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**[START OF TRANSCRIPT]**

**Helen:** Ladies and gentlemen, welcome and thank you for joining today's live SBA web conference. Before we begin, please ensure you are in the WebEx event and have opened the chat panel by using the associated icon located at the bottom of your screen. You're welcome to submit written questions during the presentation and these will be addressed during the Q&A session. To submit a question, please select all panelists from the drop-down menu in the chat panel, enter your question in the message box provided and press send. Please note that all audio connections are muted at this time. If you require technical assistance, please send a chat through the WebEx to the event producer. With that I'll turn the conference over to Chris Eischen. Chris, please go ahead.

**Chris:** Thank you Helen. Hello everyone and welcome to the first session of SBA's first Wednesday webinar series for fiscal year 2020. I want to start off with thanking all the participants and speakers from our FY19 program as we saw record high attendance numbers which exceeded 8,000 participants. We appreciate you making this program such a great success and we look forward to building on this achievement in 2020. On to slide two.

For today's session we'll be focusing on size and affiliation. By the end of today's program, you should have a better understanding of this topic as well as the resources available to you. If you are new to our event, this is a webinar series that focuses on getting subject-matter experts on specific small business topics such as size and affiliation and having them provide you with the valuable information you can use in the performance of your job. We appreciate you taking the time to participate in the FY20 Program, and we hope you benefit from today's session.

Now for a little background on the First Wednesday Program. The program was initially created for contracting staff, which is why the training was called 1102 First Wednesday. The 1102 designated government series for contracting personnel was later dropped to be more inclusive of other series as federal agencies increased the requirements for **[0:02:04 inaudible]** non 1102s to obtain DAWIA certifications; additionally, other federal buying activities, SBA staff, PTAC and SBDC personnel who after hearing about the training requested access and were added to the list of participants. So that is why SBA's First Wednesday Program is aimed at federal government employees and our resource partners like PTACs and SBDCs. Thank you to those of you who are repeat attendees and welcome to those who are new.

On to slide three. As Helen mentioned, I am Chris Eischen and I work as a procurement center representative or PCR in Kansas City, Missouri. Additionally, Ms. Gwen Davis who is the PCR in Minneapolis, Minnesota, will be reading your questions submitted during the program for our speaker to address at the end of today's session. We both work in government contracting Area Four and slide three includes our information.

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On to slide four. Please note that all lines are on mute. However, you may submit questions or technical issues in the chat box on the bottom right hand corner of your screen. Your questions may be submitted anytime during today's session by entering them into the chat box and these questions will be addressed at the end of our speakers' presentation. Please make sure that your question doesn't get overlooked. Please ensure that it is addressed to all panelists on the drop-down menu and not just to one individual.

As most as you know, we have transitioned to WebEx and have been informed that some users may experience issues such as a block website or other error messages when attempting to access the conference log in from their computers. If you're affected by this issue, please make sure you dial in and follow along with the slides provided in this email. We will ensure the page numbers are clearly stated so you can follow along. We are hopeful this issue will be resolved soon, and we apologize for any inconvenience. Now, if you're having any other technical issues, please call the AT&T support desk. This telephone number is included in the email invitation for today's program and on slide four of the PowerPoint presentation.

For more SBA small business program training and additional resources, please visit the SBA learning center at [www.sba.gov](http://www.sba.gov). Slide five.

Did you know that the association of procurement technical assistance centers or APTAC hosts a website where they post the First Wednesday Programs? Since these sessions are recorded, you can re-listen to this program as well as previous sessions by visiting their website, which is provided here on slide five. Additionally, procurement technical assistance centers or PTACs are a great resource and partnering with your local PTAC for an industry day, sharing RFI notices or **[0:04:45 inaudible]** announcement or referring small business concerns to a PTAC are just a few reasons why they are such a useful resource for acquisition personnel. Please contact your local PTAC for additional information.

Slide six is the program schedule for fiscal year 2020 and today's session on size and affiliation is the first topic in the series for this fiscal year. You will see that we have added some new topics to our program list and improved on other topics that have been presented in the past. The participation continues to grow each month and a positive word of mouth is greatly appreciated.

