

[START OF TRANSCRIPT]

Carla: Ladies and gentlemen, welcome and thank you for joining today's live SBA web conference. Please note that all participant lines will be muted for the duration of this event. You are welcome to submit written questions during the presentation and these will be addressed during Q&A like when **[00:00:15 inaudible]**. To submit a written question, please use the chat panel on the right hand side of your screen. Choose All Panelists on to Send drop down menu. If you require technical assistance, send a note to the event producer. I would now like to formally begin today's conference and introduce Chris Eischen. Chris, please go ahead.

Chris: Thank you, Carla. Hello everyone and welcome to the second session of SBA's first Wednesday webinar series for fiscal year 2019. On the slide two, for today's session we will 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're new to our event, this is a webinar series that focuses on getting subject matter experts on specific small business programs. In this case size and affiliation and having them provide you with more information you can use in the performance of your job as an SBA employee, a member of the Federal Acquisition community, or a PTAC employee. We appreciate you taking the time to join us for our second session of the FY19 program. We hope that you benefit from today's session.

Now for a brief 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 designAICSd government's series for contracting personnel was later dropped to be more inclusive of other GS series as federal agencies increase the requirements for non 1102s obtain diarrhea and vaccine certifications.

Additionally, other federal bonding activities, SBA staff, PTAC and SBDC personnel who after hearing about the training requested access and were added to the list of participants. That is why SBA's first Wednesday program is aimed at federal government employees and our resource and welcome to those of you who are new to the program.

On to slide three, as Carla mentioned, I am Chris Eischen, and I work as a Procurement Center Representative or better known as PCR, and I'm located in Kansas City, Missouri. Additionally, Miss Gwen Davis with the PCR located in Minneapolis, Minnesota will be reading your questions submitted during the program for a speaker to address at the end of today's session. We both work in government contracting and slide three includes our information.

Slide four. Please note that all lines are mute. However, you may submit questions anytime during today's session by entering them into the chat box on the bottom right hand corner of your screen and these questions will be

addressed at the end of our speakers' presentation. As most of you know we have transitioned to WebEx location 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 login 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're hopeful this issue will be resolved soon, and we apologize for any inconvenience. Now if you are having any other technical problems, please call the AT&T support desk at the following number, 1-888-796-6118. This telephone number is also included in the email invitation for today's program, and on slide four on the PowerPoint presentation. Otherwise, just keep listening in and follow along with the PowerPoint presentation that accompany the invitation for today's session. As mentioned earlier, we will continually announce the page number, so you can follow along. For more SBA, Small Business Program training, please visit the SBA learning center@www.sba.gov

On to slide five. The Association of Procurement Technical Assistance Centers, or APTAC host 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. Procurement Technical Assistance Centers or PTACs are a great resource and partnering with your local PTAC for an industry day, sharing a source **[00:04:35 inaudible]** our fine notices, 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.

On to slide six. It's a little more filled up than what we had last month. It contains the programs capable for fiscal year 2019, and today's session on size and affiliation is the second topic in the series. As you will see, we have added a couple 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 the positive word of mouth is greatly appreciated. We hope that you find these topics interesting and applicable to your job.

Slide seven. I'm sure that many of you will want to receive credit for today's training. You'll 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. First you will manually fill in your name and then print the certificate from the PowerPoint to request credit for today's session. A PowerPoint presentation was part of the SBA email invitation that you received for today's session.

Please note that SBA does not track your CLPs' or communicate with your training program regarding this your CLP achievements. Several of you may have received this information for the training from a friend or colleague, but if you want to receive an email address directly from us notifying you of upcoming first

Wednesday webinar events, just send us an email at [SBA learning@sba.gov](mailto:SBA_learning@sba.gov). So that is SBA, L-E-A-R-N-I-N-G @sba.gov. In the subject line, please enter the words "Add to list", and we'll ensure your added to the distribution list.

As I had mentioned earlier, slide eight that's where you'll see the certificate. First, you will need to access the PowerPoint presentation that was emailed to you. Then you will 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. Another reminder that SBA does not track your CLPs or communicate with your training program regarding your CLP achievements.

On to the slide nine. Today's training has been assembled to address the topic of size and affiliation as well as provide you with the resources available for your use. Our speaker has graciously accepted the invitation and she will be directing me to continue on to the next slide. As mentioned earlier, if you are unable to access the WebEx application, please follow along with the PowerPoint presentation that was included in the email for today's training. We will identify the page number, so you can follow along. Also, please note that due to connectivity issues, some viewers may experience a delay as the slide changes on your screen. Now I am pleased to introduce today's speaker to you Miss Stephanie Lewis who is the area five size specialist for SBAs Office of Government Contracting. Stephanie, we appreciate that you can meet with us today and I'll turn the program over to you now.

Stephanie:

Thank you, Chris. Good afternoon, everybody. It's my pleasure to be here today. I'm going to talk to you a little bit about size and affiliation. Last month the topic was on non-manufacturing rule and next month topic is on joint venture, so they all three kind of go hand in hand. This one's kind of the cornerstone for the other two programs. My presentation today will touch on those other two subjects, but not go into them as far depth as the actual presentation would have.

Next slide. Topics we're going to cover today, I'll have to do size and affiliation. We're going to talk about size standards, NAICS codes and the non-manufacturers rule and when the limitations on so contracting rule would apply. We're going to talk about affiliation, types of affiliation, joint ventures. Like I said, join next month for more detail on that and mentor protégé programs. We're also going to touch on what to do when you get a size protest, and maybe perhaps an OHA appeal from that protest.

Next slide, slide 11. As I was putting together the material I got to thinking, how is this useful for contracting activities, contracting officer person, contract specialist and small business specialists? In what way where they find this PowerPoint to be useful to them? How does it apply to your daily work rather than mine? I'm a size specialist. I do this for my job. I look at company size, status and how it applies to procurement, but how does it apply to you?

