



Billing Code: 8025-01

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 134**

### **RIN 3245-AG87**

## **Rules of Practice for Protests and Appeals Regarding Eligibility for Inclusion in the U.S. Department of Veterans Affairs, Center for Verification and Evaluation Database**

AGENCY: U. S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) is proposing to amend the rules of practice of its Office of Hearings and Appeals (OHA) to implement procedures for protests of eligibility for inclusion in the Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) database, and procedures for appeals of denials and cancellations of inclusion in the CVE database. These amendments would be in accordance with Sections 1832 and 1833 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017).

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG87 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail, Hand Delivery/Courier: Delorice Price Ford, Assistant Administrator for Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to Daniel K. George, Attorney Advisor, Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416, or send an email to [Daniel.George@sba.gov](mailto:Daniel.George@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Daniel K. George, Attorney Advisor, at (202) 401-8200 or [Daniel.George@sba.gov](mailto:Daniel.George@sba.gov).

**SUPPLEMENTARY INFORMATION:**

**Background:**

Sections 1832 and 1833 of the NDAA 2017 authorized the SBA's OHA to determine protests and appeals related to inclusion in the CVE database. In order to implement these sections, this proposed rule would amend OHA's jurisdiction at subparts A and B of 13 CFR part 134 to include protests of eligibility for inclusion in the CVE database and appeals of denials and cancellations of inclusion in the CVE database. In addition, the proposed rule would create a new subpart J in 13 CFR part 134 to set out detailed rules of practice for protests of eligibility for inclusion in the VA CVE database,

and a new subpart K to set out detailed rules of practice for appeals of denials and cancellations of verification for inclusion in the VA's CVE database.

### Section-By-Section Analysis

#### A. 13 CFR part 134 subparts A and B

SBA proposes to amend § 134.102, the rules for establishing OHA jurisdiction, to add protests of eligibility for inclusion in the CVE database and appeals of denials and cancellations of inclusion in the CVE database, as two new types of proceedings over which OHA would have jurisdiction. New § 134.102(u) would allow for protests of eligibility for inclusion in the CVE database. New § 134.102(v) would allow for appeals of denials and cancellations of inclusion in the CVE database.

SBA also proposes to amend § 134.201(b) by adding new paragraphs (8) and (9) to include protests of eligibility for inclusion in the CVE database and appeals of denials and cancellations of inclusion in the CVE database. As a result of these new paragraphs, existing § 134.201(b)(8) would be redesignated as § 134.201(b)(10).

#### B. 13 CFR part 134, subpart J

SBA proposes to add new subpart J, consisting of §§134.1001-1013, in order to conform OHA's rules of practice for protests of eligibility for inclusion in the CVE database (CVE Protests). As a result, the new rules of practice for protests of eligibility for inclusion in the CVE database would mirror SBA's existing rules for protests of service-disabled veteran owned small businesses, found in 13 CFR part 125 subpart D.

Proposed § 134.1001(b) states that the provisions of subparts A and B also apply to protests of eligibility for inclusion in the CVE database. Section 134.1001(c) adds that the protest procedures are separate from those governing Service-Disabled Veteran-

Owned Small Business Concern (SDVO SBC) protests for non-VA procurements, which are subject to 13 CFR part 125. Section 134.1001(d) states that protests of a concern's eligibility for a non-VA procurement as an SDVO SBC are governed by 13 CFR part 125. In addition, § 134.1001(e) specifies that appeals that relate to a determination made by the SBA's Director, Office of Government Contracting (D/GC) are governed by subpart E of 13 CFR part 125.

As proposed in § 134.1002, the Secretary of the VA, or his/her designee, as well as the Contracting Officer (CO) or an offeror in a VA procurement awarded to a small business may file a CVE Protest. A protesting offeror need not be the offeror next in line for award.

Section 134.1003 establishes the grounds for filing a CVE Protest as status, and ownership and control. Paragraph (c) requires the Judge to determine a protested concern's eligibility for inclusion in the CVE as of the date the protest was filed.