Slide seven. I'm sure many of you will want to receive credit for today's training; so, you'd be glad to know that today's session is worth one CLP. On the following slide, which is slide eight, you'll find the training certificate and I will go over the instructions when we get there.

Now several of you may have received this information for this training from a friend or colleague, but if you want to receive an email directly from us notifying you of upcoming first Wednesday webinar events, just send us an email at [sbalearning@sba.gov](mailto:sbalearning@sba.gov). In the

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subject line, please enter the words "add to list" and we'll ensure you're added to the distribution list. On to slide eight.

First, you'll see the certificate. First, you'll need to access the PowerPoint presentation that was emailed to you. Then you'll manually fill in your name where it states "insert your name here"

Next, within the print settings, you will select print current slide which will allow for only the certificate to be printed. Once this is done, you can coordinate the CLP achievement with your training program coordinator. In just another reminder, SBA does not track your CLPs or communicate with your training program regarding your CLP achievements.

Slide nine. Today's training has been assembled to address size and affiliation as well as provide you with additional resources available for your use. Our speaker has graciously accepted our invitation and he will be directing me to continue on to the next slide.

As mentioned earlier, if you were unable to access WebEx, please follow along with the PowerPoint presentation that was included in the email for today's training. We will identify the page numbers so you can follow along. Also, please note that some viewers may experience a delay as a slide changes on your screen.

Now I am pleased to introduce today's speaker to you, Mr. David Gordon, who is the Area Four Size Program Manager for SBAs Office of Government Contracting. Dave, we appreciate that you can meet with us today and I'll turn the program over to you now.

**David:** Okay, thanks Chris. Before we get started, I just have a couple housekeeping announcements and the first is the most important and that is, on the last slide you're going to find my phone number and my other contact information as well as that for my colleagues at the various area offices around the country. Don't hesitate to call us. If you have a question, if you have a concern about a procurement, about a protest, anything relating to size protests, give us a call. It's a lot easier to answer a call and address an issue before it becomes a problem than it is sometimes to try to solve a problem after it's already arisen. We're here to help you, and to the extent you get confused by size program issues, which are very complex. We're happy to take your calls and so I want to encourage you to make use of that. You can email us; you can call us, and all that information will be on the last slide in terms of how to get in touch with us.

The only other point I wanted to make is on almost every slide I have tried to include a citation in the bottom right-hand side of the slide so you'll know what my statement is based on, so you know where you can go in the regulations if you want to see it in the actual regulatory language. Keep in mind one thing, procurement personnel for procuring activities follow the federal acquisition regulation. For the most part, 97 or 98% of the time, the provisions in the FAR and the provisions in the Code of Federal Regulations Title 13, which is what SBA follows, are identical. However, there are a few

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occasions where they do not quite track exactly. Keep in mind SBA will always follow the CFR Title 13; we will not follow the FAR. If an issue arises, just something to keep in mind.

With that, Chris, why don't we move ahead to the first slide. I'm not going to cover every single issue relating to size determinations. I'm going to talk in general about the process with a little bit of stuff about the substance. But I'm going to try to hit all the high points, all of the things you'll need. Okay, Chris, slide 10, terrific.

What is a small business? In the first place, there's a definition at 121.105 of 13 CFR, and the first requirement is a business has to be organized for profit. Not-for-profit entities are not eligible to be considered small businesses. However, what that parenthetical there says is for-profit subsidiaries of not-for-profits may be eligible. So long as the entity that's at issue is for profit, that's okay. It can have a not-for-profit parent, but the not-for-profit parent will never be eligible to be considered a small business.

When we're determining the size of a protested concern, we measure the size of the firm plus the size of all of its affiliates. If it was simply a matter of measuring the size of a firm, there'd be no challenge really to doing size determination. The hardest part of doing the size determination is deciding who the affiliates of the protested firm are if in fact there are any affiliates. And the reason we need to do that is because affiliates are included when we measure the size of a firm.