Some of the things that I thought of were, in the pre-award phase when you're determining whether to set something aside for a small business, a small business set aside, when you're determining the rule of whether you have to or not, and you're taking a look through whatever sources that you have, possible candidates for companies who could perform that contract and you're thinking are these companies small? What if I suspect one of them is not small? If they're showing that they're small, can they actually meet the non-manufacturers rule of the limitations on subcontracting rule that's going to apply to a small business set aside.

We'll talk about those issues through the PowerPoint. I wanted just to stress that when your pre-award phase, most often what you'll have to rely upon is to stamp certification for a company. Then once you get offers in, you may be looking through the proposal and perhaps you suspect that there isn't a sensible subcontract, perhaps based on some, maybe one of the offers that's appearing to be the apparent successful offer. You're suspecting that perhaps they're not small, because you know that they have received considerable awards from your agency in the past three years, or you may receive a protest from another offer. Is that offer an interested party who's allowed to protest?

Then once you receive a protest, what do you do with it? You have to do something with it. Then, whether you have to hold up your award once you receive the protest. I just wanted to mention that some people are developing language that you should put them in the solicitation and the pre award phase that has to do with some size issues to help guide companies in evaluating whether they're going to be small for the procurement and able to bid on the procurement. Sometimes they'll put in information about joint ventures, the non-manufacturers rule.

I just wanted to stress that those should be in line with the current regulations. Even though you do clarify things like weather subs, past performance can count towards their past performance evaluation factor. This doesn't mean that whatever you put in the solicitation is then going to override our evaluation when we do an investigation as to whether there's an extensible subcontracting relationship. Because if there's total reliance or undue reliance upon a subcontractor even when you've said that they can use the past performance of a sub-contractor, we will still have to take that into consideration as to whether there's undue reliance. That's just some areas that I thought of it that you may be able to apply the topics today and we'll go through them now.

Next slide, 12. The basic says, what is a small business? A small business, it has to be organized for profit. Nonprofits are not small businesses. They have to have a place of business in the United States that operates primarily in the United States and makes a significant contribution to the US economy through taxes, American products, labor, or material. Then they have to be small

according to their revenue or employee count that is for the size standard that is assigned to the NAICS code, which has been assigned to the procurement.

The NAICS code is, North American Institute Classification System. Each of those has a small business size standard. The NAICS codes are created by the Census Bureau, and then SBA takes those NAICS codes and we create size standards for each of those. It isn't SBA that's creating NAICS codes. We're just matching the size banner for each of the NAICS codes created by the Census Bureau. I wanted to stress that you should not be using wholesale or retail NAICS codes in government procurement. You can find that regulation in 13CFR121.105, and we have lots of discussion on that topic with both small businesses and agencies.

The reason for that is when you're buying a product or supply, you're buying something that's been manufactured. You're going to use a manufacturing NAICS code. You're not advertising a procurement thing. We think a wholesaler should supply this, or we think a retailer should supply this. When you issue a procurement, you shouldn't be saying what type of company you want to be on the contract. You should just be asking for somebody that provides this manufactured product. That's the reason that we asked for you to use the manufacturing NAICS codes. The wholesale and retail NAICS codes do appear in our size chart. However, those are for other purposes and not federal government procurement such as SBA loans.

Next slide, 13. When you go to the www.sba.gov, and you click on our size standards, you'll see a chart and it'll have the NAICS code. It's the six-digit code on the left and that's what you assign to your procurement. Then it has a general description in the middle and then in the right hand side you'll see the size standard. That's the small business size standard. Someone with lower than that, is small, and higher than that is large. Some of them are revenue based and some of them are employee based. Almost none of them have both. So, it's usually either or situation.

The size standard table is divided into sections, manufacturing, services, transportation, and so you'll see the different sectors as you go through the code. You can also use a search tool on the Census Bureau that works on keywords if you're having trouble finding a NAICS code. It also has the full description of what the NAICS code is. If you're trying to determine what the appropriate NAICS code is for your procurement, it's a very important thing that you select the correct one. Like I said, the Census Bureau creates the NAICS code. So, you may want to go to their website to read the full description of what they consider should be placed in that NAICS code.

Next slide, 14. Like I said, the SBA is the one who sets the size standards for each NAICS code. Right now, we're operating on a 2017 NAICS code size standards. We do take a look at the size standards on a rolling basis every five years, and we also do adjustments for inflation. It's important that when you issue a

procurement that you do go to the size standard table and make sure that that's still the size standard that's applicable as of the date that you're issuing the solicitation. Any change to the size standard that is applied after your solicitation is posted will not take effect unless you issue a modification to incorporate the new size standard into the solicitation while it's still open.

Next slide. The size standard table either had average annual receipts or number of employees as the basis for determining size. When it is average annual receipts, we're going to use the federal tax returns of the company. Specifically, on those tax returns, we use cost of goods sold plus total income. It's a very simple calculation, and it's meant to be that simple so that it doesn't become too complicated, and a company can make that calculation very quickly. They're going to take their last three years of tax returns. If the procurement was today, and they had submitted their offer today, in 2018, we would take their last three completed years. So '17, '16 and '15. We're going to take the tax returns for those years, add total income plus cost of goods sold, and then divide by three and that comes up with the average.

If that number is higher than the size standard, they're what we call other than small. If it's lower than the size standard than they're a small business. For number of employees, it's more of a rolling average. It's a monthly rolling average. It's going to be counted... We're going to count all individuals that are employed on a full time, part time or other basis for the last 12 completed months. What you can see by this is like, once a company has calculated their average annual receipts as of January 1, they'll start using the past three fiscal years. They're small for the entire year. So, it's not like something that they have to keep calculating. Calculating also changes going on within their company. For number of employees, they would have to be done monthly.