Section 134.1004(a) establishes the deadlines for filing a CVE Protest, which is at any time for the Secretary of the VA and any time during the life of a contract for the CO. Paragraph (a)(2)(i) instructs that an offeror must file its protest within five days of being notified of the identity of the apparent awardee. Paragraphs (a)(3) and (4) indicate the rule for counting days and that any untimely protest will be dismissed. Paragraph (b) describes the methods for filing a CVE Protest by interested parties. A CVE Protest brought by an offeror is filed with the CO, who then forwards the protest to OHA.

Section 134.1005 specifies the contents that every CVE Protest must have. Paragraph (b) would require a protective order be requested within five days of a protest being filed.

Section 134.1006 would apply the servicing and filing requirements found at § 134.204.

Section 134.1007 would establish the process of CVE Protests as follows:

Paragraph (a) would require OHA to issue a notice and order if the protest is found to be timely, specific, and based on protectable allegations; paragraph (b) would require dismissal of a protest if the Judge determines the protest to be premature, untimely, nonspecific, or based on non-protestable allegations; paragraph (c) would require the Director of the CVE (D/CVE) to send the case file to OHA by the deadline specified in the notice and order; paragraph (d) describes the process for requesting a protective order; paragraph (e) allows for supplemental arguments after a protester reviews the CVE case file; paragraph (f) allows for a response to a protest within 15 days of the date the protest was filed; and paragraph (g) would require the Judge to base the decision on the case file and information provided by the parties or information requested by the Judge. The Judge may also investigate issues beyond those raised by the parties. Paragraph (h) proposes to allow a CO to award the contract after a protest is filed but before a decision is reached if the CO determines the public interest will be protected and notifies the Judge of his/her decision; paragraph (i) would require OHA to serve all parties with the decision, which would be considered a final agency decision; finally, paragraph (j) stipulates the effects of the decision upon the protested concern and the contract at issue.

Section 134.1008 prohibits discovery in CVE Protest proceedings.

Section 134.1009 allows for oral hearings only in extraordinary circumstances, as found by the Judge, and establishes that if a hearing is allowed, it would be conducted in accordance with the rules of practice in subpart B of Part 134.

Section 134.1010 establishes the standard of review as preponderance of the evidence, in which the burden of proof falls on the protested firm, not the protester.

Section 134.1011 specifies that the Judge will give greater weight to specific, signed, factual evidence than to unsupported allegations and opinions, and provides that the Judge may draw an adverse inference from failure to produce relevant information.

Section 134.1012 applies the provisions of § 134.225 where relevant.

Under § 134.1013, there will be no appeal of OHA's decision on a CVE Protest. However, paragraph (a) allows for the Judge to reconsider a CVE Protest decision if a party to the proceeding files a petition for reconsideration within twenty (20) calendar days after issuance 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. Paragraph (b) states that if the Judge reverses the initial decision on reconsideration, the CO must comply with § 134.1007(j) in applying the new decision's results.

#### C. 13 CFR part 134, subpart K

The rule proposes a new subpart K to cover the procedures for filing appeals of denials and cancellations of verification for inclusion in the VA CVE database (CVE Appeals). Section 134.1101 states that the provisions of subparts A and B also apply to CVE Appeals. Section 134.1101(c) adds that the appeal procedures for CVE Appeals are separate from those governing SDVO SBC status appeals based on D/GC determinations, which are subject to 13 CFR 134 subpart E. Paragraph (d) states that protests of a concern's eligibility for inclusion in the VA's CVE database are governed by 13 CFR 134 subpart J.

Section 134.1102 establishes standing to file a CVE Appeal upon a concern that has been denied verification of its CVE status or had its CVE status cancelled.

Section 134.1103 permits CVE Appeals to OHA as long as the denial or cancellation was not based on the concern's failure to meet any veteran or service-disabled veteran eligibility criteria.

Section 134.1104 requires CVE Appeals to be filed within 10 business days of being notified that the CVE status has been denied or cancelled. Paragraph (b) establishes the rules for counting days as those in § 134.202(d). Paragraph (c) requires OHA to dismiss any untimely appeal.