Contrary to popular belief, it does not matter if a small business is owned by a foreign entity. Foreign ownership in and of itself is not a problem so long as the concern we're talking about has a place of business that's located in the United States and it either operates primarily in the U S or, and this is the way most foreign-owned businesses qualify under this regulation, makes what's called a significant contribution to the U S economy. And the way the regulation provides for testing whether they make a significant contribution is do they pay American taxes, or do they use American products or materials or labor? If they have American citizens working in their office, if they're paying American taxes, that is considered a significant contribution, and so long as they have a place of business here that is sufficient for a foreign-owned business to qualify as a small business. So, assuming of course it meets the size standard as well. But the key takeaway here is not to remember all the nitty gritty details of the definition, but to remember that foreign ownership in and of itself does not disqualify a concern from being considered a small business. Okay, Chris, next slide.

Small businesses have to certify themselves as small. SBA does not certify small businesses. There is maybe eight or 10 people who do what I do at SBA, which is determine informal determinations whether a business is small or not. There's 28 million, give or take, small businesses in the United States. Do the math. We cannot possibly certify every small business in the United States or every applicant to be considered a small business. Therefore, businesses are, if you will, on their honor, they certify themselves as small. It used to be a check box on a solicitation, now it's generally

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through SAM. And in that regard, I should go back to the previous slide dealing with foreign businesses.

Do not assume that simply because SAM says it cannot render a decision on a business listed in SAM with a foreign address, do not assume that means it's not small. SAM has a piece of software that automatically spits back a very difficult to comprehend answer anytime a business is listed in SAM with a foreign address and they're basically saying, "We're not going to tell you whether they're large or small;" and the answer is because they don't know and they don't want to get into the business of making determinations. But generally, you rely on SAM. If they certify themselves as small. COs are required to take that certification at face value.

Small businesses certify themselves. Women-owned businesses, veteran-owned businesses, the exceptions are the 8(a) Program and the HUBZone Program because those involve programs that are run out of SBA headquarters in Washington and one of the determinations that needs to be made before they're admitted to those programs is whether they're small or not. If they're in the program, that means they were certified as small when they were admitted to the program. It doesn't mean they could not have grown since they were admitted, but they were at one point certified to be small.

Speaking of which, next slide, slide 12 please. Self-certification has to be given deference. What that means is, unless you have a specific reason to believe that a certification is incorrect, the FAR specifically requires the contracting officers shall accept, meaning must accept a small business's representation that it's a small business.

You cannot challenge a small business because you don't think they're small. You have to have a specific reason, and we'll get into specificity and size protests in a little bit. But again, the general rule is unless there's a specific reason to believe otherwise, COs shall accept a small business's representation that it's small.

Then the other bullet point I've listed on this slide I've listed here because it fits here better than anywhere else, but I acknowledge it doesn't fit here. Every once in a while, we'll see a protest that says this company can't be small because they did not list the NAICS code assigned to this procurement in SAM. That's irrelevant. Cases have gone to GAO on that very subject and GAO said there's nothing in the law that requires them to list it.

The final word on the subject is generally the solicitation. If the solicitation requires it, and I have to admit I've never seen one, but if a solicitation required them to list an NAICS code assigned to the procurement in SAM before they submitted an offer, then they'd have to do it. But short of that, there is no other legal requirement. The only requirement I've seen and this from time to time was simply that they have that code listed in SAM before award is made, but not simply in order to make an offer.

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Slide 13 please. Again, this doesn't quite fit anywhere, but it's important enough to deserve its own slide. You cannot assign a wholesale or a retail NAICS code to a procurement of supplies, you have to use a manufacturing code. The policy underlying that rule is that the government wants the biggest possible pool of **[0:18:52 offerors]** of bidders. And if they just list a wholesale or a retail code for sellers of widgets, that means that manufacturers of widgets can't bid because they're generally not wholesalers or retailers.

So, what the government has done is instead say the procurement has to bear the manufacturer's code, that way manufacturers can bid; and it's created the non-manufacturer rule. Under the non-manufacturer rule, which has its own set of requirements, anyone who is not a manufacturer, in other words, wholesalers, retailers, brokers, distributors can bid on the procurement even though they do not have the manufacturing code because they're not manufacturers. Again, bottom line takeaway, you cannot assign a wholesale or a retail NAICS code to a supplies procurement.

Next slide please Chris. When can SBA conduct the size determination? The first point I want to make here is that this is not something that's up to SBA, if you will. In other words, SBA only has the authority that Congress gives it, and Congress has given SBA the authority to conduct size determinations in two categories. One is requests, and that deals primarily, although not exclusively with internal SBA programs. If the 8(a) program has a question, they can submit a request for a formal size determination.