Next slide. We're on slide 16. There are just a few exclusions from the receipts calculation and I don't want to go into them specifically. The most common ones are, in our affiliate transfers and which are proceeds from transactions between affiliates. I just want to mention that when calculating revenue or employees, you have to include the revenue employees of all affiliates.

Next slide. Can you go back one slide? Back to 16 again. The only other thing that I wanted to mention on that is the exclusions are very specific. The regulations call out the exclusions and there's no debate on adding other exclusions when you have good cause and good rationale for that. We are only able to exclude the revenue that is derived as you see, like in number five from certain industry groups, and we can't consider others, even if you have a really good basis or rationale for why that should be done.

Next slide, 17. Like I said, contracting officer shall generally accept size self-certifications in SAM, unless there's a reason to question the firm's size. In SAM, updated every 12 months required to be updated by the user, by the company, you will look at their SAM representation that was effective as of the date they

placed their offer. If you want to look up a company size as of a previous date, I wanted to let you know that SAM has some adjustment filters that are really easy to use to adjust the date that you are looking at a company profile. If you wanted to see what their size representation was on February 1 of 2017, you could easily do that by adjusting the date and then hitting Enter and it'll show you their SAM reps and search as they stood as of that date. That's sometimes helpful if you have a company who's changing their size and you can't quite figure out what's going on, because they were small and now they're large or vice versa. You want to find out exactly when that happened. That's a useful tool to use.

Next slide, 18. I mentioned earlier that selecting the NAICS code is very important. That's because the NAICS code can always be appealed. You want to make sure that you're selecting the NAICS code that describes what you're procuring. Don't select the NAICS code because you're trying to get certain companies to qualify as small. That is definitely wrong. You want to make sure you can take a look at past history. You can look at the NAICS code description at the Census Bureau, things like that, to determine what the best NAICS code is.

You can also look at previous OHA decisions where other codes were appealed and look at the rationale for why those were selected and ruled by the judge to apply. The OHA cases do you have a keyword search. The OHA cases are fairly easy to research. If you wanted to do that, you could just use the NAICS code or keywords.

I also wanted to mention that subcontracts. When prime contractors determine the size of their subcontractors for the sub-contracting plan compliance, the prime contractor is going to determine the NAICS code that applies to the subcontract. It's going to be the NAICS code for the work that they're subcontracting. They don't use their NAICS code. The prime contractors that use their names that they were ordered by the federal government. They would determine what their subcontract NAICS code is and flow that onto their subcontractors. Also, the non-manufacturers rule and limitations on subcontracting rule do not apply in subcontracts. That information is just useful, basically, if you are dealing with prime contractors who have small business subcontracting plans.

Next slide, 19. A big thing in size is exactly what is the day size is determined and we're very specific about it, because it's the circumstances and events that are occurring as of that date is what we use to determine whether the company is small or not. It's important because a lot of companies have a lot going on. They could have a merger coming up, they could have a big explosion in revenue or employees, things like that. We really key in on what is the date size is going to be determined and that is the date that they submit their offer that includes price. It's the date they submit their initial offer including price. So, really final

proposal revisions and all that don't really have much to do with the date, unless a sensible subcontractor and non-manufacturer rule is involved.

For multiple award contracts, again, size is determined as of the day they submitted their offer, their initial offer for the multiple award contract. Now, as orders are placed against the mark, the contracting officer may request size recertifications with each offer. Again, that's "may", they do not have to. If they do not, it defaults back to the date that the company submitted it's the offer for the mark. If they choose to ask for a size recertification with an order, then it's going to apply as of the date they requested the recertification.

Next slide. A small business that becomes large after it has self-certified for a procurement is still going to be small for the life of the contract unless a re-certification is required. When a re-certification is required, the applicable date is the date that the company is recertified, and the NAICS code and size standards that are effective as of that date. Again, even if a company grows to be large during the performance of the contract it doesn't matter, all that matters is what size they were on the date they submitted their initial offer that included a price for the procurement. Unless...

Next slide, 21... re-certification is required. Re-certification happens in long term contracts. If you have a contract that last over five years, you're going to have to have the company re-certified at size status at the five-year mark. Other instances which require re-certification are companies whose is size changing because of an innovation or a merger and acquisition. In those cases, they must notify you that that event has occurred and re-certified their size status for the contract. Now, contracting officers are the driving force for the five-year mark, and they must request size re-certifications from the companies who are still in contract in passing the five-year mark. They must be certified before the end of the fifth year and then every time an option is exercised thereafter.

Next slide. When does the limitations on subcontracting rule apply? The limitations on subtracting rule applies when someone is... when the procurement is for a supply, a service, or all of the different types of procurements. It's the self-performance requirement that they have to perform in a small business set aside situation. So, if a contract is set aside for small businesses, the offer, the prime contractor, the small business has to self-perform a certain amount of work.

In the CFR we recently changed not the amounts, but the way that we calculated. You can see that on the screen there. Unfortunately, at this point in time, the FAR does not match this calculation. It still has our old definitions for self-performance. The percentages are the same. Like I said, however, in the CFR, SBAs regulations we allow for similar situated entities to count towards the percentage of work that is done by the prime contractor.

Next slide. A similarly situated entity is a firm that meets the same size and status as the prime contractor for the procurement. For instance, if it was a woman owned small business set aside, and the prime contractor is a woman owned small business, any of the women owned small business subcontractors that it plans to use would count towards its limitations on sub-contracting percentage. Also, firms that are similarly situated cannot have enough sensible subcontracting relationship with their prime.

