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I would now like to formally begin today's conference and turn the call over to Valerie Coleman. Valerie, please go ahead.

Valerie: Thank you and good morning everyone and welcome to our June edition of our SBA First Wednesday on size and affiliation. As Carla said, I'm Valerie Coleman and I'm going to be your host today. Jan Kaiser is taking a well-deserved vacation this week. And Deborah, of course, as Carla said, is on the line to do our questions. So, we're trying to keep it to about 40 minutes. When we do the presentation, to leave the last 10 minutes for questions.

If you can go through this, I don't need to read that for the technical issues. I will be doing page numbers as we go through to make sure that you all are on the same page as our speaker. We do have some quick references at the end of the presentation that deal with databases, FAR references, things of that nature. We always put that at the end for you all to use. And so we hope that at the very end, you will go through that. And that's a good thing to download and keep as a desk guide for you. And then we do have more training for SBA, and we have given you the website there where you can go to do that.

We do want to give a shout out to our PTACs – are procurement technical assistance centers. They do keep past programs, if you were not able to listen in on one. We are giving you that website and how the PTACs partner with federal agencies, and then their general website, if you would like to find the PTAC closest to you.

This is the rest of our schedule. You can see that we have two more after this. And for the next month, we have added a new topic. Our speaker, unfortunately, was not able to come in, in July, so we did a new one on Consolidation and Bundling, which we have gotten a lot of questions about. We will end with the 8(a) Business Development program in August. We do not have a session in September. We will start back up in October.

And, as you can see at the top, right now we are at 9:30 AM to 10:30 AM CST. Due to the survey that you all completed, starting in October, we will be at 2 PM CST in the afternoon. So we will be reverting over to afternoon sessions starting October 1.

You do get one CLP on this. And in the PowerPoint, you will see the certificate. You do not need to let us know that you listened in. All you need to do, when we get done, is to insert your name where it says that. And download the certificate for you to enter into whatever system that you are using to count your CLPs.

If you are phoning in, you can download it and put everyone's name in there. Please remember we do have a learning box, let me go back to that – down here, sbalearning@sba.gov where we can take questions, if you don't get your question answered at the end of this presentation. If you want to be added to the database, if your email address changes, if you just have general questions. We really hope that you will use that. So, again, here's your certificate that you can download.

Our speaker today is someone that I have known for a long time. We won't go into how long Stephanie and I have known each other. But in my opinion, she's probably the best size person that SBA has in the whole country. She is excellent at what she does and I know that you will get a lot of great information. So I would like to turn it over now to Stephanie Lewis, who is a Size Specialist and also a Commercial Market Rep. with the Office of Government Contracting out of Fort Worth, Texas. Stephanie?

Stephanie: Good morning everyone. As Val said, my name is Stephanie Lewis and I'm a Size Specialist here. I cover the states centered in area six, and we'll go into that in a little bit. My email address is not on this slide, but I would like for you to have it. If you ever come across any size or affiliation questions, or you receive a size protest and you're not quite sure what to do with it, you can always contact me. Email is the best way to contact me. And it's stephanie.lewis@sba.gov

Right now we're on slide eight, and we will move on to slide nine. As I was going through this presentation I was thinking about why is size important to contracting officers, federal agencies, contract specialists. And I came across a variety of reasons that you may be interested in size. I know that you get a lot of

questions on a recurring basis, as to what is a small business? And it's important to always remember that size is a self-certification program. So companies that want to do business with the federal government, self-certify in SAM their size status. And what they normally input is the revenue and employee information, and then the same SAM software calculates their size for each NAICS code and puts it in a table that is easily readable for you to determine whether the company is small or large.

But, other areas that I think are important for contracting officers to know whether companies are small or not, is of course the small business set-aside arena. When you're making your Rule of Two decisions, do I have two or more small businesses that can compete in this, size becomes an issue. Also, in our program certification areas at SBA – the 8(a) HUBZone program – companies must be small to participate in those programs. It's also important to know when recertification is required on your procurement. And whether those companies, upon recertification, turn out to be large or small.

Also, I know that you will probably receive questions from coworkers during evaluation proposals. When they are reading offers, they may have questions like – this company seems to be owned by a large business. Can it still be small? Or this company seems like another company is doing all the work. Can they still be considered small? Also, when you have contract clauses – certain contract clauses have to be in contracts when companies are small when the prime is subcontracting. Also, the non-manufacturers will apply under a small business set-aside.

And then we have subcontracting plans. Small businesses are exempt from subcontracting plans, but the whole purpose is that they subcontract to small businesses. So you may get a lot of questions in that arena as well. So this presentation will go over each of those areas. What is a small business? And that includes the non-manufacturers rule. What are affiliates? That's going to touch on joint ventures and mentor protégé programs. And then we have size protests. What to do if you receive one, or if you want to question an offeror size yourself. Next slide. Slide 11.