The vast majority of the cases we do fall under the second category which is protests, and every kind of protest has its own section in the regulation. Small business set asides have one set of eligible protestors, service-disabled set asides have another set, and so on. There are, I believe, nine categories of requests and each one has different parties who are eligible to protest. I've listed them there for a typical total small business set aside and I would suggest if you have questions about another kind of procurement, simply go to the reference I've given you there at the bottom.

Okay, Chris, next slide. Premature protests in particular contracts. As I said, we only have authority to do formal size determinations in certain kinds of cases, and one of the areas or one of the categories in which we do not have the authority is to take a protest off the street, if you will. A small business can't simply come in and say, "Hey, my competitor down the road or in another state or located elsewhere is not a small business. I want to protest" We can't hear those cases. A protest always has to be in connection with a particular procurement, meaning a pending procurement that has not yet been awarded.

Size protests can't be used by procuring activities to vet the finalists either. We just got one last week. I got a protest from a buyer... and a buyer by the way, is not authorized to file a protest, it has to be a CO, and they said, "We haven't decided who's going to get it yet, but we'd like you to take a look at this company."

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We had to inform them there was nothing we could do; we don't have the authority to do that. We can only entertain a protest when there is an apparent successful offeror, when someone is in line for the award, they have been identified as going to receive the award, but for this protest. So, it has to be in connection with the pending procurement and it can't be used to vet a list of finalists.

We do not, again, contrary to apparently popular belief have some sort of secret internal SBA database that tells us the status of every small business in the country. We use SAM just like everybody else. There is no internal SBA database that's not public. And even if we've done a size determination on a company previously, that is no guarantee that that company is still whatever they were determined to be last year or five years ago. Companies are dynamic; their size changes. They may have been small five years ago and are not now or vice versa.

The last important point on this slide, it sort of goes with the first point there about not vetting finalists, premature protests. In other words, a protest before the bids are even opened or before offerors have been notified who is successful, who is unsuccessful, will be dismissed even if the protest is filed by the CO. Premature protests cannot be entertained.

Next slide please Chris, slide. What is it? 16. You've gotten the size protests or what looks to be a size protest. What do you do next? Well, my first piece of advice is not on the slide. If you're not sure ...well actually it is, I've modified this slide. Excuse me. The second point, if you get a document and you honestly can't tell whether it's a size protest or a status protest or just a complaint, call us and ask for help. We see all kinds of different protests and we can probably help guide you with deciding whether in fact it's a size protest and we need to see it or not.

That said, if it's a size protest, the law requires that it be referred to SBA. Procurement personnel do not have the authority to decide protests. It doesn't matter how clear the answer is. No one except SBA can decide a size protest. You are welcome to share your thoughts, your opinions, any information you have when you refer it, but the law requires that it be referred to SBA.

Again, the last slide has all the contact information. Please be sure you send the protest to an SBA area office. It's the only set of offices within the SBA that has jurisdiction over size protests. If you send it to a district office, and I speak from experience, they generally do not know what to do with it and have in the past, unfortunately, been known to sit on them and nothing will get done. They don't always know who to contact themselves so please be careful. You are to send it to an SBA area office. It's always the jurisdiction, the office that has jurisdiction over the state where the protests did concern is located.

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It doesn't matter where you are, it doesn't matter where the bids were opened. It doesn't matter where performance will be, it doesn't matter where the protester is. It has to be the state where the protested concern is located.

And the last point on where protests go, if it's not a size protest, it does not go to an area office. If it's somebody protesting eligibility or status, we don't think this firm is a bona fide HUBZone firm or a bona fide 8(a) firm. Those are status protests. They go to SBA headquarters.

Okay, next slide, Chris. When we get it, we will notify the protested concern. They've got three business days to respond. Do not notify anybody about the protest. When you get it, all you do is forward it to SBA and we'll take care of everything after that. It's a 15-business day process and the first three business-- well, actually the first five business days are taken up with notifying the company and letting them respond. I will tell you as time has passed over the years, more and more companies are getting lawyered up. The lawyers slow everything down and it is more common than ever for protested firms to ask for an extension. You are the only person that can grant that extension or decline that extension. SBA does not have the authority. It's not our procurement, so we'll contact you. Please try to get back to us as quickly as possible. You're in a hurry generally to make an award. We're in a hurry to get the case handled, but there's time that the company is automatically entitled to respond.

