 134.916(a) of this chapter.

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

3. The authority citation for part 134 is revised to read as follows:

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

4. Amend § 134.101 by revising the definitions of “AA/OHA” and “Judge” and adding definitions for “Administrative Judge”, “Petitioner”, “Size Standard Petition”, and “Step One and Step Two” in alphabetical order to read as follows:

§ 134.101 Definitions.

* * * * *

AA/OHA means the Assistant Administrator for OHA, who is also the Chief Hearing Officer.

* * * * *

Administrative Judge means a Hearing Officer, as described at 15 U.S.C. 634(i), appointed by OHA to adjudicate cases.

* * * * *

Judge means the Administrative Judge or Administrative Law Judge who decides an appeal or petition brought before OHA, or the AA/OHA when he or she acts as an Administrative Judge.

* * * * *

Petitioner means the person who initially files a petition before OHA.

* * * * *

Size Standard Petition means a petition for reconsideration of a revised, modified, or established size standard filed with OHA pursuant to 15 U.S.C. 632(a)(9) and subpart I of this part.

Step One and Step Two refer to the steps of the Employee Dispute Resolution Process, see § 134.801(a) for more information.

5. Amend § 134.102 by revising paragraphs (r) and (t) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(r) Appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure (SOP) 37 71 (available at <http://www.sba.gov/tools/resourcelibrary/sops/index.html> or through OHA's Website <http://www.sba.gov/oha>) and subpart H of this part;

* * * * *

(t) Petitions for reconsideration of revised, modified, or established size standards pursuant to 15 U.S.C. 632(a)(9).

6. Amend § 134.201 by:

a. Removing the word “and” in paragraph (b)(6);

- b. Redesignating paragraph (b)(7) as paragraph (b)(8); and
- c. Adding a new paragraph (b)(7).

The addition reads as follows:

§ 134.201 Scope of the rules in this subpart B.

* * * * *

(b) * * *

(7) For Size Standard Petitions, in subpart I of this part (§§ 134.901 through 134.918); and

* * * * *

7. Amend § 134.227 by:

- a. Removing the word “and” in paragraph (b)(3);
- b. Redesignating paragraph (b)(4) as paragraph (b)(5); and
- c. Adding a new paragraph (b)(4).

The addition reads as follows:

§ 134.227 Finality of decisions.

* * * * *

(b) * * *

(4) Size Standard Petitions; and

* * * * *

§ 134.801 [Amended]

8. Amend § 134.801 by:

- a. Adding the word “and” at the end of paragraph (b)(9);

b. Removing “; and” at the end of paragraph (b)(10) and adding a period in its place; and

c. Removing paragraph (b)(11).

9. Amend § 134.803 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 134.803 Commencement of appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes).

(a) An appeal from a Step Two decision must be commenced by filing an appeal petition within 15 calendar days from the date the Employee receives the Step Two decision.

(b) If the Step Two Official does not issue a decision within 15 calendar days of receiving the SBA Dispute Form from the Employee, the Employee must file his/her appeal petition at OHA no later than 15 calendar days from the date the Step Two decision was due.

* * * * *

10. Amend § 134.804 by:

a. Revising paragraphs (a)(1), (2), and (3);

b. Adding the word “and” after the semicolon in paragraph (a)(5);

c. Removing paragraph (a)(6);

d. Redesignating paragraph (a)(7) as paragraph (a)(6);

e. Revising paragraph (b)(1);

f. Removing paragraph (c); and

g. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d).

The revisions read as follows:

§ 134.804 The appeal petition.

(a) * * *

(1) The completed SBA Dispute Form;

(2) A copy of the Step One and Step Two decisions, if any;

(3) Statement of why the Step Two decision (or Step One decision, if no Step Two decision was received), is alleged to be in error;

* * * * *

(b) * * *

(1) The Step Two Official;

* * * * *

§ 134.805 [Amended]

11. Amend § 134.805 in paragraph (d) by removing the words “U.S. Mail” and adding in their place the word “email” and removing the words “at his or her home address”.

§ 134.807 [Amended]

12. Amend § 134.807 as follows:

a. By removing from paragraph (a), the words “a copy of the Dispute File” and adding in their place the words “any documentation, not already filed by the Employee, that SBA wishes OHA to consider”;

b. By removing from paragraph (b), the words “15 days” and “45 days” and adding in both their places the words “15 calendar days”; and

c. By removing from paragraph (c), the words “and the Dispute File are normally the last submissions” and by adding in their place the words “is normally the last submission”.