We just talked about most of these areas here so we can just progress to the next slide. Slide 12.

What is a small business? We're going to go over the basics of how does a company determine whether it's small or not. First of all, it must be organized for profit. Any company that is a nonprofit, is automatically considered what we call, other than small. We have two categories. Small business and then other than

small business. So, of course, only eligible small businesses are able to bid on small business set-asides. And if you are a nonprofit, you are not eligible for small business set-asides.

You must have a place of business in the United States that operates primarily in the United States or makes a significant contribution to the US economy. You cannot exceed the small business size standard. Each federal procurement is assigned a NAICS code, we call that a NAICS code. And then, each NAICS code has a small business size standard. A company must be small under that standard, in order to participate as a small business.

And then we do want to let you know that wholesale and retail codes are not to be used in federal procurement. So when you are selecting NAICS codes for your contracts, please do not select one that is a wholesale or retail NAICS code. If you are procuring a supply, you should look into the manufacturing NAICS codes, and use those for your procurement. Next slide.

Slide 13. When you go to our website, [www.SBA.gov](http://www.SBA.gov) you can click on a link called size and you can find a variety of information. One that's very important is the NAICS size table. And it looks like this. It has the major two digit Sector at the top and then it has the six digit NAICS code that you use on your procurements with the little description. And then it has the size standard on the right-hand side. In this illustration, these are all revenue-based size standards. There's another column, that's one more to the right, which is employee-based size standards. So, the NAICS code has either a revenue or an employee-based size standard, not both.

It's important to recognize that a firm can be small for some NAICS codes and large for others. So that's why we have small businesses certify for a specific NAICS code on a procurement, whether they are small or large for that procurement specifically. Next slide.

Slide 14. NAICS codes are created by the Department of Census, not the SBA. And so you can go to the Department of Census website when you are determining what an appropriate NAICS code is. The Department of Census website will have a description for each. And you can do a keyword search as well. So that's a very helpful link to use to determine the appropriate NAICS code, especially if you have found a NAICS code that is appropriate, but it seems to be a wholesale NAICS code. That website can help you find the appropriate manufacturing NAICS code to put on your procurement.

You should be using the NAICS code that best describes the principal purpose of the product or service being acquired. Don't use a NAICS code for which the

company that you think you want to win the procurement is going to end up being small. That's not the appropriate way to select a NAICS code. You can look at 13 CFR 121.402 and it provides you some guidance on how to select the appropriate NAICS code and asks you to consider which component accounts for the greatest percentage of the contract value, which product or service is described in the solicitation.

What's the relative value and importance of the components in the procurement making up the end item? And what is the function of the goods and services? So that's for you to take a totality of the circumstances as to what you are procuring and then determine what the appropriate NAICS code is. Each procurement should be assigned one NAICS code, unless you are having separately priced (?), or something like that, and that's the only instance in which you could have separately awarded contracts that have different NAICS codes. But if you are only going to award one contract, or you are going to award a contract to multiple offerors, you should only have one NAICS code on the procurement. Like I said, the NAICS code is determined by the Department of Census.

Okay, yes, slide 15. And it's SBA that creates the small business size standard that match those NAICS codes. We reevaluate the small business size standards on a rolling basis, every five years, and they are adjusted for inflation as well. The size standards that are posted on our website at [www.sba.gov/size](http://www.sba.gov/size), in that size table, those are always the latest updated size standards for the current regulations. So you can always rely upon those. When you are putting a size standard in your solicitation, it is best not to go from what you know to be the size standard for that NAICS code, but to double check on our website, in case we have done an update. Which, of course, are posted in the Federal Register. And you can also find on that web link, under a tab called "what's new?" – where we talk about all the recent updates to our Federal Register for any new size standards.

The Department of Census, every five years, re-issues, deletes, and amends NAICS codes. We had one done in 2012. And that's what we are currently operating under. The 2012 NAICS codes. On January 1 of 2017, they issued new NAICS codes. We will not create matching size standards for those new NAICS codes, until October of 2017. So at the beginning of this fiscal year, in October, you will see that the new NAICS codes for 2017 have been added to our size table and size standards for those have been created.

Changes are going to apply only to new solicitations that are issued after October 1. However, if you have a pending solicitation and you want to incorporate a new NAICS code or modify size standards, you will have to modify your solicitation prior to award. Prior to offer, excuse me. Next slide.

Slide 16. SBA sets forth how to calculate whether you are small or not. And they've kept it really simple through the years on purpose. So that it is not a complicated procedure and it's readily visible to a small business to determine whether they are – meet the size standard or not. For the average annual receipts, the revenue-based size standards, they're going to use their federal tax returns. They're going to use (?) from that – cost of goods sold, plus total income. And that is their revenue for the year. And then they are going to average that for the last three completed fiscal years.