It's a very onerous matter to respond to a protest. Protests can be literally dozens of pages long. They can be extremely technical, and they can be very hard to respond to. To the extent you're able, I would always encourage you to grant more time, and it's also possible SBA will ask you for more time. Some of these cases can, as I say, simply be extremely complex and it can be very difficult to do them in the time we have. We try very hard to get them done in 15 days. We usually, [0:29:35 inaudible] but sometimes we're going to need some assistance from you.

That said, we can't expedite determinations. We sometimes get protests in with a, "We really need this right away."

Well, so did the people whose protests are in front of you. It's very rare that your protest is the only protest sitting on my desk and I have no authority and even if I did, I would be very reluctant to start jumping protests over other protests. I have no ability to say this procurement is more important than that procurement. I take them in the order I get them. To the extent I need more time I ask for it. We will get it done as soon as we can, but it doesn't help to ask us to expedite. We simply can't. And that applies to updates as well.

I have literally seen cases where the way I was leaning changed day by day by day because we are generally in contact with the firm asking a continuing series of questions and the information, we get can totally change the analysis. Giving you much of an update is extremely difficult. There's really not much we can say except we're working



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on it. We hope to get it done soon. Beyond that it's extremely difficult to say anything useful to you. Keep in mind, the FAR has a provision. I've cited it at the bottom. If there is a formal finding in writing that there's an immediate need to award the contract and waiting will be disadvantageous, advantageous to the government, the CO can award after 15 days. So, you don't have to wait for us if it's that urgent. But otherwise I would ask you to work with us to the extent possible.

Okay, Chris, next. There are some basic requirements we look at anytime a protest comes in, because if a protest fails on one of these three grounds, we can dismiss it, and dismissals can usually be done in a handful of days as opposed to three weeks.

First of all, as I said before, the protester has to be legally authorized to file a protest. If they're not eligible to protest in this procurement, then the protest gets dismissed. In addition, the protest has to be received in a timely way. And finally, the protest has to be specific. If I get a base, if I get a protest that says, "Gee, you know, somebody told me that these guys are big so I'm protesting them because somebody told me they're big." That will be dismissed. Or "I don't think they're small, but I can't point to anything in particular." That will be dismissed.

The law requires a basis for the belief that the business is not small. There has to be some evidence. You don't have to be right, and this applies to both outside protestors as well as procurement personnel, you don't have to be right. It doesn't have to be a mountain of evidence, but you have to be able to point to something specific as the reason you believe that a firm is not a small business.

Okay, Chris, next slide please. We're on slide 19. We determine size as of a specific point in time. Size is always changing. Size is based on generally either average annual receipts or number of employees and that never stays the same. The only way to do a size determination is to take a snapshot at a certain point in time. 13CFR 121.404 tells us depending on the kind of procurement when we take that snapshot.

As a general rule, it's as of the date that company submits its written self-certification that it's small as part of the initial offer. That generally means a cover sheet with a signature and a date on it that they submitted either as a bid or as an offer. There are several other points on the slide. The only one I want to point out is the last one, which is that recertification is required in certain cases. Those cases, mergers, sales or acquisitions that occur after offer, but prior to award.

Next slide Chris. How do we make a size determination? That's the initial process to get the case to us. We measure size as I said at the beginning by first of all, figuring out who the affiliates are because we have to measure the size of the protested concern and the size of all of its affiliates. How do we know who is an affiliate? The key to affiliation is control. And I give you the probably most basic definition in all of our regulations dealing with size concerns or 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. It does

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not matter if a company has separate divisions or subsidiaries, separate locations, separate CAGE codes, they pay their taxes separately, they're incorporated in separate States. different divisions have different NAICS codes. All of that stuff is irrelevant. The only issue we look at when we're determining the size of a concern and its affiliates is the issue of control.