Next slide. If a company is submitting an offer on a manufactured product, but they are not the manufacturer, then the limitations on subcontracting rule does not apply. They're not self-performing anything. They may be doing work, but they're not doing the manufacturing. We have something called the non-manufacturers rule. Then non-manufacturers rule is going to apply a supply contract where the company is not the manufacturer. There's a definition of who's the manufacturer or not in the 13 CFR 121 regulations.

The non- manufacturer rule is not applicable to small business set asides between the micro purchase threshold and the simplified acquisitions threshold. It is applicable to small business set asides over the SAP and it is applicable to socio economic small business set aside of any dollar level. The only exemption of the acquisitions that are between the micro purchase threshold and the simplified acquisitions threshold only apply to small business set aside. If it's between that range, the non-manufacturers rule does not apply.

The non-manufacturers rule has four requirements. We're going to go over them next. When it is not applicable, it just means that the company does not have to meet those four requirements. It only has to meet the small business side standard assigned to the procurement. If it does that, then it's good to go. One thing that a lot of contracting officers don't know is that exclusion that range between the MIT and the SAT for the exclusion doesn't apply if it's a woman owned set aside or if it's an 8A set aside or a HUBZones set aside, or service disabled veteran set aside. That exclusion doesn't apply. It only applies to small business set aside. Also, the non-manufacturers rule is going to apply to any orders that you place off of the GSA Schedule if they're set aside for small businesses. The non- manufacturers rule has to be self-performed by the offer themselves, not an affiliate.

Next slide. So, here's the non-manufacturers rule. If they're bidding on a small business set aside, they're not a manufacturer, they have to meet these four conditions. They have to have less than 500 employees. They have to be primarily engaged in supplying this product. They have to take ownership or possession of the product that's consistent with industry practice. Here's the big one, they have to supply an end item of a small business manufacturer made in the United States. They can't be using a large business and they can't be using a foreign owned supplier to supply the product. It has to be a small manufacturer, and it has to be made in the United States.

However, they do not have to comply with the fourth requirement if there's an individual or a class waiver. This was all covered in last month's training. So, just as a quick refresher. A class waiver is one where SBA has approved certain NAICS codes where we recognize there are no small business manufacturers, so, you do not have to comply with the fourth rule for these NAICS codes and they are published on our website.

The individual waiver is contract specific. It's where a contracting officer comes to the SBA and they say, "Can I get an individual waiver for this procurement because I know in this instance that I am buying a name brand that has to be compatible with something else we already have in place." So, even though I'm putting it out as a small business set aside, they are going to have to get this from a large manufacturer. That's just one instance. I want to request an individual waiver, so this fourth element will not apply to the small businesses that submitted offer all my procurement.

Those that are submitted, those individual waiver requests are submitted right to our SBA headquarters office and handled by that office quickly within a few weeks period. Your individual waivers have to be announced in the solicitation, so that everyone knows that there's a waiver for that. You can't hide it or just hold an offers or have it effective like after the solicitation's issued. It should be there when the solicitation comes out, announced in the solicitation.

Next slide. Okay, let's get into what's affiliates. I know that you guys get a lot of questions from small businesses that want a bid on procurement. They say, well, we're small, but you know, we're owned by this parent company, or I'm not sure because my brother has a business that runs out at the street next to me. Let's just go over affiliation quickly so that when you get those kinds of questions, you can answer the basic ones yourself.

Next slide. We're on slide 27. We have two types of affiliations. We have general ongoing affiliation, you're owned by a parent company, that's an affiliate, is general ongoing, it's everyday it's not going to change probably. The second one is, affiliation for a specific procurement. This is going to be an affiliation with another company when you're bidding on a specific contract, either as a teaming agreement, joint venture or something like that.

Next slide, 28. The key to affiliation is always control. If there's no affiliation if there's not a power to control. So, concerns are affiliated with one another if one concern controls, or has the power to control another, or a separate party controls both concerns. A concern size always includes its domestic and foreign affiliates. If a company says, I have different divisions, I have subsidiaries, I have separate NAICS codes and separate [00:32:30 inaudible] codes, we don't do the same thing. We're not incorporated together. We don't pay taxes together. All that doesn't matter. None of that matters. It all goes back to control and whether an individual or our party has the ability to control another party.

Next slide. For general affiliation. In general, affiliations and SAMs are common ownership, common management and identity of interest is a big one. This is where businesses are owned by immediate family members, or there's a pattern of common investments among individuals, or there's a dependence upon one company for revenue from another firm. Like, if a company has 70% or more of its revenue derived from one source, we may say that there's a contractual dependence because you would not be able to sustain your business without that revenue stream.

Then we have a newly organized concern rule. That's to prevent what we used to call the spin off rule. It's when someone works for a company decides, "Hey, might be a good idea if we get some small business set aside, even though we're large now. I'll just start a company and then I'll start a small business. I'll bet on the small business set aside and then I'll subcontract some of that back to you, or you can fund this business or something like that". The newly organized concern rule is there to stop that kind of situation. It creates an affiliation with the spin-off company. For contracts specific affiliation, we have joint ventures and teaming.

Next slide. This is how affiliation works. If I were to own 100% of an ice cream shop, 50% of a manufacturing company, and 75% of a machine shop, all in very different places in the globe, they are all affiliates, because I have 50% or more ownership of all of the companies. Based on common ownership, in this instance, they're all going to be affiliated. I'm going to have to aggregate the revenue and employees of the company and jockey it against the size standard to determine if I'm a small for the NAICS code. Even if none of these companies do any business with one another, because they're all controlled by me they're affiliates. That's a very simple scenario.

Then next slide, 31. This is a little bit more complicated and a little bit more of what we see. Let's say I own... because small business owners are very risky, and they are diverse, and they like to double in some things. So, a lot of times own certain percentages in a lot of different companies. In this instance, let's just talk about one where I might own 75% of one company, 33% of another company, my two kids on the remaining shares. I own 14% of company C, the other shareholders are 40/40 and 6%. Then I own 10% of company D and I've nine other shareholders with 10%. Let's go through each of these and I'll tell you whether those are affiliation or not.