Section 134.1105(a) requires the appeal petition to include a copy of the denial or cancellation, a statement as to why the cancellation or denial is in error, any information the appellant believes the Judge should consider, and the name, address, telephone number, facsimile number, and signature of appellant or its attorney. Paragraph (b) requires that the appellant serve copies of the appeal upon the D/CVE and VA counsel. Paragraph (c) requires all appeal petitions to include a certificate of service that meets the requirements of § 134.204(d). Paragraph (d) allows the Judge to dismiss appeal petitions that do not meet all the requirements of § 134.1105.

Section 134.1106 applies the provisions in § 134.204 regarding the service and filing requirements of all pleadings and submissions allowed under 13 CFR part 134, subpart K.

Section 134.1107 requires the D/CVE to send OHA the entire case file relating to the denial or cancellation, by the deadline specified in the notice and order. The case file

must be authenticated and certified that it is the true and correct copy of the case file, to the best knowledge of the D/CVE.

Section 134.1108 would permit a response to the appeal petition. Paragraph (a) allows the D/CVE, or his/her designee, or VA counsel, to respond to the appeal.

Paragraph (b) establishes the close of record as 15 days after the Judge issues a notice and order informing all parties of the filing of the appeal. The notice and order would establish the date all responses to the appeal petition would be due. Paragraph (c) requires all respondents to serve their response upon all parties identified in the certificate of service attached to the appeal petition, as required by § 134.1105. Paragraph (d) prevents a reply to a response, unless allowed by the Judge.

Section 134.1109 does not allow for discovery or oral hearings in CVE Appeals.

Section 134.1110 prevents new evidence in CVE Appeals, unless good cause is shown.

Under § 134.1111, the standard of review for CVE Appeals would be whether the denial or cancellation by the D/CVE was based on clear error of fact or law, which the appellant would have the burden of proof.

Under § 134.1112(a), the Judge will decide a CVE Appeal, if practicable, within 60 calendar days after the close of record. Paragraph (b) requires the decision to contain findings of fact and conclusions of law, and any reasons for those findings and conclusions, and any relief so ordered. Paragraph (c) requires decisions to be based primarily on the evidence in the CVE case file, and arguments made during the appeal process. The Judge will, however, have the ability to consider issues that are beyond those raised by any pleading or in the denial or cancellation letter. Paragraph (d)

establishes a Judge's decision as the final agency decision, becoming effective immediately. If OHA dismisses an appeal of a D/CVE denial or cancellation, the D/CVE determination remains in effect. Paragraph (e) requires OHA to serve a copy of the decision on all parties, or their counsel if represented. Paragraph (f) stipulates that if the appeal is granted and the appellant is found eligible for inclusion in the CVE database, the D/CVE must reinstate or include the appellant in the CVE database immediately. Paragraph (g) allows any party that has appeared in the proceeding, or the Secretary of VA or his or her designee, to file a petition for reconsideration. The petition must be filed within twenty (20) calendar days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

Compliance with Executive Orders 12866, 12988, 13132, 13771, and 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 proposed rule would amend the rules of practice for the SBA's OHA in order to implement procedures for protests of eligibility for inclusion in the CVE database and appeals of denials and cancellations of inclusion in the CVE database. 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 or VA. 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 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.

#### Executive Order 13771

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

#### 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, as amended (RFA), 5 U.S.C. 601-612, requires Federal agencies to prepare an initial regulatory flexibility analysis (IRFA) to consider the potential impact of the regulations on small entities. 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 IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule would revise 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 proposed rule would establish rules of practice for the SBA's OHA in order to implement protests of eligibility for inclusion in the CVE database and appeals of denials and cancellations of inclusion in the CVE database, new types of administrative litigation mandated by sections 1832 and 1833 of the National Defense Authorization Act for Fiscal Year 2017. This legislation provides a new statutory right to challenge eligibility for inclusion in the CVE database, as well as denials and cancellation of inclusion in the CVE database. This proposed rule merely provides the rules of practice at OHA for the orderly hearing and disposition of CVE database inclusion protests and denials and cancellations of CVE database inclusion. While SBA does not anticipate that this proposed rule would have a significant economic impact on any small business, we do welcome comments from any small business setting out how and to what degree this proposed rule would affect it economically. Therefore, the Administrator of SBA certifies under 5 U.S.C. 605(b) that

this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 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, SBA proposes to amend 13 CFR part 134 as follows:

