





Size and Affiliation

**First Wednesday Virtual Learning
Series 2021**

Hosts

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Welcome to “SBA Virtual Learning 2021”

1. Questions answered during the final 10 minutes.
2. Technical problems: Contact your IT admin who manages Teams settings for your organization.
3. Captioning available for this presentation.
4. We cover the “**SBA Quick Reference**” as time allows.
5. For more SBA training visit the SBA Learning Center website <https://www.sba.gov/tools/sba-learning-center/search/training>

Procurement Technical Assistance Centers (APTAC)

Procurement Technical Assistance Centers are a vital resource partner.

- Contracting officer resources: “How PTACs partner with federal agencies”: <http://www.aptac-us.org/federal-partners/>
- Find your nearest Procurement Technical Assistance Center at <http://www.aptac-us.org>
- Past Learning Series Recordings: [SBA Webinar Library for Contracting Officers | APTAC \(aptac-us.org\)](#)

Small Business Administration YouTube Page

SBA YouTube page posts past “First Wednesday” programming at links below.

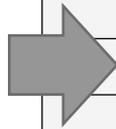
- November 4, 2020 – 8(a) Program: <https://youtu.be/QCXwMCFLB94>
- December 2, 2020 – SBIR/STTR: <https://youtu.be/uR-LkHLsnn8>
- January 6, 2021 – Surety Bonding: <https://youtu.be/PWQnNvtaovo>

FIRST WEDNESDAY VIRTUAL LEARNING SERIES

FY 2021 SCHEDULE

1:00 to 2:00 PM Central Time

FY 2021	Date	Topic
1	October 7, 2020	8(a) Program
2	November 4, 2020	8(a) Program Updates
3	December 2, 2020	SBIR/STTR Program
4	January 6, 2021	Surety Bonds
5	February 3, 2021	Size and Affiliation
6	March 3, 2021	Consolidation/Bundling
7	April 7, 2021	Women Owned Small Business (WOSB) Program
8	May 5, 2021	Certificate Of Competency (COC)
9	June 2, 2021	Regulatory Updates
10	July 7, 2021	Subcontracting Program
11	August 4, 2021	TBD



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

One Continuous Learning Point

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

“SBA 1st Wednesday Virtual Learning 2021”

This Certificate is awarded to

Insert Your Name Here

For completion of

Size and Affiliation

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



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

2/03/2021

DATE

Today's Speaker(s)

Mr. David Gordon
Size Program Manager
Office of Government Contracting, Area IV
U.S. Small Business Administration



SBA Size Proteests:

A Primer for Contracting Personnel

First Wednesday Virtual Learning Series 2021

What is a small business?

- Must be organized as a for-profit entity.
- Must meet the size standard for the NAICS assigned to the procurement. Its size includes all of its affiliates.
- Foreign ownership **irrelevant** so long as concern:
 - 1) has a place of business located in the US, **and**
either
 - 2a) operates primarily in the US, **or**
 - 2b) makes a “significant contribution” to the US economy by paying US taxes or using American products or materials or labor.

13 CFR §121.105

Certification as a SB

- SBA **does not** certify businesses as small; small businesses and (SD)VOSB **self-certify** (how depends on the procuring activity; maybe SAM).

13 CFR §121.405(a); FAR §52.219-1(c)(1)

- Exceptions: 8(a) and HUBZone (and possibly, WOSB) where program admission effectively certifies.

- An offeror is **not** required to list NAICS in its SAM profile unless solicitation requires it; usually only necessary before formal award.

In the Matter of S4, Inc., B-299817 (August 23, 2007);
affirmed in *Veterans Electric, LLC*, B-413198 (August 26, 2016).
See also *Size Appeal of Ipkeys Technologies, LLC*, SBA No. SI2-5353 (2012).

General protest matter

- Firm must be in line for award; protests cannot be used to vet offerors, “finalists,” or potential awardees.
- Protests must be in connection with a pending procurement. “Off the street” protests will be dismissed.
- There are 30 million SBs in the US; we have no internal SBA database on all of them. We use SAM too.
- Premature protests (i.e., before bid opening or notification to offerors) will be dismissed, even if filed by CO. (**Free advice**: consider notification anyway.)