Company A, I control that company because I own 50% or more of the stock. It's a clear affiliation that can't be rebutted, stop control. Company B, I own 33%, but because I have immediate family members that on the remainder, I have an identity of interest with these people based on a familial relationship, so I would be able to control company B as well. Company C, I own 14%, but two other shareholders are larger than me and their shares are approximately equal, even though they're less than 50%, there are approximately equal and when they're

added together, 40 plus 40 it makes 80, and their 80% compared to my 14% gives them the power to control. That's a stock ownership rule. So, I do not control company C. Company C is controlled by two shareholders. Each of them have the power to control it, and it's the two 40% shareholders.

Company D, I own 10% of that we all have equal ownership. So, that's kind of widely distributed equal ownership. Nobody with the majority and nobody with a larger share. In that instance, we look at the board of directors and the officers and what's in the operating agreement to determine who controls it. If I'm also a director on a two-person board, that's a 50% board, and I do have the power to block anything on a board. So, then I do have power to control that companies through my position and my ownership. On that company, I also control it. In that instance, I control Company A, B, and D. That's how size case works right there. Just going through each of the affiliates and determine whether there's power to control and whether it's an affiliate and if it is, we add in the revenue or employees.

Next slide. On next month session is joint ventures. I don't want to spend a lot of time on this and you can get your detailed questions asked, answered next month. I just want to hit on a little bit. Is a teaming agreement, a joint venture or prime sub relationship, because a lot of times when companies bid on procurements, they put forth a teaming agreement and they say, "We're a team. This is Company A and I have Company B, C and D, and they're my team members". Yet they bid it in the name of Company A, but when you read through the proposal, everything says team ABC, team ABC. So, you're like, hmm, this really sounds more like a joint venture, but their teaming agreement isn't really defined. We have two relationships that we would recognize. One, joint venture, two prime sub relationship. When we see a teaming agreement, we're going to fit it into one of those other buckets based on examining what the relationship is.

Next slide, which is going to be 33. Prime sub relationship is pretty easy. That's when a prime bids on a contract, and they have subcontractors. That's what we call it prime sub relationship.

Next slide. A joint venture is also pretty easy, especially when it's called out as a joint venture. It's in writing and registered in SAM under a separate company name and it's organized for a specific and limited purpose. When a company is bidding as a joint venture and acknowledging it's a joint venture, its size is going to be calculated by each individual partner, because the joint venture has to be small. If we have a procurement that has a \$10 million size standard, and they had two joint venture members, one and two, one owns seven million and one owns four million. The company is still small for the procurement because individually they don't exceed \$10 million dollars. Together they would, but in this instance, it doesn't matter because they came together as a joint venture.

Next slide. One exemption from affiliation is the mentor protégé program. We have the 8A mentor protégé program and we have the all small mentor protégé program. In this instance, when there's an approved mentor protégé agreement, and the mentor and the protégé have formed a joint venture and there's a joint venture agreement, they can bid on federal contracts. We will only consider the size of the protégé when considering whether they're small or not.

If it's an 8A mentor protégé agreement, the mentor protégé agreement and the joint venture agreement have to be approved by SBA. The mentor protégé agreement is approved before the company submits its offer, and the joint venture agreement must be approved before contract award on an 8A contract only.

Next slide. The all small mentor protégé program works kind of the same way. If they have an approved mentor protégé agreement, approved by SBA and in place before they submit their offer, only the size of the protégé counts when determining size. For the ultimate mentor protégé program, we do not review the joint venture agreement. However, if someone challenges through a size protest, the status of the company as a small business, we will look at the joint venture agreement to make sure that it contains all the required elements in compliance with our regulations. If it fails to we would not find that it's a small business for that procurement.

Next slide. Extensible subcontracting comes into play when we have a prime contractor who says on bidding as a prime, although they have dominant subcontractors. It's what we call like a de facto joint venture. We're going to treat it as a joint venture if we find that it's extensible sub-contracting. There's two conditions have been a sensible subcontractor. One is that the subcontractor is performing the primary and vital requirements of the contract.

The second is that the prime contractor isn't duly reliant upon the subcontractor. We take a look at the whole picture of what's going on with the company. We rely heavily on the teaming agreement and on how they presented themselves in the relationship in the proposal to determine whether a sensible subcontracting relationship exists. This is one that we really rely a lot upon contracting officers to recognize, because they're the ones that have privy to the proposal. You can see when you're reading, and if you think that, "You know this prime is sort of like a front, they're not really doing anything. It's the subs doing this and the subs doing that", and all the past experiences coming from the sub and the sub has the license and the sub is qualified to do business in four of the five states that the contract covers, stuff like that. If you suspect something like that, you can refer it to SBA to do a size determination to determine whether this is a sensible subcontracting relationship or not. We do also get a lot of protests from other offers alleging a sensible subcontracting.

Next slide 39. Talk about size protest for a minute. If you receive a size protests, how many of them do you have to send to SBA and when you send them to SBA? Well, the answer is you always send all of them to SBA. Protest have to be filed with the contracting officer, but then the contracting officer sends it over to SBA. Contracting officers can't dismiss, put to the side, not acknowledge or not sent to SBA protest, because you find that they're not timely or they didn't have any merit or whatever. You don't have really the authority to do that. It has to be SBA. If it comes to us, and we find it's not timely, it's not from an interested party, et cetera, it's not specific, we'll dismiss it at SBA and you can move on with your procurement. That usually doesn't take us very long.