So if we have a company that has a balloon year – a lot of revenue in one year, such as a company that was involved in Hurricane Katrina, and got a lot of work that year, but its two years prior to that were not as good, it's not penalized for the work that it received in its most recently completed years because it can average it out over the last three years. And that is what keeps some companies small. When they have had balloon years.

For the number of employees, that's going to be all individuals employed by the firm on a full-time, part-time, or other basis. And it's done on the 12 calendar month basis. And it's an average over the last 12 completed months – the number of employees in each pay period. Next slide.

Slide 17. There are some exclusions from revenue and employees. They do not count inter-affiliate revenue. And there also are some amounts that can be excluded from revenue. And those are all outlined in 13 CFR 121.104, and it's a very limited list and those are the only exclusions. One of which is amounts collected for another, such as an agent. That's just one of the illustrations. But there are like four or five limited exclusions from revenue. And there is no more.

And also, when a company has an affiliate, they must include the revenue or the employees of the affiliate in their calculations.

Slide 18. Like we said at the onset of the presentation, a contracting officer shall accept self-certification unless there is a reason to question the firm's size self-certification. In SAM – and most agencies are using SAM – for representation of size, they must be updated every 12 months to remain active. It's effective as of the date they submit their offer.

When you're looking in SAM for a company size status, the SAM website does have a way that you can look at prior dates. So if you have a procurement that was – offers were submitted two years ago, you can go back and adjust those dates and see what that company size was as of that date. Because when we determine size, we used to take the company's submitted initial offer, including price. And so, when the company is in there annually updating their size self-certification, your

view is going to be the latest. But you may need a prior view, if you have a procurement that was a little older. You may have to do those adjustments to make sure that they were small as of the date they submitted their offer.

And then, also in SAM, I wanted to mention that when you look at the SAM table, a company may appear four or five or six NAICS codes in the end table. However, SAM doesn't allow you to look at their size for all NAICS codes. Just because you don't see your NAICS code, that you have assigned to your procurement in the table, does not mean that they have not self-certified for the procurement as small. There's a little link at the bottom of the table that says "See more," and if you click on that you can look up their size for every NAICS code in the table. Next slide.

Slide 19. On the small business set-aside, we have something called the Non-manufacturer's rule. So on a small business set-aside, the offeror must either be the manufacturer and comply with the limitations on subcontracting, or it must meet the requirements of the non-manufacturer's rule. And this is one of the reasons that we require you to use a manufacturing NAICS code and a supply-based procurement. Next slide.

Slide 20. The non-manufacturer's rule says if the contract is over \$150,000 and the company is not the manufacturer of the end item, then the offeror must have less than 500 employees. It must be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied. It must take ownership or possession of the item with its own personnel, equipment, or facilities in a manner that is consistent with industry practice and it must supply the end item of a small business or manufacturer made inside the United States or there's a waiver.

We get a lot of size protests on this rule for supply-based procurement. And most of them center around the fact that they think the item is not being manufactured ultimately by a small business. They are passing on the good of a product made by a large business. And so we do receive protests on this. And this is the analysis that we will go through. These four steps, and the conditions that accompany them, which a small business set-aside has to meet.

The waiver at the end is one of two things. We have something called class waivers, which are preapproved products, a list of preapproved products, for which SBA has found there's no small business, that manufactures this. So in those cases, we are going to allow a large business to produce this product, and a small business to pass it on to the government. Those are listed on our website and it's called the "class waiver list." When you use those waivers, you have to have the product service code and the NAICS code and the description – all has to

be a match. You can't just slowly use the NAICS code and assume that every product in that NAICS code has a waiver. All three of those things have to be a match. It's a very specific list.

And then we have something called an individual waiver, whereby contracting officers, if they feel that there are no small businesses, then manufacturers can request an individual waiver for their specific procurement. So they would request that prior to issuing the solicitation and request it from SBA. And we take a look at their rationale and determine whether we want to issue an individual waiver for the procurement. And once that waiver is issued, then the contracting officer announces that, that waiver exists in the solicitation so that all offerors are aware that they don't have to have a small business manufacturer.

It's a little bit of a complicated rule, and if you ever have questions on it, you can always feel free to call your SBA size specialist.

Let's talk a little bit about affiliations. So we went through size and it's revenue or employee-based. And it's going to include the company, plus all of its affiliates. This is where a lot of companies get into trouble and where we receive a lot of protests. Because people have different opinions on what an affiliate is. So let's just talk about what our regulations consider to be an affiliate.

We have two types of affiliation. We have general affiliation, it's like a long-standing, ongoing affiliation. Like you have a parent company. You have a sister company. Those are general affiliations. You are always affiliated. You always aggregate your revenue and your employees with your ongoing general affiliation.

