



U.S. Small Business
Administration



Size and Affiliation:

What Contracting Personnel Should Know

First Wednesday Virtual Learning Series FY2020

Hosts

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Welcome to “SBA Virtual Learning 2020”

1. Questions answered during the final 10 minutes.
2. Technical problems: Contact the moderator with a note or call AT&T Support Desk at 1-888-796-6118.
3. Page numbers stated for those working off hard copies of the program.
4. We cover the “**SBA Quick Reference**” as time allows.
5. For more SBA training visit the SBA Learning Center website <https://www.sba.gov/tools/sba-learning-center/search/training>

Association of Procurement Technical Assistance Centers (APTAC)

Procurement Technical Assistance Centers are a vital resource partner.

- APTAC posts past “First Wednesday” programming at this link: <http://www.aptac-us.org/for-contracting-officers-sba-webinar-library/>
- Contracting officer resources: “How PTACs partner with federal agencies”: <http://www.aptac-us.org/federal-partners/>
- Find your nearest Procurement Technical Assistance Center at <http://www.aptac-us.org>

FIRST WEDNESDAY VIRTUAL LEARNING SERIES

FY 2020 SCHEDULE

1:00 to 2:00 Central Time

FY 2020	Date	Topic
1	October 2, 2019	Size & Affiliation
2	November 6, 2019	Understanding the Non-Manufacturer Rule
3	December 4, 2019	Subcontracting Plans
4	January 8, 2020	Surveillance Reviews
5	February 5, 2020	Historically Underutilized Business Zone (HUBZone) Program
6	March 4, 2020	Certificate of Competency (COC)
7	April 1, 2020	Procurement Center Representative (PCR) functions
8	May 6, 2020	Market Research
9	June 3, 2020	Regulation Updates
10	July 1, 2020	Woman Owned Small Business (WOSB) Program
11	August 5, 2020	All Small Mentor Protégé Program

The program schedule is for information only and is subject to change.

One Continuous Learning Point

- Self-service: Using the PowerPoint that was sent with your invitation for this training event, fill in your name on the certificate slide and save. Download the certificate and print for your records. You submit your request for training credit IAW your agency policy, i.e. FAITAS.
- Phoning in only: If you listen in groups and you want all attendees to be included on the future mailing list, send email addresses of participants in an excel document to sbalearning@sba.gov.

“SBA 1st Wednesday Virtual Learning 2019”

This Certificate is awarded to

Insert Your Name Here

For completion of

Size and Affiliation

This training seminar may be credited towards “Continuous Learning Points” as described in OFPP Policy Letter 05-01. Recommendation of One CLP.



Pamela J. Beavers
Director, Area IV
SBA Office of Government Contracting

10/02/2019

DATE

Today's Speaker

**David Gordon, Size Program Manager
Office of Government Contracting
Area IV – Chicago, IL
U.S. Small Business Administration**

What is a small business?

- Organized “for profit.” (FP subs of NFPs are okay)
- Firm, including all its affiliates, must meet the size standard for the NAICS assigned to procurement.
- Foreign-ownership **does not matter** if the concern has a place of business located in the US, **and either**
 - ✓ operates primarily in the US
 - or**
 - ✓ makes a “significant contribution” to the US economy by paying US taxes or using American products or materials or labor.

13 CFR §121.105

Small business certification

- SBA **does not** certify businesses as small unless they are admitted to participate in the 8(a) or HUBZone programs.
- Small businesses certify themselves as small.
- All other types of small businesses self-certify:
 - ✓ SBCs
13 CFR part 127
 - ✓ Woman-owned SBCs (WOSB/EDWOSB) (may also use private third-party certifiers approved by SBA)
13 CFR part 125
 - ✓ Veteran-owned (and SDVO) SBCs
13 CFR part 125

Self-certification must be given deference

- FAR requires that CO “shall accept” SBC’s representation unless CO has specific reason to believe otherwise.

FAR §19.301-1(b); FAR §19.302(c)(2)

- Company *not* required to list NAICS assigned to procurement in SAM unless solicitation requires it—usually only necessary before formal award.

In the Matter of S4, Inc., B-299817 (August 23, 2007); affirmed in *Veterans Electric, LLC*, B-413198 (August 26, 2016).
See also *Size Appeal of Ipkeys Technologies, LLC*, SBA No. SIZ-5353 (2012).

Supply procurements and NAICS

- Wholesale/retail NAICS codes may **not** be assigned to procurements of supplies. Must use **manufacturing** codes.
13 CFR §121.402(b)(2)
- SBA's non-manufacturer rule is designed to let wholesalers, retailers, brokers, distributors, etc. bid on such procurements (they need not have mfg NAICS to bid)
13 CFR §121.406(b)(3)
- Subcontracts: NAICS decided by prime; must reflect product/svc provided

When can SBA conduct a size determination?

