



This document is scheduled to be published in the Federal Register on 09/30/2013 and available online at <http://federalregister.gov/a/2013-23759>, and on [FDsys.gov](http://FDsys.gov)

DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Part 819

RIN 2900-AM92

VA Acquisition Regulation: Service-Disabled Veteran-Owned and Veteran-Owned Small Business Status Protests

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication procedures for Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and Veteran-Owned Small Businesses (VOSB) status protests, to provide that VA's Director, Center for Veterans Enterprise (CVE), shall initially adjudicate SDVOSB and VOSB status protests, and to provide that protested businesses, if they are denied status, may appeal to VA's Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU). Additionally, VA amends the title of CVE from the Center for Veterans Enterprise to the Center for Verification and Evaluation, to more appropriately represent the function of this office.

DATES: Effective Date: This interim final rule is effective [insert date of publication in the FEDERAL REGISTER].

Comment Date: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AM92-VA Acquisition Regulation: Service-Disabled Veteran-Owned and Veteran-Owned Small Business Status Protests.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments are available online through the Federal Docket Management System at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Cheryl Duckett-Moody, Senior Procurement Analysis (003A2A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 632-5319. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: In a final rule with request for comments published in the Federal Register on December 8, 2009 (74 FR 64619), VA revised 48 CFR parts 802, 804, 808, 809, 810, 813, 815, 817, 819, 828, and 852 to implement portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 and Executive Order 13360, which provide opportunities for SDVOSBs and VOSBs to increase their Federal contracting and subcontracting. VA solicited comments on an interim provision included in the final rule, which amended regulations governing SDVOSB and VOSB status protests to provide that the U.S. Small Business Administration (SBA) would be utilized to consider and decide VA SDVOSB and VOSB status protests. This required VA and SBA to execute an interagency agreement pursuant to the Economy Act (31 U.S.C. 1535). Because negotiations of the interagency agreement had not been finalized at the time the final rule was published, the interim provision included in the final rule provided that VA's Executive Director, OSDDBU, would consider and decide SDVOSB and VOSB status protests. This interim provision was necessary because, without an SDVOSB/VOSB status protest resolution process in place for acquisitions under this authority, performance of any contract award that was challenged would have been suspended and would have deprived VA and Veterans of necessary services and/or supplies.

Since the issuance of the final rule with request for comments, VA has reconsidered reaching an interagency agreement with SBA to review and decide status protests and subsequently determined that SDVOSB and VOSB status

protest adjudication shall remain within VA. Therefore, VA is issuing this interim final rule to remove from VA Acquisition Regulation (VAAR) 819.307(a) (or 48 CFR 819.307(a)) references to an interagency agreement between VA and SBA to handle SDVOSB and VOSB status protests outside VA. Moreover, in the first sentence of paragraph (a), the word “eligible” is removed as the use of this term is premature because the Director or Executive Director could find the SDVOSB or VOSB ineligible as a result of the status protest. Additionally, we reorganized VAAR 819.307 for ease of readability and clarity.

This revised decision is based on the unique statutory requirements that VA must meet pursuant to the SDVOSB/VOSB set-aside acquisition authority at 38 U.S.C. 8127 and 8128. For example, VA's statutory authority has an exception where surviving spouses of certain service-disabled Veterans may remain qualified as owners of SDVOSBs, which is not present in the government-wide SDVOSB set-aside authority program at 15 U.S.C. 657f. In contrast, SBA adjudicates only SDVOSB status protests pursuant to the separate Government-wide SDVOSB set-aside authority. Moreover, VA has developed expertise over the last 2 years in adjudicating SDVOSB and VOSB verification examinations and status protests. VA's current interim SDVOSB and VOSB status protest processes and procedures have mainly proved effective, and VA now has the infrastructure and experience to address and resolve future SDVOSB and VOSB status protests. However, VA is revising the current interim process in this interim final rule to provide that VA's Director of CVE shall initially adjudicate SDVOSB and VOSB status protests and to provide that either the protesting

party or the protested business may appeal the Director of CVE decision to the Executive Director of OSDBU.