§ 134.808 [Amended]

13. Amend § 134.808(a) by removing the word “AMO’s” and adding in its place the words “Step One or Step Two”.

14. Revise § 134.809 to read as follows:

§ 134.809 Review of initial decision.

(a) If the Chief Human Capital Officer, General Counsel for SBA, or Counsel to the Inspector General (IG) believes OHA’s decision is contrary to law, rule, regulation, or SBA policy, that official may file a Petition for Review (PFR) of the decision with the Deputy Administrator (or IG for disputes by OIG employees) for a final SBA Decision. Only the Chief Human Capital Officer, General Counsel, or Counsel to the IG may file a PFR of an OHA decision; the Employee may not.

(b) To file a PFR, the official must request a complete copy of the dispute file from the Assistant Administrator for OHA (AA/OHA) within five calendar days of receiving the decision. The AA/OHA will provide a copy of the dispute file to the official, the Employee, and the Employee’s representative within five calendar days of the official’s request. The official’s PFR is due no later than 15 calendar days from the date the official receives the dispute file. The PFR must specify the objections to OHA’s decision.

15. Add subpart I to read as follows:

Subpart I--Rules of Practice for Petitions for Reconsideration of Size Standards

Sec.

- 134.901 Scope of the rules in this subpart.
- 134.902 Standing.
- 134.903 Commencement of cases.
- 134.904 Requirements for the Size Standard Petition.
- 134.905 Notice and order.
- 134.906 Intervention.
- 134.907 Filing and service.
- 134.908 The administrative record.
- 134.909 Standard of review.
- 134.910 Dismissal.
- 134.911 Response to the Size Standard Petition.
- 134.912 Discovery and oral hearings.
- 134.913 New evidence.
- 134.914 The decision.
- 134.915 Remand.
- 134.916 Effects of OHA's decision.
- 134.917 Equal Access to Justice Act.
- 134.918 Judicial review.

Subpart I--Rules of Practice for Petitions for Reconsideration of Size Standards

§ 134.901 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to Size Standard Petitions.

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

§ 134.902 Standing.

(a) A Size Standard Petition may be filed with OHA by any person that is adversely affected by the Administrator's decision to revise, modify, or establish a size standard.

(b) A business entity is not adversely affected unless it conducts business in the industry associated with the size standard that is being challenged and:

(1) The business entity qualified as a small business concern before the size standard was revised or modified; or

(2) The business entity qualifies as a small business under the size standard as revised or modified.

§ 134.903 Commencement of cases.

(a) A Size Standard Petition must be filed at OHA not later than 30 calendar days after the publication in the Federal Register of the final rule that revises, modifies, or establishes the challenged size standard. An untimely Size Standard Petition will be dismissed.

(b) A Size Standard Petition filed in response to a notice of proposed rulemaking is premature and will be dismissed.

(c) A Size Standard Petition challenging a size standard that has not been revised, modified, or established through publication in the Federal Register will be dismissed.

§ 134.904 Requirements for the Size Standard Petition.

(a) Form. There is no required form for a Size Standard Petition. However, it must include the following information:

(1) A copy of the final rule published in the Federal Register to revise, modify, or establish a size standard, or an electronic link to the final rule;

(2) A full and specific statement as to which size standard(s) in the final rule the Petitioner is challenging and why the process that was used to revise, modify, or establish each challenged size standard is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, together with argument supporting such allegation;

(3) A copy of any comments the Petitioner submitted in response to the proposed notice of rulemaking that pertained to the size standard(s) in question, or a statement that no such comments were submitted; and

(4) The name, mailing address, telephone number, facsimile number, email address, and signature of the Petitioner or its attorney.

(b) Multiple size standards. A Petitioner may challenge multiple size standards that were revised, modified, or established in the same final rule in a single Size Standard Petition, provided that the Petitioner demonstrates standing for each of the challenged size standards.

(c) Format. The formatting provisions of § 134.203(d) apply to Size Standard Petitions.

(d) Service. In addition to filing the Size Standard Petition at OHA, the Petitioner must serve a copy of the Size Standard Petition upon each of the following:

(1) SBA's Office of Size Standards, U.S. Small Business Administration, 409 3rd Street, S.W., Washington, DC 20416; facsimile number (202) 205-6390; or sizestandards@sba.gov; and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, S.W., Washington, DC 20416; facsimile number (202) 205-6873; or OPLService@sba.gov.