Next slide. When you receive ... When you issue... When you've identified the apparent successful offer, and you notify unsuccessful offers of that identity, we ask that you wait five days before making award to see if you get any size protests. Size protests have to be made within five working days. If you wait that time period and don't get a protest, size protests then you're safe to make the award. If you do get a protest, you have to send it to the SBA, which SBA office do you send it to? It's the one that has jurisdiction over the state where the protested company is located. So, the apparent successful offer, where are they located, then you send it to that SBA office.

Next slide. Here's our offices. We have six area offices. I am area five in Fort Worth, Stephanie Lewis. I cover 11 states. If you received this PowerPoint earlier with the announcement of the first Wednesday session, one address has been changed, and that's the third one down for **[00:44:55 inaudible]**. Her address has changed. If you just want to make note of that on your PowerPoint or whatever, I'll just give you a moment to do that. In saying that, you'll see the names of the five specialists on the slide. All of our all six areas, I'm very honored to do this presentation, but all six of our areas have excellent size specialist.

If you are a federal agency located in another state, I have full trust that you can contact that size specialist and get the right answer about your question. They're all very experienced. We all issue lots of size determinations every year. We all have experience in all of the different arrangements. Mentor protégé, extensible sub-contracting, joint ventures, non-manufacturers rule. We all have experienced in all those areas, and so feel free to contact any size specialist when you have a question about a company size, or you want to submit a protest, or you get a protest and you're not quite sure what to do with it.

We do recommend that if you receive a size protest that you reach out to the size specialist. Again, it's the one who covers the state where the protested company is located. You ask them, do you have a checklist of information that you want from me to send along with my protest, because there are other documents we need besides just the protest. We need a lot of procurement information to make sure that we make the right decision.

Next slide, 42. We're getting towards the end. If you do receive a size protest, please do not make award for 15 business days, 50 working days because that's how long it takes SBA to make our size determination. That's how long we have. You may make award if it's urgent and compelling. If you determine that it's in the best interest of the public to do so, you have to put that in writing and put in your contract file if you're going to make award before waiting up to 15 days. If SBA does not make this decision within 15 days, and you can't wait any longer again, you can make award by finding a formal finding in writing that there's an immediate need to make the award.

We do our best to issue size determinations within 15 working days. It's a very busy process with protests coming in and out and appeals and everything going on, but we do work really hard to try to meet the 15 working days. There's times of the year that we really struggle with that around the end of the fiscal year in the beginning of the next fiscal year, because of the huge influx protest we get around all those contracts being issued. Sometimes we get a little bit behind them, but we do work as diligently as we can to get those issue that as soon as we can. It's all we're doing is the size protest, the six size protest... six size specialists on that list.

Next slide. Just to let you know, we don't issue size discriminations when you're going to vet potential awardees. If you get in a bunch of offers and you're like, I really don't think this company small. Sorry, but there's nothing we can do about that until you've identified it as the apparent successful offer, and until you've notified unsuccessful offers. No protest can take place even from a contracting officer unless notice to unsuccessful offers has been issued. Protest must have to do with particular procurement. There's no secret database that SBA has that list all 28 million small businesses. We use the same database that's visible to the public, which is SAM. Premature protests will be dismissed even if they're made by a contracting officer. So that is any protest that's made before notification of the apparent successful offer, or on ISP before bids are open. If you could also inform us if there's a GAO protest going on, we would appreciate that. Sometimes that affects our protest.

Next, 44. Protest must be received within five days. Otherwise, we're going to dismiss it as untimely. The data, the debrief is irrelevant. A lot of companies say, "Well, I did know, because I didn't have my debrief and I didn't become aware that this company could have this affiliate until the debrief". It doesn't matter, you should have done your investigation back when you found out who the apparent successful offer was, and you only had five days from that date. Protest must be specific. They must contain detailed evidence to support the allegation. You can't just say, I don't think this company is small. I just have heard about them in the news and I don't think they're small. You have to have something, some piece of evidence.

A lot of companies use [00:49:31 inaudible] bid spending or USA spending, SPDS to justify that the revenues over the last three years look like they're not small that's a common one. A lot of them use internet sites to prove affiliations, news articles of who bought who, that kind of thing. Also, protester must have standing to protest. They cannot have been eliminated from competition for reasons other than size. If they were eliminated from competition, they don't have standing to protest and we'll dismiss those too.

Next slide, 45. If it's timely and specific when we get into protests, we notify the protest a concern there have three days to respond. We have 15 days to issue our determination. Sometimes in there, there's reasons that we have to request an extension. A lot of times the company themselves will request an extension, because three days is not a lot of time to put a lot of data together, especially if it's something like a sensible subcontracting and a lot of them when they get an attorney involved, they immediately asked for an extension.

When we finalize our determination and it's signed by our area director, we send it to the protester, the protester concern and the contracting officer, usually all at the same time. There are very few instances where we redact some information from the size determination. We try not to do that. We try to have all size determinations written in a manner that is public. We don't put specific employees or revenue in a size to make sure we just say whether they're over or under the size standard based on the evidence we looked at, but if you've ever received the determination, you will see that it's very detailed and explains why we're finding affiliation and how because all parties have the right to protest.

Next slide, 46. Oh, I'm sorry. That a little head of myself. When we find a company other than small in size discrimination, it cannot self-certify in any procurement with the same or lower size standard, unless it's re-certified by SBA small again. A re-certification will not apply to the procurement for which it was found small. It only applies to future procurement. They also must notify contracting officers with any pending procurement. So, if they were found not small and they must immediately change their size status and stamp. The only time that that does not apply is if we're finding them other than small for a specific contract, like an extensible so contracting relationship where it's a joint venture that is only contract specific.

Next slide. Okay, we got into the office of hearings and appeals. All size determinations can be appealed by any party that firstly affected including contracting officers, they can appeal. Parties have 15 calendar days after they receive the size to termination to appeal. It goes to an administrative judge at OHA at SBA. Contracting officer, typically notified by the judge of the appeal, they receive a copy of the appeal. Then they're asked to fill out a one-page flyer on contract specific details and I return it to the judge and then you just wait for the decision. They have about 60 calendar days to issue the decision.