VA provided a 30-day comment period for the interim provision included in the final rule, which ended on January 7, 2010. VA received one comment regarding paragraph (b) of VAAR 819.307, "SDVOSB/VOSB Small Business Status Protests." Under the interim provision included in the final rule, VAAR 819.307(b) provides that, if an SDVOSB/VOSB status protest is sustained after VA has already awarded a contract, VA will proceed with the award but the VA contracting officer cannot count the award as an award to an SDVOSB or VOSB and the concern cannot submit another offer as an SDVOSB or VOSB on a future SDVOSB or VOSB procurement "unless it demonstrates to VA that it has overcome the reasons for the determination of ineligibility." The commenter stated that allowing an award to proceed rather than terminating it following a successful status protest rewards fraudulent actions by letting the award stand; overlooks the lack of diligence by the contracting officer; disregards case law indicating contract awards resulting from fraudulent representation are considered void ab initio, so the contractor forfeits the contract; and ignores that the award of a fraudulently obtained contract set-aside for SDVOSBs and VOSBs is no different than any other Federal contract. The commenter also stated that allowing a fraudulently obtained contract to proceed will discourage companies from submitting protests as there is no recourse for them on a contract they may have won, if the status protest is sustained and the fraudulent contractor becomes ineligible from future procurements. The commenter suggested the

following: (1) if a contract is won by submitting fraudulent information, the contract award should be overturned and re-solicited or awarded to the next qualified bidder, and (2) VA should require contracting officers to issue a letter of intent to award, so companies may have the opportunity to protest prior to contract award.

We agree with the commenter and have revised the regulation to add VAAR 819.307(h) to state that when an SDVOSB or VOSB status protest is sustained after the award of a contract, the contract shall be deemed to be void ab initio and the contracting officer shall cancel the contract and award the contract to the next eligible SDVOSB or VOSB in line for the award. Additionally, the ineligible SDVOSB or VOSB firm is precluded from submitting another offer as an SDVOSB or VOSB on a future SDVOSB or VOSB set-aside procurement under VAAR part 819, unless it successfully appeals the determination of the Director, CVE, to the Executive Director, OSDDBU, or unless it applies for and receives verified SDVOSB or VOSB status in accordance with 38 CFR part 74.

As to the commenter's second issue, regarding notification of apparently successful offers, this was already addressed previously in current VAAR 819.307(c)(2) and remains in the revised regulation at 819.307(c) where it provides that an interested party must submit its status protest to the contracting officer by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in

negotiated acquisitions). Therefore, we make no changes based on this comment.

In promulgating this regulation to establish more detailed SDVOSB and VOSB status protest procedures, VA has largely adopted procedures equivalent to Federal Acquisition Regulation (FAR) 19.306 (or 48 CFR 19.306) associated with protesting a firm's status as a Historically Underutilized Business Zone (HUBZone) small business concern and FAR 19.307 for SDVOSB status protests for the Government-wide SDVOSB set-aside program established by 15 U.S.C. 657f. First, with respect to who may file a VA SDVOSB or VOSB status protest, revised VAAR 819.307(b) provides that either a contracting officer or an interested party may protest the apparently successful offeror's SDVOSB or VOSB status. Further, VA defines "interested party" for the purpose of filing a status protest as an actual offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. This is consistent with FAR 19.307(a) except that SBA cannot raise a VA SDVOSB or VOSB status protest since this is a title 38 program.

The regulation further establishes in revised VAAR 819.307(c) that, except for premature status protests, the contracting officer must forward to the Director, CVE, any status protest received. This is because the Director, CVE, subject to appeal to the Executive Director, OSDDBU, shall determine the timeliness of a status protest. The contracting officer can determine if a status protest is premature because that means the contracting officer has not yet opened bids or made a decision as to the apparently successful offeror upon which to raise a

challenge. This is consistent with FAR 19.307(e). Revised 819.307(c) further provides that any assertions that a protested concern is not an SDVOSB or VOSB concern, without setting forth specific facts or allegations, are insufficient. This is consistent with FAR 19.307(g). A status protest may only raise a challenge to an apparently successful offeror's SDVOSB or VOSB status by disputing the Veteran or service-disabled Veteran status of the individual owner(s) of the concern, or ownership and/or control of the concern by a Veteran or service-disabled Veteran."