The next slide, Chris, slide 21 is a list of how we decide whether control exists or not. This is just a list of the most common tests that we look at. Obviously if you own 100% of something, you control it. Well, what if you own 45%? And I'll talk about that in just a minute, the next slide coming up. But as you can see, there's a whole series of different tests we use to look at a situation involving more than one company to decide who controls who if in fact control exists and whether the firms are affiliated. It can be, as I've said several times already, a fairly complicated process to determine when or whether control exists.

Next slide please. I want to get to the 45% I talked about. If I own all of the following companies, 100% of an ice cream parlor in Chicago, 50% of a furniture manufacturing plant in Tibet, 75% of a machine shop in Ohio, and 45% of a construction company in Montreal, the first thing you'll notice is none of them are located in the same place. None of them do the same thing. The odds of any of these companies sub-contracting to any of these other companies is pretty remote. The odds of any of them having anything to do with the others is pretty remote. They all have one thing in common though. I own them all. If it's 50% or more ownership, it's automatically control. If it's less than 50% it becomes a much more subjective test.

If I own 45% of a company, I might still control it. It depends on how the other 55% is owned. If one person owns the 55%, then I probably don't control it, but if 55 other people each own 1% and I own 45%, then I probably do control. You can let your imaginations run wild because we've seen it all, all kinds of ownership schemes and this is just analysis by stock ownership, so we need to look at all of this stuff just under the first test alone, stock ownership.

Next slide, Chris, please. Very important rule, I'm going to pick out of all the tests. I'm not going to talk about most of the tests, but I do want to talk about the ostensible subcontractor rule because it's so critical. A prime and its subcontractor will be considered affiliated. They're unrelated companies otherwise, but they're a prime and a sub on this contract if the subcontractor is the tail wagging the dog. In other words, if the sub performs the primary and vital requirements of the contract or if the prime is unusually reliant on the sub, in other words, the tail wags the dog. The small business is there simply because they are lending their small business status to let the big guy in the door to perform the contract. It's a very complicated test. There's all kinds of factors we look at. There is no full litmus test, yes or no on this test and we know it's a very-- they're probably one of the two most complicated tests we have to apply. But they're critical because if we find that there's ostensible subcontract, that the sub is the tail wagging the dog, then the small business prime is going to be affiliated with a large

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business sub which makes the small business prime ineligible for award and they will be thrown out as a large business. It is a very simple rule to explain with significant consequences.

Let's do joint ventures and teaming Chris, next slide please. Slide 24. A joint venture has to be in writing. It has to be registered in SAM in its own name. If it's a separate legal entity, it can only be populated with people who will perform administrative functions. It cannot employ people who will actually perform contracts awarded to the JV.

Change in the rules a couple of years ago, there is now the general, the rule is now in general application that if each partner to the joint venture qualifies as small individually, then the joint venture as a whole will be considered small. You will not aggregate them all and decide based on the sum total of the aggregate. If each one is small individually, then the joint venture will be small.

And then this is a topic I love to discuss because nobody believes me. There is no such thing as teaming. The government has invented it. As a legal matter, a team can only be one of two things. A team can only be a joint venture or a prime and a sub. There is no legal entity known as a team. The government's created teams because it's very handy to allow teams to do certain things, but when it comes to size determinations, we're going to analyze the team and it's only going to be either a joint venture or a prime and a sub and we will analyze them that way.

Chris, next slide. There is, as you probably know, a safe harbor for joint ventures with involving 8(a) firms. There are some very picky technical rules. I don't want to go through them on the slide, but basically if there is an approved mentor-protégé agreement with an SBA approved mentor and an 8 (a) firm as the protégé, it can bid on a joint venture as a small business so long as the protégé is small. There are other technical requirements that they have to meet under SBA rules, but that's a big safe harbor for 8(a) joint ventures.

Within the past couple of years-- oh, I'm sorry, next slide please, 26, Chris. We've come up with the all small mentor-protégé program. In other words, we've extended a lot of the benefits of mentor-protégé agreements beyond the 8(a) program. Firms that are not in the 8(a) program can also have a mentor-protégé relationship and can form JVs to compete for set asides. It applies to service disabled, it applies to women-owned businesses, it applies to HUBZone businesses so long as the protégé qualifies for the contract.