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

1. 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); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

2. Amend § 134.102 by adding paragraphs (u) and (v) to read as follows:

#### **§ 134.102 Jurisdiction of OHA.**

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(u) Protests of eligibility for inclusion in the Department of Veterans Affairs Center for Verification and Evaluation (CVE) database;

(v) Appeals of denials and cancellations of inclusion in the CVE database.

3. Amend § 134.201 by:

- a. Removing the word “and” in paragraph (b)(7);
- b. Redesignating paragraph (b)(8) as paragraph (b)(10);
- c. Adding new paragraphs (b)(8) and (b)(9).

The additions read as follows:

#### **§ 134.201 Scope of the rules in this Subpart B.**

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(b)\*\*\*

(8) For protests of eligibility for inclusion in the Center for Verification and Evaluation (CVE) database, in subpart J of this part;

(9) For appeals of denials and cancellations of inclusion in the CVE database, in subpart K of this part; and

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4. Add subpart J to read as follows:

**Subpart J—Rules of Practice for Protests of Eligibility for Inclusion in the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) Database (CVE Protests)**

Sec.

- 134.1001 Scope of rules.
- 134.1002 Who may file a CVE Protest?
- 134.1003 Grounds for filing a CVE Protest.
- 134.1004 Commencement of CVE Protests.
- 134.1005 Contents of the CVE Protest.
- 134.1006 Service and filing requirements.
- 134.1007 Processing a CVE Protest.
- 134.1008 Discovery.
- 134.1009 Oral hearings.
- 134.1010 Standard of review and burden of proof.
- 134.1011 Weight of evidence.
- 134.1012 The record.
- 134.1013 Request for reconsideration.

AUTHORITY: 38 U.S.C. 8127(f)(8)(B).

**Subpart J—Rules of Practice for Protests of Eligibility for Inclusion in the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) Database (CVE Protests)**

**§ 134.1001 Scope of rules.**

(a) The rules of practice in this subpart J apply to Department of Veterans Affairs (VA) Center for Verification and Evaluation protests (CVE Protests).

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

(c) The protest procedures described in this subpart are separate from those governing protests and appeals of a concern's size or status as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) for a non-Department of Veterans Affairs (non-VA) procurement. All protests relating to whether a veteran-owned concern is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the concern and the concern's eligibility for the CVE database, SBA will process each protest concurrently. All protests relating to a concern's status as a SDVO SBC for a non-VA procurement are subject to part 125 of this chapter and must be filed in accordance with that part. SBA does not review issues concerning contract administration.

(d) Protests of a concern's eligibility for a non-VA procurement as a SDVO SBC are governed by 13 CFR part 125 subpart D.

(e) Appeals relating to determinations made by SBA's Director, Office of Government Contracting regarding SDVO SBC status are governed by subpart E of this part.

(f) Appeals of denials and cancellations of verification for inclusion in the CVE database are governed by subpart K of this part.

**§ 134.1002 Who may file a CVE Protest?**

A CVE Protest may be filed by:

(a) The Secretary of the VA, or his/her designee; or

(b) In the case of a small business that is awarded a contract for a VA procurement, the contracting officer or an offeror.

**§ 134.1003 Grounds for filing a CVE Protest.**

(a) *Status.* In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Judge will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, Department of Defense, or the U.S. National Archives and Records Administration to show that they meet the definition of veteran, service-disabled veteran, or service-disabled veteran with a permanent and severe disability.