Upon receipt of the status protest, the regulation further provides at new VAAR 819.307(d) that the Director, CVE, will notify the protester and the contracting officer of the date the status protest was received by CVE and whether the status protest will be decided on the merits or dismissed on jurisdictional grounds for lack of timeliness or specificity. This is consistent with FAR 19.307(g) where, for SBA status protests, SBA officials notify the protester and the contracting officer of the receipt of the protest and whether it will be processed or dismissed for lack of timeliness or specificity. If the status protest is decided on the merits, the regulation provides in new 819.307(e) that the Director, CVE, will determine the SDVOSB or VOSB status of the protested concern based on the totality of the circumstances within 21 business days after receipt of the status protest. A totality of the circumstances standard is appropriate because, as the integrity of the SDVOSB/VOSB set-aside program is paramount, this permits the Director, CVE, to consider facts or issues not specifically raised by the protesting party that impact the SDVOSB/VOSB status



and compliance with 38 CFR Part 74 of the protested party. If the Director, CVE, does not contact the contracting officer within 21 business days, the contracting officer may award the contract to the apparently successful offeror, unless the contracting officer has granted the Director, CVE, an extension. The contracting officer may award the contract after receipt of a status protest if the contracting officer determines in writing that an award must be made to protect the public interest. The contracting officer shall document this determination for the contract file. These provisions are equivalent to those contained in FAR 19.307(h) except to the extent that VA has determined VA requires 21 business days in lieu of 15 business days to decide a status protest based on available agency resources.

The regulation provides at new VAAR 819.307(f) that a decision on the merits by the Director, CVE, that is based on the failure to meet the Veteran or service-disabled Veteran status of the individual owner(s) of the concern as defined in 38 CFR 74.1 is not subject to an appeal to the Executive Director, OSDBU, and is a final decision since Director, CVE exercises no independent discretion with respect to this question. VA's Veterans Benefits Administration (VBA), not OSDBU, is the entity within the Department responsible for determinations of individual Veteran or service-disabled Veteran status. Director, CVE relies exclusively on currently valid individual Veterans' eligibility determinations rendered by VBA or, in some cases, disability determinations of the Department of Defense pursuant to 38 CFR 74.1 (definition service-disabled Veteran)".

Upon rendering a decision, new VAAR 819.307(g) provides that the Director, CVE, will notify the contracting officer, the protester, and the protested concern of its determination. The decision is effective immediately and is final unless overturned on appeal by the Executive Director, OSDDBU. The determination may be sent by mail, commercial carrier, facsimile transmission, or other electronic means. This is consistent with FAR 19.307(i) where, for SBA status protests, SBA officials notify the protester and the contracting officer of the determination and that it is effective immediately and final unless overturned on appeal.

In order to provide an additional layer of due process, new VAAR 819.307(i) provides that, except for a decision based upon an allegation of failure to meet the Veteran or service-disabled Veteran status of the individual owner(s) of the apparently successful offeror, the Director, CVE, status protest decision may be appealed. The protester or the protested SDVOSB or VOSB concern may file an appeal of the status protest determination with the Executive Director, OSDDBU. The determination to retain the appeal process within VA OSDDBU is a policy determination but it is consistent with the government-wide HUBZone status protest process set forth in FAR 19.306(m) wherein status protests are submitted to SBA's Associate Administrator for the HUBZone Program, who issues initial decisions, and appeals are filed with and determined by SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development. Within VA, the Director, CVE, and the Executive Director,

OSDBU, are the two most senior officials with the necessary expertise on SDVOSB and VOSB status examinations to make proper determinations.

The Executive Director must receive the appeal no later than 5 business days after the date of receipt of the status protest determination. This is consistent with FAR 19.306(j), with respect to HUBZone status protest appeals. The Executive Director will dismiss any appeal received after the 5-day period. "Filing" means a document is received by the Executive Director by 5:30 p.m., Eastern Standard Time, on that day. Documents may be filed by hand delivery, mail, commercial carrier, or facsimile transmission. Hand delivery and other means of delivery may not be practicable during certain periods due to, for example, security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt by the Executive Director, OSDBU. Appeals are to be submitted to: Executive Director, OSDBU (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

New VAAR 819.307(j) sets forth that any appeal must meet the following criteria. The appeal must be in writing. The appeal must identify the status protest determination being appealed and also must set forth a full and specific statement as to why the decision was based on clear error of fact or law. This is consistent with FAR 19.306(k) with respect to HUBZone status protest appeals and 13 CFR 134.508 with respect to SDVOSB status protest appeals at SBA's Office of Hearing and Appeals.

New VAAR 819.307(k) requires that the party appealing the determination must provide notice of the appeal to the contracting officer. In order to avoid a piecemeal presentation of the relevant issues and frivolous appeals, 819.307(k) also establishes that the Executive Director will decide all appeals solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto. These provisions are consistent with FAR 19.306(l) with respect to HUBZone status protest appeals and 13 CFR 134.512 with respect to SDVOSB status protest appeals at SBA's Office of Hearing and Appeals.