(e) Certificate of service. The Petitioner must attach to the Size Standard Petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.905 Notice and order.

Upon receipt of a Size Standard Petition, OHA will assign the matter to a Judge in accordance with § 134.218. Unless it appears that the Size Standard Petition will be dismissed under § 134.910, the presiding Judge will issue a notice and order initiating the publication required by § 121.102(f) of this chapter; specifying a date for the Office of Size Standards to transmit to OHA a copy of the administrative record supporting the revision, modification, or establishment of the challenged size standard(s); and establishing a date for the close of record. Typically, the administrative record will be due seven calendar days after issuance of the notice and order, and the record will close 45 calendar days from the date of OHA's receipt of the Size Standard Petition.

§ 134.906 Intervention.

In accordance with § 134.210(b), interested persons with a direct stake in the outcome of the case may contact OHA to intervene in the proceeding and obtain a copy of the Size Standard Petition. In the event that the Size Standard Petition contains confidential information and the intervener is not a governmental entity, the Judge may require that the intervener's attorney be admitted to a protective order before obtaining a complete copy of the Size Standard Petition.

§ 134.907 Filing and service.

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

§ 134.908 The administrative record.

The Office of Size Standards will transmit to OHA a copy of the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard by the date specified in the notice and order. The Chief, Office of Size

Standards, will certify and authenticate that the administrative record, to the best of his or her knowledge, is complete and correct. The Petitioner and any interveners may, upon request, review the administrative record submitted to OHA. The administrative record will include the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard.

§ 134.909 Standard of review.

The standard of review for deciding a Size Standard Petition is whether the process employed by the Administrator to revise, modify, or establish the size standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. OHA will not adjudicate arguments that a different size standard should have been selected. The Petitioner bears the burden of proof.

§ 134.910 Dismissal.

The Judge must dismiss the Size Standard Petition if:

(a) The Size Standard Petition does not, on its face, allege specific facts that if proven to be true, warrant remand of the size standard;

(b) The Petitioner is not adversely affected by the final rule revising, modifying, or establishing a size standard;

(c) The Size Standard Petition is untimely or premature pursuant to § 134.903 or is not otherwise filed in accordance with the requirements in subparts A and B of this part; or

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

§ 134.911 Response to the Size Standard Petition.

Although not required, any intervener may file and serve a response supporting or opposing the Size Standard Petition at any time prior to the close of record. SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first. The response must present argument.

§ 134.912 Discovery and oral hearings.

Discovery will not be permitted. Oral hearings will not be held unless the Judge determines that the dispute cannot be resolved except by the taking of live testimony and the confrontation of witnesses.

§ 134.913 New evidence.

Disputes under this subpart ordinarily will be decided based on the pleadings and the administrative record. The Judge may admit additional evidence upon a motion establishing good cause.

§ 134.914 The decision.

The Judge will issue his or her decision within 45 calendar days after close of record, as practicable. The Judge's decision is final and will not be reconsidered.

§ 134.915 Remand.

If OHA grants a Size Standard Petition, OHA will remand the matter to the Office of Size Standards for further analysis. Once remanded, OHA no longer has jurisdiction over the matter unless a new Size Standard Petition is filed as a result of a new final rule published in the Federal Register.

§ 134.916 Effects of OHA's decision.

(a) If OHA grants a Size Standard Petition of a modified or revised size standard, SBA will take appropriate action to rescind that size standard and to restore the one that

was in effect before the one challenged in the Size Standard Petition. The restored size standard will remain in effect until SBA issues a new size standard. The OHA decision does not affect the validity of a concern's size representation made under the challenged size standard prior to the effective date of the SBA action rescinding that challenged size standard. Such a concern remains eligible for award as a small business, and the procuring agency may count the award towards its small business goals. If the procuring agency amends the solicitation and requires new self-certifications, those self-certifications will be based on the size standard in effect on the day those self-certifications are made. If the size standard in question was newly established, the challenged size standard remains in effect while SBA conducts its further analysis on remand.

(b) If OHA denies a Size Standard Petition, the size standard remains as published in the Code of Federal Regulations.

§ 134.917 Equal Access to Justice Act.

A prevailing Petitioner is not entitled to recover attorney's fees. Size Standard Petitions are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.918 Judicial review.

The publication of a final rule in the Federal Register is considered the final agency action for purposes of seeking judicial review.

Dated: May 11, 2017.

Linda E. McMahon,

Administrator.

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