Again, I've listed several bullet points on this slide that deal with SBA specific requirements to be considered small and to meet the program requirements for all small, but it's another program to keep in mind.

Again, next slide. There was a change a couple years ago, we invented something called similarly situated entities. And what it basically means is if you have an 8(a) prime and

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an 8(a) sub, the 8(a) is similarly...I'm sorry, the sub is similarly situated and if the sub is a similarly situated firm, it is exempt from being considered affiliated with the prime under the ostensible sub-contracting rule. So, if you have an 8(a) prime and four subcontractors, two of the subs are also 8(a) firms, those two are effectively exempt from a finding of affiliation. The other two that are not 8(a) might be found to be affiliated simply because they're not similarly situated entities. They still, by the way, have to perform the prime and it's similarly situated entity subs have to perform the required amount of work under limitations on subcontracting. They cannot subcontract out more work than is permitted to non-similarly situated entity subcontractors.

Next important point. What if a firm's size changes during contract performance? This is a very complicated rule that's only gotten more complicated as time has gone by. General rule is that a company that is small at the beginning of the contract is considered to be small for the life of the contract, period. That's the general rule. The problem is not only are there exceptions, there are lots of qualifiers to the general rule and the first and most important qualifier is that a company must recertify if there is a novation or if there's a merger or an acquisition even without a novation. If the company is bought out, if it's merged out of existence or it's acquired, the company has to recertify. This is not a optional if you want to, you can recertify.

Obviously if the company is no longer small when it recertifies, that contract cannot be counted toward the agency's small business goals. However, interesting wrinkle, although that can't be counted, there is no legal requirement in the FAR or the CFR to terminate. In other words, if the CO wants the company to continue to perform, even though they're not small, even though it was a set aside at the beginning or is a set aside, they may continue to allow them to perform; they simply can't count it toward the small business goals.

Now there's a third category; long-term contract and this is by far the biggest. There are far more long-term contracts than there are contracts involving novations or mergers and acquisitions. If you have a contract that is more than five years long, and by that, I mean options primarily, you're going to need to make a decision anytime an option period rolls around. When an option period rolls around and it's up to the CO to decide what to do, CO has to request recertification on a long-term contract. So, if you've got a five-year base period and it's time to consider whether or not to extend the contract by granting the first option, the CO has to ask the company to recertify. Same rule applies. They could still be considered small. I'm sorry. They could, yeah, they're still considered small, but they can't be...the award can't count against the total goal for the procuring activity and there is no requirement to terminate.

Last slide, and this comes up, it always surprises me how often it comes up, but it does. A CO can make an award based on the area office determination. Often determinations are appealed. You can wait for the appeal to run its course, which typically takes several months at least. Or if you want, you can go ahead, and award based on the area office decision. Even if OHA, the Office of Hearings and Appeals reverses the area office, you

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will not need to terminate that contract. There's a series of other rules there that I've listed. Take a look at them. There's a very long section on the legal effect of size determinations, but that's the basic rule.

That's basically the whole presentation. The next slide I believe is the slide with all the contacts on it. It gives you the jurisdiction, jurisdictional coverage for each area office, the name and address of the person, the phone number for that person so feel free to contact us. With that, I'll stop talking so we can take some questions.

**Chris:** Alright, Gwen, if you have any questions, let's start them off.

**Gwen:** Okay. Well, the first one goes back to slide 12. You were talking about the NAICS code. The question is, do they not have to have that NAICS code in SAM in order to be awarded the contract?

**David:** The short answer is it depends on the solicitation. Most solicitations do not require it and so generally the answer is no. However, it all depends on what's in the solicitation. If the solicitation says they have to have it before award, then they have to have it before award. The solicitation is a legal document and so if it has a requirement in it, it's a legal requirement. Most solicitations don't have it, some do. So, I can't give you a definitive answer for every circumstance.

**Gwen:** Okay. Slide 17, SBA size standards are very generous in revenue and number of employees. Why and when do companies protest? Is it because they're too close to upper end of standards?