New VAAR 819.307(l) provides that the Executive Director will make a decision on the appeal within 10 business days of the receipt of the appeal, if practicable, and will base the decision only on the information and documentation in the protest record as supplemented by the appeal. The Executive Director will provide a copy of the decision to the contracting officer and the protested SDVOSB or VOSB concern. The Executive Director's decision, if received before the award, will apply to the pending acquisition. If the Executive Director's decision is received after the award, the contracting officer may terminate the contract or not exercise the next option (i.e., the contract will end once the contract term expires). This policy determination weighs the needs of the agency and the public interest against the due process rights of an interested party and is consistent with the government-wide HUBZone status protest process where the Director of HUB issues an initial decision and a higher level SBA official issues the appellate decision and when SBA's Office of Hearing and Appeals

issues a decision in an SDVOSB status protest appeal after a contract has been awarded. See FAR 19.306(m); 13 CFR 125.27(g)(2)(iii). If the appeal is decided in favor of the appealing party after the contract is awarded, the contracting officer is given the business discretion to terminate the contract or not exercise the next option because, due to the passage of time, the costs of a termination and disruption of services for the benefit of veterans or a construction project may be so extensive as to outweigh the programmatic issues of ensuring an award is made to a valid veteran small business. The Executive Director's decision is the final decision. The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means. This process is essentially consistent with the method for appeals related to SBA's HUBZone status protest process set forth in FAR 19.306(m) except that VA has determined that VA requires 10 business days in lieu of 5 business days to decide an appeal due to VA's available administrative resources.

Finally, a technical change would re-designate VA's Center for Veterans' Enterprise as the Center for Verification and Evaluation to more accurately reflect the mission of this office which is to determine the status of SDVOSBs and VOSBs with respect to VA's SDVOSB/VOSB set-aside acquisition program established by 38 U.S.C. 8127.

#### Administrative Procedure Act

This document revises VAAR 819.307, "SDVOSB/VOSB Small Business Status Protests," the interim provision included in the final rule on which we

requested comments. In the interim provision, VA provided that the Executive Director, OSDDBU, shall consider and decide SDVOSB and VOSB status protests until VA and SBA executed an interagency agreement for SBA to consider and decide SDVOSB and VOSB status protests. For the reasons stated above, we have determined that SDVOSB and VOSB status protests shall remain within VA. Therefore, we are revising the interim provision to provide that the Director, CVE, shall initially adjudicate SDVOSB and VOSB status protests and to provide that either the protester or the protested business may appeal the Director, CVE, decision to the Executive Director, OSDDBU.

Good cause exists for the agency to include this change in an interim final rule to make a change to the interim provision that is essential for this contracting program to function so as not to deprive VA and veterans of necessary services and supplies and to provide immediately appropriate due process by authorizing an administrative appeal process on initial status protest decisions. The current interim process does not authorize an administrative appeal at the agency level, which has been criticized in Miles Construction, LLC v. United States, 108 Fed. Cl. 792 (2013), as not providing a party adequate due process and the opportunity to be heard at a meaningful time in a meaningful manner. Thus, delay in the implementation of this rulemaking would be contrary to the public interest. VA hereby solicits comments on this regulatory amendment.

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The final arbiter of VA SDVOSB and VOSB status protests remains the Executive Director, OSDDBU, as previously promulgated. The main change is that the Secretary has determined that SBA should not be involved in VA SDVOSB or VOSB status protests because these status protests are solely associated with title 38 SDVOSB and VOSB set-aside acquisitions where SDVOSB or VOSB status is to be determined by the Secretary pursuant to 38 U.S.C. 8127(f). On this basis, the Secretary certifies that the adoption of this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, at 2 U.S.C. 1532, requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

## Paperwork Reduction Act

This interim final rule contains no collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

## Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)



Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www1.va.gov/orpm/>, by following the link for “VA Regulations Published.”

#### Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number or title for this program.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, approved this document on September 13, 2013, for publication.

List of Subjects in 48 CFR Part 819

Administrative practice and procedure, Government procurement,  
Reporting and recordkeeping requirements, Small businesses, Veterans.

Dated: September 25, 2013

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Robert C. McFetridge, Director,  
Office of Regulation Policy and Management,  
Office of the General Counsel,  
Department of Veterans Affairs.

For the reasons set forth in the preamble, the Department of Veterans Affairs amends 48 CFR part 819 as follows:

## PART 819—SMALL BUSINESS PROGRAMS

1. The authority citation for part 819 continues to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); 48 CFR 1.301-1.304; and 15 U.S.C. 637(d)(4)(e).