Next slide. Last slide. Here's my tip from everything that we've just talked about. Make sure that you pick the correct NAICS code. It's going to affect your procurement. If you pick a supply NAICS code, the limitations on subcontract and the non-manufacturing rule are going to apply. The NAICS code also dictates the size standards. So, it applies who can bid on the procurement. Again, do not use wholesale or retail NAICS codes in your procurement.

On a multiple award contract, determine when your placing an order against the multiple award contract. As the contracting officer determine whether you want to have offers re-certified their size status for the order or not and be very clear in your solicitation as to whether you're requiring re-certification or not.

Have a method in place requiring long term contract holders to re-certify their size status, so that those contracts that are lasting over five years. It's the contracting officer's responsibility to request re-certification. You're going to need some sort of trigger mechanism to remind you that you need to do that at the five-year mark.

Consider adding joint venture language to your proposal. By this I mean, a lot of times contracting officers call me and they say, they've bid as a joint venture. Can I ask for the joint venture agreement? I'm like, "Sure, ask for anything you want from them", but really, if you had thought about that ahead of time, maybe it would have been good in your solicitation to have that a part of their proposal when it submitted. If you can kind of think ahead. If you think you're going to get a lot of joint ventures ahead of time. Maybe think through the requirements in your proposal to make sure that you're getting the documents you want to see from joint venture members.

Forward all size protests to SBA soon as you receive them. Involve your PCR if you have questions and try not to make award of the contract until five days after you've notified unsuccessful offers, or after the size determination is issued if you've received a protest. If things get muddier if you've awarded the contract and then you have to put a stay on the contract or hold and it's just muddier. It's better if you just hold off for five days.

Next slide. Questions. Back to Gwen, I think.

Chris: Yes, absolutely. We'll get Gwen a second to get the questions all lined up. Gwen whenever you're ready, fire away.

Gwen: Okay. They're starting to come in, kind of like crazy. I'll start with the first one. Okay, I'll queue this last one that came in? The first one was not really a question about the slides, but it was more about when a [00:55:32 inaudible] is going to post the last couple of first Wednesday courses.

Chris: I'll take that one. That's just something I'll have to follow up with them as well. So, we'll make sure the most recent training gets on there.

Gwen: Okay, so the first one was back on slide 14. It was, why are we using manufacturing NAICS codes for things like native grass, seed, gravel, fuel, not all commodity items are manufactured?

Stephanie: The non-manufacturer's rule says it for and applies to supplies that are manufactured or produced. Anything that's a supply item generally is going to have a non-manufacturers rule applied to it, like fuel isn't necessarily manufacturer, but it is produced. It has limitations that apply to it if it's being provided by a company who is not doing the refining.

Gwen: Next question. There are two minor exceptions to the non-use of wholesale retail NAICS codes pertaining to value added resellers. They see those on the NASA food contract. Is that correct?

Stephanie: I have no idea. I'm sorry. I don't know the answer to that. I could research that a little bit. I'm not familiar with that at all. I don't know about any exceptions to the wholesale retail NAICS codes. We do see a lot of wholesale retail NAICS close on the GSA schedules, but we hope that GSA in the future convert those to manufacturing codes.

Gwen: On slide 17, would you happen to have an example of a reason to question of firm's self-certification?

Stephanie: Sure, if you've recently become aware that this company has been bought out by a larger firm that would be one example. A lot of times a company is owned by a foreign company, and so they changed their name just slightly. Like ABC Inc. is the foreign parent, and then they change their name to ABC of Texas, ABC of Arkansas, ABC of California. Then ABC of Texas bids on a procurement and doesn't necessarily know that it has to include its parent company ABC as an affiliate. We see that quite a bit. They think that because they've created a stand-alone company that they don't have to include the parents as an affiliate and they do.

Gwen: Next. Two questions came in on slide 22. The first one starts out. The FAR does not reflect the changes to calculations for the subcontracting limitations set forth by the NDAA for fiscal year 23 incorporated by SBA in 2016. As OSPP and or the FAR council chair provided an update as to when 52219-14 will be revived to reflect the revised SBA regulation.

Stephanie: I did hear a presentation about two months ago from the duty small business specialist. They are working them through the FAR Council, and it should be very soon now. We've waited a while. I hope we're getting near the end now. We expect that change to come out pretty soon.

Gwen: The other part of that question was, how should agencies handle the limitation on subcontracting since so FAR has not implemented the rule in the ranks?

Stephanie: That is a little bit of a difficult situation. What would be really helpful is in solicitations if you say which version that you're reliant upon. That would make it very clear to offers, because otherwise, they're also in limbo as to which applies and when we take a look at... we consider our regulations to be effective. When we look at a size challenge, if otherwise not noted, we would compare it against the CFR.

SBA has the authority to say who's a small business and so we lean towards our own regulations. Although we do have to take into consideration we usually consult the agency and say, which regulations does your agency deem is applicable. If small businesses questioning this that might be something that they want to put in the questions and answer session so that it's clear. I really encourage contracting officers to say for the limitations and sub-contracting, we will be reliant upon either 13 CFR 125.6 or 452219- I think it's 14.

Gwen: Next question was on slide 27. What's the original goal of the individual waiver to exempt the solicitation with several line items for the small business could authentically supply say, three or four of the items but you can waver as to supply the fourth item, which was not obtainable from a domestic small business?

Stephanie: Our regulations on the non-manufacturers rule were expanded for multiple item procurements. That will be handled a little bit different where they would have to supply the majority of the line... they would have to manufacture the majority of the line items. I would invite whoever that person is asking the question to go to 13CFR121.406 and read the specific language on multiple line items, and how it's applicable for companies in that situation. I didn't put that in the PowerPoint because I was a little bit detailed.