(b) *Ownership and control.* In cases where the protest is based on ownership and control, the Judge will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more veterans or service-disabled veterans.

(c) *Date for Determining Eligibility.* The Judge will determine a protested concern's eligibility for inclusion in the CVE database as of the date the protest was filed.

**§ 134.1004 Commencement of CVE Protests.**

(a) *Timeliness.* (1) The Secretary of the VA, or his/her designee, may file a CVE Protest at any time.

(2) Where the CVE Protest is in connection with a VA procurement:

(i) An offeror must file a CVE Protest within five business days of notification of the apparent awardee's identity.

(ii) A contracting officer may file a CVE Protest at any time during the life of the VA contract.

(3) The rule for counting days is in § 134.202(d).

(4) An untimely protest will be dismissed.

(b) *Filing.* (1) *Private Parties.* Interested parties, other than the contracting officer or Secretary of the VA or his/her designee, must deliver their CVE Protests in person, by email, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer.

(2) *Referral to OHA.* The contracting officer must forward to OHA any non-premature CVE Protest received, notwithstanding whether he/she believes it is sufficiently specific or timely. The contracting officer must send all CVE Protests, along with a referral letter, directly to OHA, addressed to Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, by email at OHAfilings@sba.gov, or by facsimile to (202) 205-6390, marked Attn: CVE Protest. The referral letter must include information pertaining to the solicitation that may be necessary for OHA to determine timeliness and standing, including:

(i) The solicitation number;

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer;

(iii) Whether the contract was sole source or set-aside;

(iv) Whether the protester submitted an offer;

(v) Whether the protested concern was the apparent successful offeror;

(vi) Whether the procurement was conducted using sealed bid or negotiated procedures;

(vii) The bid opening date, if applicable;

(viii) When the protest was submitted to the contracting officer;

(ix) When the protester received notification about the apparent successful offeror, if applicable; and

(x) Whether a contract has been awarded.

(3) *Protests filed by Secretary of the VA.* The Secretary of VA or his/her designee must submit his/her CVE Protest directly to OHA in accordance with the procedures in § 134.204.

(4) *Protests filed by a contracting officer.* The contracting officer must submit his/her CVE Protest directly to OHA in accordance with the procedures in § 134.204. The protest should include the information set forth in the referral letter in Paragraph (2).

**§ 134.1005 Contents of the CVE Protest.**

(a) CVE Protests must be in writing. There is no required format for a CVE Protest, but it must include the following:

(1) The solicitation or contract number, if applicable;

(2) Specific allegations supported by credible evidence that the concern does not meet the eligibility requirements for inclusion in the CVE database, listed in § 134,1003;

(3) Any other pertinent information the Judge should consider; and

(4) The name, address, telephone number, and email address or facsimile number, if available, and signature of the protester or its attorney.

(b) If the protester intends to seek access to the CVE case file under § 134.205, the protester should include in its protest a request for a protective order. Unless good cause is shown, a protester must request a protective order within five days of filing the protest.

**§ 134.1006 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.

**§ 134.1007 Processing a CVE Protest.**

(a) *Notice and order.* If the Judge determines that the protest is timely, sufficiently specific, and based upon protestable allegations, the Judge will issue a notice and order, notifying the protester, the protested concern, the Director, CVE (D/CVE), VA Counsel, and, if applicable, the contracting officer of the date OHA received the protest and ordering a due date for responses.

(b) *Dismissal of protest.* If the Judge determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, the Judge will dismiss the protest and will send the contracting officer, D/CVE, and the protester a notice of dismissal, citing the reason(s) for the dismissal. The dismissal is a final agency action.

(c) *Transmission of the case file.* Upon receipt of a notice and order, the D/CVE must deliver to OHA the entire case file relating to the protested concern's inclusion in the CVE database. The notice and order will establish the timetable for transmitting the case file to OHA. The D/CVE must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

(d) *Protective order.* A protester seeking access to the CVE case file must file a timely request for a protective order under § 134.205. Except for good cause, a protester must request a protective order within five days of filing the protest. Even after issuance of a protective order, OHA will not disclose income tax returns or privileged information.