And then we have affiliation for specific procurement. That means you are affiliated with the company, just in that instance on that procurement that you submitted a bid on. Those are joint ventures. You've come together to submit an offer on a specific procurement so we consider that you are affiliated for that procurement only. It's not a long-standing affiliation, unless – well, we'll go into that later. It applies only to the contract at hand.

Slide 23. The key to affiliation is always control. Concerns are affiliated, if one concern has the power to control the other. It doesn't mean that the control is exerted. It means that they have the power to control the other company. When a company is calculating size, they always include all of their affiliates. Including their foreign affiliates. It's fine for a company that is located in the United States, doing business in the United States to have a foreign affiliate. That is fine.

A company that says we have separate divisions, we have separate CAGE codes, we have separate tax returns. We've organized ourselves independently by



incorporating separately, has no bearing on affiliation. We always look at control. All of those things that I just mentioned, don't disseminate control. I mean, dissolve control. When a company has the power to control another, we consider them affiliate. Next slide.

Slide 24. These are just a couple of our regulations to talk about affiliation. Companies that have common ownership are affiliated. Companies that are commonly managed are affiliates. And then we have something called the Identity of Interest rule. This means that companies that have substantially similar business interests, are affiliated with one another. And we have designated those groups to be immediate family members, people who have a pattern of common investments, and companies that are dependent through contractual relationships.

So, we did have several protests on this and the Identity of Interest rule is a lot of places where we find that small businesses do not understand there is an automatic assumption of affiliation between immediate family members. If I own a business and my brother owns a business, we are assumed to be affiliated through that familial connection. That is a rebuttable connection. If there is a clear fracture between the two parties. But, people with immediate family members should be aggregating those businesses unless there is a clear fracture that they can support and document, in the case of protest.

People have a pattern of common investments, like me, and a close friend of mine – she invests in my company and I invest in her company and we invest in a third company together and we invest in a fourth company together. That is a pattern of common investing, and so because we have established this pattern, we would aggregate those businesses, including our own.

And then we have dependents through contractual relationships. If a company derives 70% or more of its revenue from another source, we consider that it is economically dependent on that source for revenue. So we would consider that to be an affiliate.

And then, we have joint ventures, which we will get into, in a little bit.

Slide 25. So, for instance, if I own fully an ice cream parlor in Chicago, and I own 50% of the furniture manufacturing plant in Paraguay, and 75% of a machine shop in Algeria, all of these companies are affiliated with one another. Why? Because I have the power to control all of them. 50% or more of the company stock is automatic power to control. So since I own 50% or more of all of these companies, I have the ability to control them. And so when I am self-representing my ice cream parlor as a small business, I have aggregated the revenue of all the other companies in that. Even if none of these companies have any business with

each other, or any connection with each other. The connection is me. I'm the owner.

Slide 26. Okay, let's move on from size and affiliation to joint ventures and prime subcontracting relationships.

Slide 27. So a lot of times we'll see something called a teaming agreement. And so, a teaming agreement is neither a joint venture or a prime sub relationship. We don't know what a teaming agreement is. So we literally encourage offerors, when they submit proposals, to call it what it is. Is it a joint venture agreement? Or is it a subcontracting agreement? Because when they use the word teaming agreement, it can fit into either of those categories.

And then under a challenge, SBA is going to determine whether it is a prime sub relationship or a joint venture relationship. So we really encourage offerors, and in your counseling of small businesses, and in your solicitations, we would encourage you to state what type of arrangement this is. Because, the size of the company is handled differently for each.

A prime sub relationship is, of course, when a prime contractor agrees with one or more companies to have them act as subcontractors. Very clear. A normal subcontract arrangement.

Slide 28. And then a joint venture is the coming together of two or more parties for the purpose of performing the contract at hand. It has an organized, specific, and limited purpose. A joint venture must be bid in the joint venture's name, and it must be in writing. And a joint venture must be registered in SAM. A joint venture cannot be populated with contract performing employees. So when the joint venture bids on the contract, it could have one or two administrative employees that run the joint venture, but the work has to be performed by the joint venture members.

When we are determining size under a joint venture, under a new rule that became effective June 30, 2016 each joint venture member must qualify as small under the NAICS code assigned to the procurement. So we no longer aggregate the revenue or employees of all joint venture partners. Now, as of June 30 of last year, the company can be considered small as each joint venture is small for the NAICS code. So this allows companies that are small to come together to bid on the procurement and not be penalized for their aggregated size.

So here we have small business #1 whose revenue is \$7 million and small business #2, whose revenue is \$4 million. And the size for the procurement is \$10 million. Together, the company's aggregated revenue is \$11 million, so under our

old regulations, they would not be permitted to submit an offer on a small business set-aside. Under our new regulations, which we have relaxed a little bit to encourage teaming and joint venturing from small businesses, we now look at their size individually. So now, this procurement, small business #1 is small under the procurement and small business #2 is small under the procurement. So this company may joint venture and submit an offer as a small business on the procurement.