Gwen: Slide 37, could you please talk a little bit about GSA's contract team and agreements. They seem somewhat Lucy Goosey and are there any statutory or regulatory foundation for them?

Stephanie: Well, I have not received a size protest yet on a contractor teaming agreement. In fact, I just listened to a presentation that was given by a law firm on contractor teaming agreements, and they are sort of a unique beast. All I can say about them is when the time comes, we would have to judge the size of the company in accordance with SBA regulation as they currently stand. We're going to take a look at who's the prime contractor and whether the prime contractor is unduly reliant upon the subcontractors. They're not considered joint ventures. I can't talk that much about them because I only know what I learned. I haven't seen one in a protest situation, so I really don't really feel comfortable talking about them.

Gwen: Next question. How could a contracting officer request the SBA provide verification of its approval of the JV as a mentor protégé agreement?

- Stephanie:** Can you say that one, one more time?
- Gwen:** Yes. How can a contracting officer request the SBA provide verification of its approval of a JV as a mentor protégé agreement?
- Stephanie:** Okay. A contracting officer can always contact SBA. You would go to the SBA district office for where the company is located and ask for a copy of the joint venture agreement. SBA approves joint venture agreements, only 8A contracts. So, if this is a joint venture on a not 8A contract, the SBA did not have to approve that. Mentor protégé agreements for the all small mentor protégé are listed on our website. Mentor protégé agreements for 8A program are not. We're pretty open and honest about who has a mentor protégé agreement and to has joint venture. So, if you call SBA, we can let you know particularly if it's an 8A firm, call the business opportunity specialist for that 8A firm. Like I said in the presentation, it is also good for you to put it in your solicitation just to get it yourself. You can even request a copy of the approval letter.
- Gwen:** Okay. Somebody wanted to verify the socio economic SBAs are FTP, USB, USB, WFB, HUBZone and 8As?
- Stephanie:** Yes, 8A, HUBZone, Women, economically disadvantaged women and service disabled veterans.
- Gwen:** How does the SBA investigate a new organized concern?
- Stephanie:** Well, there's a lot of newly organized concerns. We use the regular size standards. If it's just a company that's someone starting up, even when they don't have revenue, if they don't have a year's revenue or three years of revenue, there's an aggregation, not an aggregation. That's not the right word. There's an averaging of formulas in our regulations to average out the revenue that they have received to see if they exceed the size standard. Newly organized companies were just treat them like our normal regulations, unless we suspect its newly organized concern, like a spin off, or it's a subsidiary of another firm or sister company, something like that.
- Gwen:** Next question is kind of about the non-manufacturer rule. One-person office where they just have a computer and a phone allowed to use the non-manufacturer rule. They are contracting with another business who has the product to deliver the product to the recipient, is this acceptable? If not, is there something in writing that they can get from the SBA confirming that it's not acceptable?
- Stephanie:** That is going to be acceptable in certain situations. They have to comply. If they're not the manufacturer, they have to comply with a non-manufacturers rule, and there's four components. They have to be small, which obviously they would be. They have to be primarily engaged in doing this business. They just can't... you can't hunt and peck, you can't sell guns one day, and then you're

selling flooring the next, and then you're drop shipping some other commodity another day. You have to be in the regular business of that commodity.

You have to take possession or ownership in line with industry practice. Possession is obvious ownership, so you may not have to touch the product. Ownership is something different. If you are taking ownership of the product, then you have met that regulation.

Then the last one is that they have to use a small business that's manufactured in the United States. If they're meeting all those conditions, then it's okay that they're a one-person shop doing business out of their garage. Dealers and wholesalers are okay to do business with the government as long as it's within the framework that's established on the non-manufacturers rule. Of course, if the procurement is between the micro purchase threshold and simplified acquisitions threshold, they don't even have to be using a small domestic manufacturer. They can be using a large company and passing it through.

Gwen: Next question. Large business is awarded a four-year contract halfway through the performance of the contract, the average company size has changed, and they now qualify a small. Can a company re-certify for the contract as a small business even though the contract is not considered a long term contract.

Stephanie: No, and the reason is, because we determined size as of the date that they submit their offer, including price, and so that size is locked in for the duration of the contract, unless a re-certification requirement is tipped off. So, since this one was only four years, the re-certification requirement never came about, and so they're just large. They're large for the whole contract, the whole four years.

Gwen: Ops. Sorry.

Chris: Gwen, we're over on time. We're going to ask one more question and then we'll wrap it up.

Gwen: Okay, can you clarify if the protester must have standing to protest or will be dismissed. For example, if an offer didn't pass an evaluation factor, they are not an interested party?

Stephanie: Correct. If they're [01:08:27 inaudible] unacceptable, then they do not have standing and we would dismiss their protest. If there's any questions I didn't answer, and you want to email them to me directly. I'm completely fine with that. It's stephanie.lewis@sba.gov.

Chris: Great and thank you for that Stephanie, I appreciate you reaching out afterwards and be willing to answer any questions that we may have afterwards. We did get some questions regarding a lot about the slides, if you need that, please send an email to sbalearning@sba.gov. That's SBA, L-E-A-R-N-I-N-G @sba.gov, and just simply ask for the slides there.

If you want to be added to the list to ensure that you get the slides every month, please send the email and just say, "Add the list" in the subject line and we'll make sure to add you to that. Once again, I want to thank each and every one of you for the participation and it continues to grow each and every month. We appreciate the positive word of mouth as well. Getting the word out about our program. Thank you for your continued support of the program. We look forward to your continued participation throughout the rest of the year and look forward to speaking with you next month. Thank you very much.

[END OF TRANSCRIPT]