- REQUESTS: primarily for internal SBA programs (with some exceptions, such as protecting integrity of federal procurement process via SAM).

13 CFR §121.1001(b)

- PROTESTS: who is eligible to protest depends on the category of the procurement.

Example: for total SB set-asides, eligible protesters are:

- ✓ other offerors (**unless** rejected as non-responsive, technically unacceptable or outside the competitive range);
- ✓ the CO;
- ✓ SBA
- ✓ other “interested parties” (a very small category).

13 CFR §121.1001(a)

Premature protests & “particular” contracts

- Size protests cannot be used to narrow the field of offerors, “finalists,” or potential awardees.
- Protests must be in connection with a “particular”— i.e., pending—procurement, not “off the street.”
- There is no internal SBA database listing every business in the United States and its current size. We use SAM too.
- Premature protests (i.e., before bid opening or notification to offerors) will be dismissed, **even if filed by CO.**

You received a size protest. What next?

- **All** size protests **must** be referred to SBA. COs/procuring activities do not have the legal authority to decide a size protest or to ignore it.
- If uncertain whether document is a formal protest, consult SBA to see whether it should be formally referred.
- Send to the SBA **Area Office** (**not** the local District Office) with jurisdiction over state where the **protested** concern is located. (Check with Area Office first for its checklist or requirements.)
- Eligibility/status protests must be sent to SBA HQ.

13 CFR §121.1006(a); FAR §19.302(c)(1)

What happens after SBA receives the referral?

- SBA notifies the protested concern, which has 3 business days to respond. Requests for extensions are increasingly common.
- SBA then has 10 business days to complete its determination. Most cases take the full 15 business days. Dismissals usually take fewer and complex cases take more than that.
- SBA **cannot** expedite determinations.
 - ✓ other cases are pending
 - ✓ evidence may change analysis as it comes in
 - ✓ cases are frequently quite complicated to decide
- Useful “updates” are very difficult to provide.
- CO may award after 15 business days if there is a formal finding “in writing that there is an immediate need to award the contract and that waiting...will be disadvantageous to the Government.

13 CFR §121.1009(a)(3); FAR §19.302(g)(2)

Basic requirements: standing, timeliness, specificity

- Protester must be legally authorized to file a protest.

13 CFR §121.1001

- A protest must be received (by the CO) 5 business days after notification to unsuccessful offerors (RFPs/RFQs) **or** bid opening (IFBs) **or** public posting.

13 CFR §121.1004; FAR §19.302(d)

- Protest must be specific. “Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small...does not specify adequate grounds for the protest.”

13 CFR §121.1007

As of what moment is size determined?

“...as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.”

13 CFR §121.404(a)

Multiple Award Contracts and orders against them: If small at the time of offer, a firm is small for each order issued against the contract, **unless** a CO requests recertification in connection with a specific order.

13 CFR §121.404(a)(1)(i)

NMR/OS: the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

13 CFR §121.404(d)

Recertification is required if a merger, sale or acquisition occurs after offer but prior to award.

13 CFR §121.404(g)(2)(ii)(D)

How is size measured?

THE KEY TO SIZE IS AFFILIATION

A concern's size includes the size of *all of its affiliates*.

THE KEY TO AFFILIATION IS CONTROL

“Concerns are affiliated with each other if one concern **controls or has the power to control** the other, or a third party has the **power to control** both.”

13 CFR §121.103(a)(1); FAR §19.101

Separate divisions, subsidiaries, locations, CAGE codes, NAICS codes, product lines, incorporation, payment of taxes, “existence” are all **irrelevant**.

How does control arise?

SBA considers many factors when analyzing the existence of control, including:

- ✓ stock ownership
- ✓ stock options and convertible securities
- ✓ agreements to merge
- ✓ common management
- ✓ identity of interest
- ✓ economic dependence
- ✓ previous relationships or ties (e.g., spin-offs)
- ✓ franchises/licenses and joint ventures (require special attention)
- ✓ ostensible subcontracting
- ✓ negative control
- ✓ potential control (need not be actual)
- ✓ *et cetera*

13 CFR §121.103; FAR §19.101

For instance...

- I own all of the following:
 - 100% an ice cream parlor in Chicago and
 - 50% of a furniture manufacturing plant in Tibet and
 - 75% of a machine shop in Ohio and
 - 45%** of a construction company in Montreal...
- None of them do any business or have any relationships with the others (e.g. subcontracting).
- They are nevertheless **all affiliated** because I **control** them all. The size of the entire group must be calculated to determine the size of any **one** member of the group.