Slide 29. We have two types of mentor protégé programs now. We have the 8(a) mentor protégé program, and in that we have the all-small business program. So we're going to talk, on this slide, about the 8(a) mentor protégé program. And when companies have an approved 8(a) mentor protégé agreement, and then they form a joint venture under that agreement and bid on the federal procurement, when we are determining size, we look at only at the size of the 8(a) protégé. We do not look at the size of the mentor.

But, under an 8(a) procurement, the joint venture agreement has to be approved by our SBA 8(a) division. They must have written SBA approval before they submit the offer, meaning the mentor protégé agreement must be in place and approved before they submit their offer. And the joint venture agreement has to be approved before contract award. That's on an 8(a) contract. On a non-8(a) contract, SBA does not review the joint venture agreement. Next slide.

Slide 30. Then we have the all-small business mentor protégé program. It works very similar to the 8(a) one. When there is an approved SBA mentor protégé agreement, and two or more firms form a joint venture under that agreement, and bid on a federal procurement, we consider only the size of the protégé when considering whether the joint venture is large or small for the procurement. Again, SBA must approve this mentor protégé agreement before offer.

Slide 31. Sometimes we have a prime contractor that submits an offer, in its own name, but it has a significant subcontractor, what we call an ostensible subcontractor. An ostensible subcontractor is something we treat as a joint venture. It means that the subcontractor has, in layman's terms, too big a role in this procurement to be considered a subcontractor. And the litmus test we use, is that if the subcontractor performing the primary vital requirements of the contract, or the prime contractor is unduly reliant upon the subcontractor, then we find that it's an ostensible subcontractor relationship.

The subcontractor has too big of a role in this contract, and this is really a joint venture, at heart. So we call this a de facto joint venture, and we treat it as a joint venture, when we find that this instance occurs.

We have quite a few size protests dealing with ostensible subcontracting. We also have some contracting officers, while reading proposals, realize that the subcontractor has too large of a role or that there is dependence or that the prime contractor is not performing the primary vital requirements of the contract. So, we'll get contracting officers' size protests, asking us to look at whether this is an ostensible subcontractor and should be treated as a joint venture, and not a prime contractor relationship. Next slide.

Slide 33. Okay, so we've covered size and affiliation and joint ventures and mentor protégé. Now, we're going to talk about what happens if you receive a size protest.

So, if you should receive a size protest from an unsuccessful offeror or from anyone, as a matter of fact, they should all be sent to SBA. Contracting officers and agencies do not have the authority to decide a size protest, to ignore size protests, to solicit more information for a size protest, to advise the protester to modify or change or resubmit the protest. You should simply receive the size protest and then forward it on to SBA. Our regulations have a list of other documents that we need along with that referral. The FAR guide says that all protests have to be filed with the contracting officer and then the contracting officer forwards them to SBA. And we keep all three parties in the loop, as we process the size determination.

The protests will go to the SBA area offices, not our district offices, regional offices, but our area offices. And on the next slide, Val, we have a listing of who our area offices are. Val said I was the best size specialist in the country, but that's not true. Because we have great size specialists in all six of our areas. And Val, maybe it is slide 35, if we could go to that one for a minute.

So, here you can see where you should send your size protests, should you receive one or if you want to lodge a contracting officer size protest, where you should send that. So, you send it to the individual that covers the state where the protested concern is located. So the company that is in question, you look at where they are located and then you send it to the appropriate person that covers that state. So if you look down there, I cover from Arkansas to South Dakota. So any company that is protested in those states would come to me.

It's good to contact the size specialist before you send on the protest. Some of them don't receive them electronically, because of the sheer volume of a size protest being that, some protests can be hundreds of documents, hundreds of pages. And a lot of times, solicitations are very lengthy as well. So some area offices only receive them via mail. So it's good to check in to let the size specialist

know that this protest is coming, how would you like us to send it, and do you have a checklist of items that you would like? And so they can get right back to you on those things.

Back to 34. When you notify unsuccessful offerors of the apparent successful offer, we ask that you then wait five days before making the award. That's the amount of time that other offerors have to protest the size of the company that is in line for the award. So we ask that you wait those five days before making your award.

So, please go to slide 36. So, when you receive a size protest, we ask that you do not make award of the contract for at least 15 business days. Because that's how long we have to process the size determination, unless we get an extension from you. You do have the option to make an award if it must be made in order to protect the public interest. And so, you would document that, that is the case, and make the award. And if you choose to do that, the result of our size decision, is how you have to count the award. So, if you have chosen that it is urgent and that you need to make award, you cannot wait for our size determination, then you make the award and the company ultimately turns out to be an other than small business, you will have to count that as an other than small business award.