**David:** Why do people protest? Why do people fight with each other? There's all kinds of reasons for protest. Sometimes it's a matter of a bad economy. Size protests always go up when it's a bad economy because more people are fighting for fewer dollars. Sometimes it's bad blood between two firms, sometimes it's just a genuine belief that they're not small and this is a set aside. They have to be small, that's the way the rules work. So, there's all kinds of reasons, some good, some bad. You see a lot of sour grapes when you do size determination, but sometimes, this point and it is an important point to keep in mind, sometimes even somebody who's whining and it's all sour grapes can be right, which is what keeps you on your toes. There is no requirement that you have to be a good guy with good motives to be correct, and that's partly what makes it difficult.

**Gwen:** Okay. The requirement to recertify for options, is that only for contracts over five years?

**David:** Yes. There is a... because the CO has discretion in other circumstances to request it, but that's exactly what it is, it's discretionary. There is no requirement that the CO request recertification. Typically, the circumstance in which recertification arises is, well, it's one of two circumstances. One is long-term contracts; the other is task orders under a basic contract or an underlying contract. Some COs will ask for recertification for every task

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order, some won't. I am not aware of anything in the FAR that requires it. It is to the best of my knowledge, completely discretionary with the CO whether or not to ask for it.

**Gwen:** The rule about not requiring a seal to terminate if the company is no longer small, does that also apply to full source contracts?

**David:** Short answer, I don't know. I would ask the person that sent that in to shoot me an email afterwards and I will dig up the answer and let them know. I don't know why not, but I don't know, and I don't want to mislead anybody.

**Gwen:** Okay, let's see. The small business runway act is what this question goes back to. Does SBA calculate business size status based on the three year or five-year record of the entities total calculated receipts?

**David:** Three. The best information I have from talking to people in Washington is the five-year calculation won't go into effect until the end ...toward the end of this calendar year.

**Gwen:** With recent changes to limitations of sub-contracting, does the ability for a large to perform as a sub on a total small business set aside now require them to perform less than 49% of the work aggregate between all sub-contracting parties?

**David:** I think I'm going to pant on that one because I'm not certain. I understand it, Chris or Gwen, maybe one of you two can take that or even Val or Tom. I'm not certain I understand the question to be completely honest.

**Gwen:** Can we have that question sent into the SBA learning inbox and we'll get someone to answer that.

**David:** Limitations on subcontracting arises relatively infrequently in terms of size protests so I am not a master of the details on that and I just don't know the answer and I think somebody else is probably better equipped to answer that than I am.

**Gwen:** I have a couple more. With a novation, if the contract is awarded to small but company coming in as large, what are the procedures?

**David:** There has to be a recertification, unless I'm misunderstanding the question. In other words, there's been an ovation. The company that's taking over the contract is a large business, so there has to be a... well, the company, the large business is taking over performance of the contract in place of the company that was originally awarded the contract so there has to be a recertification. Generally the reason that there's an ovation is because there's been an acquisition and because the small business in one form or another has gone out of business, it's been acquired by a large business or they've merged in such a way that the legal existence of the small business is no more and the large business that's going to perform going forward is the only survivor. In that case there has to be a recertification

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**Gwen:** Are there metrics for the protests regarding the risks associated with certain types of solicitations?

**David:** Again, not certain I understand the question, but to the extent I do, the answer is no. I don't... at least I'm completely unaware of them. I think what I'm understanding the question to ask is does somebody have statistical information breaking the protests down that way? And I'm virtually certain the answer is no. The only information that I'm aware of that's likely to exist is by area office; how many companies are found to be small; how many are found to be other than small and how many cases are dismissed? Any detail beyond that is, I think pretty unlikely to have been reduced to statistics.

**Gwen:** I think that's it.

**Chris:** Okay, great. Thank you everyone for all those great questions. Once again, Dave, thank you so much for the great presentation and your thorough response to all the questions that we had. I just want to remind everybody of our upcoming event here on November 6th. We have the non-manufacturer rule. We will be sending email invitations out for that in the next couple of weeks. If you're not registered to receive those, please send us an email at [sbalearning@sba.gov](mailto:sbalearning@sba.gov) and we will get you on the distribution list for those. Once again, thank you everyone and we'll talk to you next month. Thank you.

**Helen:** And that concludes our conference. Thank you for using AT&T event conferencing enhanced. You may now disconnect.

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