Ostensible subcontractor rule

- A prime and sub are affiliated if the sub performs the **primary and vital requirements** of the contract **or** if the prime is **unusually reliant** upon the subcontractor.
- SBA considers many factors, including who manages the contract, who has necessary expertise, the division of responsibilities and tasks, who performs complex and costly contract functions, percentage of work each party is performing, etc. There is no simple litmus test.

13 CFR §121.103(h)(4)

- If SBA finds OS and the sub is large, the SBC prime will be affiliated with the large business and the prime will be **ineligible for award**.

Joint ventures and teaming

- A JV must be in writing and registered in SAM in its own name;
- If it is as a separate legal entity, it may only be populated (have its own separate employees) with individuals who perform administrative functions, **not** employees who will perform contracts awarded to JV.
- If each JV partner **individually** qualifies as SBC, the JV as a whole will be considered to be small.

13 CFR §121.103(h)

- There is no such thing as teaming. A “team” is **either** a JV or a prime and a sub.

Safe harbor for 8(a) JVs: mentor/protégé agreements

- An SBA-approved mentor and 8(a) protégé may create a JV to bid as a small business for any federal procurement, so long as the protégé is small.
- SBA must approve mentor-protégé agreement *before offer is submitted* and the JV agreement *before award*.
- The safe harbor provides exemption from affiliation based solely on the mentor's assistance under the agreement; affiliation *may still be found for other reasons*.

13 CFR §121.103(h)(3)(iii) and §124.520

JVs under the “All-Small” Mentor/Protégé Program

- Businesses who have a mentor-protégé relationship can form a JV to compete for set-asides, including SDVO, women-owned, or HUBZone businesses—as long as the protégé qualifies for the contract.
- The JV agreement must be in writing and follow SBA requirements. The JV must be separately identified with its own name, DUNS number, and CAGE number in SAM.
- The joint venture must perform the appropriate percentage of work based on the subcontracting requirements; the protégé must perform 40% of that.

13 CFR §125.8

Similarly situated entities

- A “similarly situated entity” (SSE) is a firm that meets the same size and status requirements as the prime contractor for the subject procurement.

13 CFR §125.1

- SSEs are **exempt** from a finding of affiliation with the prime under ostensible subcontractor rule.

13 CFR §121.103(h)(4)

- A prime (and its SSEs) must perform the required amount of work (LOS). They cannot subcontract out more work than permitted to non-SSE subcontractors.

13 CFR §125.6

What if a firm's size changes during contract performance?

A concern that is small at the beginning of a contract, is considered small for the life of the contract. Company **must** recertify if there is a:

- i. novation **or**
- ii. merger or acquisition without a novation

If company is no longer small upon recertification under exceptions i or ii, CO cannot count contract toward agency's SBC goals but there is no requirement to terminate.

- iii. "long-term contract" (over 5 years including options; includes MAS, MAC, and GWACS).

13 CFR §121.404(g)(1)-(3); FAR §19.301-2

If exception iii applies, the CO must request recertification.

13 CFR §121.404(g)

Legal effect of size determinations

- COs **may** award based on Area Office determination. Or wait for the appeal to be decided.

13 CFR §121.1009(g)(1)

- Firms found other than small must (i) notify COs with pending procurements; (ii) amend their profile in SAM; (iii) cannot self-certify as small until either recertified by SBA or OHA reverses the determination.

13 CFR §121.1009(g)(5)

- A concern may request SBA to recertify it as small at any time.
- A concern found to be large for a particular procurement only is free to continue to certify itself as small on other federal procurements.

13 CFR §121.1010

Where to send size protests

If the headquarters of a protested concern is located in:

CT, ME, MA, NH, NJ, NY, RI, VT

DE, DC, MD, PA, VA, WV

AL, FL, GA, KY, MS, NC, SC, TN

IL, IN, IA, KS, MI, MN, MO, NE, OH, WI

AR, CO, LA, MT, NM, ND, OK, SD, TX, UT, WY

AK, AZ, CA, HI, ID, NV, OR, WA

Send the protest/referral to the SBA Office of Government Contracting:

26 Federal Plaza, Suite 31-08
New York, NY 10278
Carolyn Clark (212) 264-3231

1150 First Avenue, Parkview Towers
King of Prussia, PA 19406
Helen Goza (484) 868-3263

233 Peachtree St., NE, Suite 225
Atlanta, GA 30303
Carol Thompson (404) 331-0139

500 West Madison Street, Suite 1150
Chicago, IL 60661
David Gordon (312) 353-7674

4300 Amon Carter Boulevard, Suite 116
Fort Worth, TX 76155
Stephanie Lewis (817) 684-5303

455 Market Street, 6th floor
San Francisco, CA 94105
Esmeralda Sanchez (415) 744-4242

DO NOT SEND STATUS/ELIGIBILITY PROTESTS TO AREA OFFICES