And, you can also make an award, if we do not get a size determination done on time. Same type of thing applies. If it's urgent, you can make the award, but please document the file as to what happened.

Size protests cannot be used to vet potential awardees. A lot of times during contract evaluations, a contracting officer will call and say, I'd like a size determination done because I don't think this company – one of these offerors – is small. We don't do it at that point in time. Our regulations require that we can only do size determinations on the apparent successful offeror. So you must notify unsuccessful offerors who the apparent successful offer is, and then you can make size protests. We do not use them for vetting.

Also, they have to be done in conjunction with a particular or pending procurement. We don't just do them in general.

SBA has no secret database of small businesses. We just use SAM. It's a self-certification database. Sometimes you will see a little notation in SAM, which is in the NAICS code table and it has an asterisk by it. And underneath it will say that SBA has previously found this company to be other than small. If you find that notation, we ask that you contact the appropriate SBA office, from my previous slide, and have a discussion with that office about that company's size determination and whether it's other than small status would apply to their

procurement. Companies who have been found large are not able to self-certify as small until we recertify them. So companies that try to represent themselves as small, even without pursuing recertification, we need to catch those companies and make sure that they're not miscertifying.

Also, contracting officers can protest the size of the firm at any time. They just can't do it before notification to unsuccessful offerors. Next slide.

Slide 38. The protest has to be what we call timely and specific. Meaning, after the first day that the company learned who the apparent successful offeror was, whether that's your notice of unsuccessful offerors, or in a public bid opening for IFBs, it would be that day, that bids are open. They have five working days to protest the size of the apparent successful offeror. If they don't receive a debrief until several days after that, that doesn't matter. We don't – debrief dates have nothing to do with the date that you are allowed to protest size. We always go back to when you first learned of the identity of the apparent successful offeror – whether that was a (?) announcement, or a written notification, or a public bid opening – that is the date that we use to calculate the beginning (?) date.

It also must be specific, meaning that it has to have specific detailed evidence to support the allegation that the offeror may not be small. A lot of this is website information. It's difficult for small businesses to get their hands on specific information. A lot of them use contracting websites that detail contract awards, and then they total those and say that this amount of awards indicates that this company would not be small. A lot of them use news releases, or that company's own website where they boast about their size as evidence. So all of that is specific enough. But what we can't have, is just a company saying, I don't think that this company is small, with no rationale.

If the contracting officer receives a protest that is late, or is not specific, you still can't just dismiss it. You still forward the protest to us and then SBA will quickly dismiss that protest as not having any standing.

Slide 39. Okay, we have seven more minutes left and only a few more slides. So it looks like we're right on time.

Once we receive a size protest that is timely and specific, we provide the companies three days to respond with their information and, in total, we have 15 working days to render our determination, assuming there is no extension. All extensions are coordinated with the contracting officer, because we know that we are delaying your procurement. So, if we're going to extend it beyond 15 days, we want your permission that, that's okay.

A copy of the final size determination is sent to the protestor, the protested concern, and the contracting officer. In very limited instances, some of the information may be redacted on the copy that is sent to the protester.

Slide 40. It's important to realize the date that size is determined because companies – sometimes contract award is not made for a significant time, after offers are due. So it's important to realize that size is determined as of the date an offeror submits the initial offer that includes price. So if we had an offer that was due on February 14, 2016 last year, and we're just now getting award ready, and protesting, we use that February 14 of 2016 date to calculate our size, which means we use our 2015, 2014, 2013 revenue to determine whether they are small or not. So, sometimes a company may currently be large, but they are still eligible for award because of the dates that are at play.

A company that becomes large after it has self-certified, is still considered small for the life of the contract unless recertification is required. In recertification, size is determined as of the date the concern recertified its size. Next slide.

These are the instances where recertification is needed. So, basically size is determined as of the date of initial offer, including price. And that is good for the life of the contract unless one of these three instances occur – if there is a novation, if there is a merger-acquisition without a novation, or if this is a long term contract over five years, including options. Those include multiple award schedules, multiple award contracts, and GWACS, then they must recertify their size when any of those instances happen.

Also, in a long-term contract, the contractor must recertify its size at the end of the fifth year and every option that comes after that, as well. So if a company's size changes because of one of those instances, then you must convert to counting it as an other than small business award from that point forward.

Slide 42. A company that is other than small, is prohibited from self-certifying as small on any procurement with the same or lower size standard until it is recertified by the SBA office that made the determination. It also must notify all contracting officers before which it has pending procurements that it has been found other than small. It also must amend its size status in SAM and any other database, unless it was a contract specific certification, which usually would only be for an ostensible subcontracting finding. Next slide.