### Subpart 819.3—Determination of Small Business Status for Small Business Programs

2. Revise 819.307 to read as follows:

#### 819.307 SDVOSB /VOSB Small Business Status Protests.

(a) All protests relating to whether a Service-Disabled Veteran-Owned Small Business (SDVOSB) or Veteran-Owned Small Business (VOSB) is a “small” business for the purposes of any Federal program are subject to 13 CFR part 121 and must be filed in accordance with that part. SDVOSB and VOSB status shall be determined in accordance with 38 CFR part 74.

(b) A contracting officer or an interested party may protest the apparently successful offeror's SDVOSB or VOSB status. "Interested party" for the purpose of filing a status protest is an actual offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(c) All status protests shall be in writing and shall state all specific grounds for the protest. Assertions that a protested concern is not an SDVOSB or VOSB concern, without setting forth specific facts or allegations, are insufficient. An interested party must submit its status protest to the contracting officer by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in negotiated acquisitions). An interested party must deliver their protest in person, by electronic mail, by facsimile, by express delivery service, or by the U.S. Postal Service within the applicable time period to the contracting officer. Any status protest received after these time limits is untimely. Any status protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester. Except for premature status protests, the contracting officer must forward to the Director, Center for Verification and Evaluation (CVE), any status protest received.

(d) The Director, CVE, will notify the protester and the contracting officer of the date the status protest was received by CVE and whether the status protest will be processed or dismissed for lack of timeliness or specificity.

(e) The Director, CVE, will determine the SDVOSB or VOSB status of the protested concern based upon the totality of circumstances within 21 business days after receipt of the status protest. If the Director, CVE, does not contact the contracting officer within 21 business days, the contracting officer may award the contract to the apparently successful offeror, unless the contracting officer has granted the Director, CVE, an extension. The contracting officer may award the contract after receipt of a status protest if the contracting officer determines in writing that an award must be made to protect the public interest. The contracting officer shall document this determination for the contract file.

(f) A denial decision by the Director, CVE, that is based on the failure to meet any service-disabled Veteran or Veteran criterion as defined in 38 CFR 74.1 is not subject to an appeal to the Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU), and is a final decision.

(g) The Director, CVE, will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by the Executive Director, OSDBU. The determination may be sent by mail, commercial carrier, facsimile transmission, or other electronic means.

(h) If the Director, CVE, sustains an SDVOSB or VOSB status protest and the contract has already been awarded, then the awarded contract shall be deemed void ab initio and the contracting officer shall rescind the contract and award the contract to the next SDVOSB or VOSB in line for the award. The

ineligible SDVOSB or VOSB concern shall not be permitted to submit another offer as a SDVOSB or VOSB on a future SDVOSB or VOSB procurement under this part, unless it successfully appeals the determination of the Director, CVE, to the Executive Director, OSDDBU, or unless it applies for and receives verified SDVOSB or VOSB status in accordance with 38 CFR part 74.

(i) Except as provided in subsection (f), the protestor or the protested SDVOSB or VOSB concern may file an appeal of the status protest determination with the Executive Director, OSDDBU. The Executive Director must receive the appeal no later than 5 business days after the date of receipt of the status protest determination. The Executive Director will dismiss any appeal received after the 5-day period. "Filing" means a document is received by the Executive Director by 5:30 p.m., Eastern Standard Time, on that day.

Documents may be filed by hand delivery, mail, commercial carrier, or facsimile transmission. Hand delivery and other means of delivery may not be practicable during certain periods due to, for example, security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt by the Executive Director, OSDDBU. Submit appeals to: Executive Director, OSDDBU (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

(j) The appeal must be in writing. The appeal must identify the status protest determination being appealed and must set forth a full and specific statement as to why the decision was based on clear error of fact or law.

(k) The party appealing the determination must provide notice of the appeal to the contracting officer. The Executive Director will decide all appeals under this subpart solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto.

(l) The Executive Director will make a decision within 10 business days of the receipt of the appeal, if practicable, and will base the decision only on the information and documentation in the protest record as supplemented by the appeal. The Executive Director will provide a copy of the decision to the contracting officer and the protested SDVOSB or VOSB concern. The Executive Director's decision, if received before the award, will apply to the pending acquisition. If the Executive Director decides in favor of the appealing party and the decision is received after the award, the contracting officer may terminate the contract or not exercise the next option. The Executive Director's decision is the final decision. The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means.

[FR Doc. 2013-23759 Filed 09/27/2013 at 8:45 am; Publication Date: 09/30/2013]