(e) *Supplemental allegations.* If, after viewing documents in the CVE case file for the first time under a protective order, a protester wishes to supplement its protest with additional argument, the protester may do so. Any such supplement is due at OHA no later than 15 days from the date the protester receives or reviews the CVE case file.

(f) *Response.* (1) The protested concern, the D/CVE, the contracting officer, and any other interested party may respond to the protest and supplemental protest, if one is filed. The response is due no later than 15 days from the date the protest or supplemental protest was filed with OHA. The record closes the date the final response is due.

(2) *Service.* The respondent must serve its response upon the protester or its counsel and upon each of the persons identified in the certificate of service attached to the notice and order or, if a protective order is issued, in accordance with the terms of the protective order.

(3) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

(g) *Basis for decision.* The decision will be based primarily on the case file and information provided by the protester, the protested concern, and any other parties. However, the Judge may investigate issues beyond those raised in the protest and may use other information or make requests for additional information to the protester, the protested concern, or VA.

(h) *Award of contract.* The contracting officer may award a contract during the period between the date he/she receives a protest and the date the Judge issues a decision only if the contracting officer determines that an award must be made to protect the public interest and notifies the Judge in writing of any such determination. Notwithstanding such a determination, the provisions of paragraph (j) of this section shall apply to the procurement in question.

(i) *The decision.* OHA will serve a copy of the written decision on each party, or, if represented by counsel, on its counsel. The decision is considered the final agency action, and it becomes effective upon issuance.

(j) *Effect of decision.* (1) A contracting officer may award a contract to a protested concern after the Judge has determined either that the protested concern is eligible for inclusion in the CVE database or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not eligible for inclusion in the CVE database. If the contracting officer has already made an award under paragraph (h) of this section, 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 Judge's decision.

(4) If the Judge finds the protested concern ineligible for inclusion in the CVE database, D/CVE must immediately remove the protested concern from the CVE database.

(5) A concern found to be ineligible may not submit an offer on a future VA procurement until the protested concern reapplies to the Vendor Information Pages Verification Program and has been reentered into the CVE database.

**§ 134.1008 Discovery.**

Discovery will not be permitted in CVE Protest proceedings.

**§ 134.1009 Oral hearings.**

Oral hearings will be held in CVE Protest proceedings only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

**§ 134.1010 Standard of review and burden of proof.**

The protested concern has the burden of proving its eligibility, by a preponderance of the evidence.

**§ 134.1011 Weight of evidence.**

The Judge will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, the Judge may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

**§ 134.1012 The record.**

Where relevant, the provisions of §134.225 apply. In a protest under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with §134.1007.

**§ 134.1013 Request for Reconsideration.**

The decision on a CVE Protest may not be appealed. However:

(a) The Judge may reconsider a CVE Protest decision. Any party that has appeared in the proceeding, or the Secretary of VA or his/her designee, may request reconsideration by filing with OHA and serving a petition for reconsideration on all the parties to the CVE Protest within twenty (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.

(b) If the Judge reverses his or her initial decision on reconsideration, the contracting officer must follow § 134.1007(j) in applying the new decision's results.

5. Add subpart K to read as follows:

**Subpart K—Rules of Practice for Appeals of Denials and Cancellations of Verification for Inclusion in the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) database (CVE Appeals)**

Sec.

- 134.1101 Scope of rules.
- 134.1102 Who may file a CVE Appeal?
- 134.1103 Grounds for filing a CVE Appeal.
- 134.1104 Commencement of CVE Appeals.
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AUTHORITY: 38 U.S.C. 8127(f)(8)(A).

**Subpart K—Rules of Practice for Appeals of Denials and Cancellations of Verification for Inclusion in the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) database (CVE Appeals)**

**§ 134.1101 Scope of rules.**

(a) The rules of practice in this subpart K apply to appeals of denials and cancellations of verification for inclusion in the U.S. Department of Veterans Affairs Center for Verification and Evaluation Database (CVE Appeals).