Slide 43. Once our size determination is issued, all parties have appeal rights. They can appeal it to the SBA Office of Hearings and Appeals. And the contracting officer can also appeal. They have 15 calendar days to appeal it after they received the formal size determination, and then the OHA judge issues an

appeal decision within 60 calendar days after they closed the record. The decision is going to either be that they affirmed the size determination, which means they uphold it, and it stands. They reverse the size determination, meaning they reverse it or remand it back to the area office. Meaning, we missed an element and so we have to re-issue the size determination.

Valerie: Stephanie, that was great. Thank you so much. And Deborah, I heard a lot of dings, so I know that we have a lot of questions for Stephanie. If you would go ahead and start with those, please.

Deborah: Yes, we have quite a few questions for Stephanie. [Unintelligible-00: 46:30]... 219-28. And the question is, for a small business... [unintelligible]... What is a reasonable amount of time to allow them to self-certify... (unintelligible)... applicable NAICS code for the solicitation.

Stephanie: Okay, so when an offeror submits its offer, it is also self-certifying its size status as of that date. And so a lot of agencies use SAM, and so they will go to the SAM table and look at what that company is classified as of that date. And that is their size self-representation, unless you requested paper written references and certifications for that procurement for whatever reason.

So it's not like they have a certain amount of time to do it. It should already be in the SAM as of the date that they place their offer. Now, like I said, remember that the NAICS code that's in SAM, is their primary NAICS code. If you don't see the NAICS code listed there, it doesn't mean that they have not self-certified for that NAICS code. You click on the, "see more" link and that shows you a table of all of their size standards. So, when a company submits its offer, you should use SAM to determine or validate whether it's small for that, and has self-represented as small, in SAM and then you can move on from there.

Deborah: Thank you Stephanie. The next question is regarding . . . [unintelligible]... GSA e-library site or is there another verification that needs to take place?

Stephanie: Can you please repeat the question again?

Deborah: ... [Unintelligible]... Can contracting officers rely on the sizes listed on the GSA e-library site or is there another verification that needs to take place?

Stephanie: So, on Federal supply schedules, companies that submit an offer to be on the schedules, self-certify their size as of the date that they are getting on the schedules. So I would have to assume the GSA has correctly coded those on the e-library, so the contracting officers then should be able to rely upon what GSA has coded them as. However, on multiple award type contract vehicles, contracting



officers have the option of asking companies to recertify their size status for specific offers, if they choose to.

So the contracting officer has two options. If it's going to exercise a contract under the Federal supply schedule, it can rely upon the sizes in the e-library for that company, or it can ask offerors to recertify their size status for that particular order. So the contracting officer, in that instance, has an option of doing either.

Deborah: There are multiple questions about joint ventures. So I'll try to consolidate them all into about five questions. The first question is, is affiliation different than mentoring? How does the mentor protégé program fit into affiliation?

Stephanie: Affiliation and mentoring are two different things. Affiliation is generally common ownership, common control, common management, things like that. Mentoring is different. Because if a mentoring relationship exists, that does not mean that a company has control. A formal mentoring is through a mentor protégé relationship and that is the most clear type of arrangement, because it's a documented agreement that has been approved by SBA as a formal mentoring arrangement, and what each party is going to benefit, and give, under that arrangement.

But other mentoring occurs informally as well. So we would have to – if there is no formal mentor protégé agreement, we have to look at what type of mentoring is going on and whether or not that rises to the level of affiliation. Which, it would have to be heavy mentoring to be an affiliate. Mentoring, as in we are providing the bonding. Mentoring, as in we are running the contract for the company. That kind of thing.

Deborah: And, the next question is... [Unintelligible-00:51:01]... even if the combined size of the JV and the two entities that comprise the JV is under the size standards that the NAICS code set for the procurement.

Stephanie: I'm sorry, please read that again.

Deborah: The question stated, ... [unintelligible-00:51:44]... joint ventures ineligible to receive contract award, even when the combined size of the JV and the two entities that comprise the JV is under the size standards for the NAICS code for the procurement?

Stephanie: Okay. So this rule – the current rule which exists after January 30, 2016 is when a company submits a joint venture, its size is determined by whether the individual joint venture partners are small or not. If they are individually small under the

NAICS code and size standards assigned to the procurement, then the joint venture is considered small.

If it's a procurement that was solicited prior to June 30, 2016 we would aggregate the size of the joint venture partners to determine whether they are small, or not.

However, if the contract is over \$10 million, if it's an employee-based size standard – it gets really complicated at this point. Because the old regulations require that the procurement has to be a certain dollar value to allow for the size exemption.

And so, I would probably prefer to go into that off-line, rather than confuse everyone. Because the new rule just says they are small, if they are individually small. So if that person would rather email me, then we can talk about the old rule. It's a much more complicated rule.

Deborah: Okay, Stephanie, on Slide 28, [unintelligible]... Joint ventures cannot be populated with [unintelligible]... administrative employees. Can you elaborate a little bit on that?

Stephanie: Yes, that's a brand-new regulation. Joint ventures can only be populated with one or two administrative employees. We cannot have the joint venture itself – employees hired under the joint venture name performing the contract. Because then we can't see which employee is doing the work. And so, the joint venture itself can have one or two administrative employees, but the work must be performed by the joint venture partners, under the joint venture partners name.

Deborah: [unintelligible -00:54:22]... JV?

Stephanie: No, if a company submits an offer as a joint venture, you would have to look at their size representation for the joint venture, in SAM.

Deborah: [unintelligible -00:54:43]... If SBA does not approve the... [unintelligible]... How can an agency determine if the joint venture is small for the procurement?

Stephanie: Well, you would just take it at face value, at that point. So in a non-8(a) procurement, SBA does not approve the joint venture agreement, but you the contracting officer have the authority to request the joint venture, and you can take a look at it. And if you feel that it is not meeting the required elements of the joint venture as outlined in 13 CFR you can submit a contracting officer size protest, or you can take it at face value that it meets the requirements.

Deborah: Okay, the next question is, can you decide that if the company's registration in SAM includes (unintelligible)... to be owned by another firm... (unintelligible)... worldwide information?

Stephanie: Yes. When a company is indicating its size in SAM, it has to include its affiliations. And so, it's SAM profile should be representative of that.

Deborah: The next question is regarding the non-manufacturing rule. Can you shed some light on the applicability of the non-manufacturing rule to subcontracts and what size standards to use?... (unintelligible)... in the wholesale/retail guidance... (unintelligible)...

Stephanie: The non-manufacturing rule applies in any small business type set-aside that is over \$150,000 and the offeror is not the end item manufacturer. If those circumstances exist, then they have to comply with the non-manufacturers rule, and the four elements under that. They offeror itself has to have less than 500 employees, and the end item manufacturer cannot exceed the small business size standard for the procurement.

Deborah: The next question deals with construction small business set-asides. The question is [unintelligible-00:57:16]... be it large or small, considered as ostensible by default?

Stephanie: Not necessarily in construction, because a general construction company only has 15% of the contract. So if the primary is doing 15% of the work, we haven't really... it's not violating the limitations on subcontracting rules. And it doesn't necessarily mean that there's ostensible subcontracting.

Normally in a general construction job, the prime contractor is doing construction management, and then it has subs which can do up to 85% of the work. That is not a high alert situation. That's a normal contracting practice. And in specialty construction, it's 25% that the prime has to do.

So, in construction, there are a lot of trades that have to be subcontracted because they specialize in different areas, and that doesn't necessarily mean ostensible subcontracting is going on. But if you have a company, like a small business that has bid on something, and then their sub underneath them, let's say, is a Ch.2 (?) large business out of Colorado, and it seems like Ch.2 is really in charge of the contract – it's not like subcontractors are doing their work. It's more like Ch.2 is running the contract, then that would be an ostensible subcontracting arrangement.

Deborah: The next question relates to slide 34.... [unintelligible]... Does this apply across the board... [unintelligible]...

Stephanie: Well, we would prefer that you always wait five days. Because five days is the window that they have to make a protest. So, if you go ahead and make an award during the five day period, you are sort of putting your procurement in jeopardy that you may have to hold the contract off, until we receive any protests. So it's preferred that you notify unsuccessful offerors, then you wait five days. If you don't receive any protests within five working days, you are safe making the award.

Valerie: How are we on time for additional questions?

Carla: We are at 10:30 Central. But if there are a few additional questions, we can take some more.

Deborah: ... [Unintelligible-00:59:48]... And also there was a question about receiving copies of the presentation slides.... If you send an email to [sbalearning@sba.gov](mailto:sbalearning@sba.gov) I can send you a copy of the presentation. And that's it. I don't think there are any more questions.... [Unintelligible]...

Valerie: Yes, and please remember [sbalearning@sba.gov](mailto:sbalearning@sba.gov) for additional questions that you may have for Stephanie, I will be glad to forward those to her, so that she can answer your questions directly. So if there are no more questions, Stephanie, thank you very much for your presentation. It was wonderful. Deborah, thank you for going through all the questions. We want to thank Carla for her wonderful expertise. We have been dealing with her for years with ATT, in getting this done and I want to thank all of you for coming in, and please remember next month, we will have our presentation on consolidation versus bundling.

I also want to remind you that if you have anyone in your office, if you were doing a group session in a conference room, or something, and individuals want to be added to our mailing list, so they individually get the notifications of each of the First Wednesdays, send it to the [sbalearning@sba.gov](mailto:sbalearning@sba.gov) also, and we will add you to the mailing list for next month. So thank you all again and I hope you guys have a wonderful week and hope to have all of you back next month. Thank you.

Moderator: The session has now concluded and you may disconnect.

**[End of Recording]**