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

(c) Appeals relating to determinations made by SBA's Director, Office of Government Contracting regarding Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) status are governed by subpart E of this part.

(d) Protests of a concern's eligibility for inclusion in the VA's CVE database are governed by subpart J of this part.

**§ 134.1102 Who may file a CVE Appeal?**

A concern that has been denied verification of its CVE status or has had its CVE status cancelled may appeal the denial or cancellation to OHA.

**§ 134.1103 Grounds for filing a CVE Appeal.**

Denials and cancellations of verification of CVE status may be appealed to OHA, so long as the denial or cancellation is not based on the failure to meet any veteran or service-disabled veteran eligibility criteria. Such denials and cancellations are final VA decisions and not subject to appeal to OHA.

**§ 134.1104 Commencement of CVE Appeals.**

(a) A concern whose application for CVE verification has been denied or whose CVE status has been cancelled must file its appeal within 10 business days of receipt of the denial or cancellation.

(b) The rule for counting days is in § 134.202(d).

(c) OHA will dismiss an untimely appeal.

**§ 134.1105 The appeal petition.**

(a) *Format.* CVE Appeals must be in writing. There is no required format for an appeal petition; however, it must include the following:

(1) A copy of the denial or cancellation and the date the appellant received it;

(2) A statement of why the cancellation or denial is in error;

(3) Any other pertinent information the Judge should consider; and

(4) The name, address, telephone number, and email address or facsimile number, if available, and signature of the appellant or its attorney.

(b) *Service.* The appellant must serve copies of the entire appeal petition upon the Director, Center for Verification and Evaluation (D/CVE) and VA Counsel at CVEAppealsService@va.gov.

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

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his/her own initiative or upon motion of a respondent.

**§ 134.1106 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.

**§ 134.1107 Transmission of the case file.**

Once a CVE Appeal is filed, the D/CVE must deliver to OHA the entire case file relating to the denial or cancellation. The Judge will issue a notice and order establishing the timetable for transmitting the case file to OHA. The D/CVE must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

**§ 134.1108 Response to an appeal petition.**

(a) *Who may respond.* The D/CVE or his/her designee or counsel for VA may respond to the CVE Appeal. The response should present arguments to the issues presented on appeal.

(b) *Time limits.* The notice and order will inform the parties of the filing of the appeal petition, establish the close of record as 15 days after service of the notice and order, and inform the parties that OHA must receive any responses to the appeal petition no later than the close of record.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1105.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

**§ 134.1109 Discovery and oral hearings.**

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

**§ 134.1110 New evidence.**

Except for good cause shown, evidence beyond the case file will not be admitted.

**§ 134.1111 Standard of review and burden of proof.**

The standard of review is whether the D/CVE denial or cancellation was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

**§ 134.1112 The decision.**

(a) *Timing.* The Judge shall decide a CVE Appeal, insofar as practicable, within 60 calendar days after close of the record.

(b) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(c) *Basis for decision.* Decisions under this part will be based primarily on the evidence in the CVE case file, arguments made on appeal, and any response(s) thereto. However, the Judge, in his/her sole discretion, may consider issues beyond those raised in the pleadings and the denial or cancellation letter.

(d) *Finality.* The decision is the final agency decision and becomes effective upon issuance. Where OHA dismisses an appeal of a D/CVE denial or cancellation, the D/CVE determination remains in effect.

(e) *Service.* OHA will serve a copy of all written decisions on each party, or, if represented by counsel, on its counsel.

(f) *Effect.* If the Judge grants the appeal and finds the appellant eligible for inclusion in the CVE database, the D/CVE must immediately reinstate or include the appellant, as the case may be, in the CVE database.

(g) *Reconsideration.* A decision of the Judge may be reconsidered. Any party that has appeared in the proceeding, or the Secretary of VA or his or her designee, may

request reconsideration by filing with OHA and serving a petition for reconsideration on all parties to the CVE Appeal within twenty (20) calendar days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

Linda E. McMahon,  
Administrator

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