You received a size protest....

What next?

- **All** size protests **must** be referred to SBA. COs and procuring activities cannot decide (or ignore) a size protest.

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

In the Matter of Eagle Marketing Group, B-242527 (May 13, 1991)

- If uncertain whether document is a formal protest, consult SBA.
- Which office? The SBA **Area Office** (**not** the local District Office) with jurisdiction over state where the **protested** concern is located.

13 CFR §121.1003; FAR §19.302(c)(1)

- **Eligibility/status** protests must be sent to SBA HQ.

What happens after SBA receives the referral?

- A protested concern has 3 business days to respond to a protest. **Requests for extensions are common; only CO has authority to grant/decline a request.**
- Most cases take full 15 business days.
- SBA cannot expedite determinations: cases are often very complex; also, prior cases are likely pending.
- CO may award after 15 business days on finding “in writing that there is an immediate need to award the contract and that waiting ...will be disadvantageous to the Government.”

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

Basic requirements: standing, timeliness, specificity

Unless a protest satisfies **all three** requirements, it will be dismissed:

- the protester must be legally authorized to file a protest. (Different rules for different procurements)
13 CFR §121.1001
- the protest must be timely (**usually** must be received by the CO within **five** business days).
13 CFR §121.1004; FAR §19.302(d)
- the protest must be specific. SBA regs and extensive case law discuss what that means.
13 CFR §121.1007; FAR §19.302(c)(2)

How is size measured?

THE KEY TO SIZE IS AFFILIATION

A concern's size includes the size of all of its affiliates, both domestic and foreign.

13 CFR §121.103(a)(6)

THE KEY TO AFFILIATION IS CONTROL

Affiliation exists “if one concern **controls** or has the power to control the other, or a third party has the **power to control** both.”

13 CFR §121.103(a)(1); FAR §19.101

Separate subsidiaries, locations, CAGE codes, NAICS codes, incorporation, payment of taxes, etc. are all **irrelevant.**

How does control arise?

SBA considers many factors when deciding whether control exists:

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

13 CFR §121.103; FAR §19.101

Ostensible subcontractor rule: does the tail wag the dog?

- A prime and sub are affiliated if the sub performs the **primary and vital requirements** of the contract **or** if the prime is **unusually reliant** on the subcontractor. These are two separate and independent tests.
- SBA considers many factors, including:
 - who manages the contract,
 - who has necessary expertise,
 - how are responsibilities and tasks allocated,
 - who performs complex and costly contract functions,
 - what percentage of work is each party performing, etc.

There is no litmus test; these cases are always complex and usually require extensive, detailed analysis.

13 CFR §121.103(h)(4)

Joint ventures

- A JV must be in writing and registered in SAM under its own name.
- If a separate legal entity, JV employees may only perform administrative functions, **not** the contract.
- A JV seeking a competitive 8(a) award need not obtain SBA approval of its JV agreement before award but must satisfy §124.513(c) and (d).
- A JV is small if every member of the JV **individually** qualifies as small.

13 CFR §121.103(h)

Mentor/protégé agreements

- An SBA-approved mentor and protégé may create a JV to bid as SB for any federal procurement so long as the protégé qualifies. SBA must approve the M/P agreement **before** the firms can submit an offer as a JV.

13 CFR §125.9(d)(1)

- The JV must meet applicable requirements in §125.8(b)-(d), including a written certification to SBA and the CO before performance that it complies with SBA requirements, including 40% performance of work (SSE contribution does **not** count).

13 CFR §125.8(d)

- The safe harbor provides exemption from affiliation **only** for the mentor's approved assistance under the agreement; affiliation *may still be found for other reasons*.

13 CFR §121.103(h)(3) and §125.9(d)(4)

Similarly situated entities

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

13 CFR §125.1

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

13 CFR §121.103(h)(4)

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

13 CFR §125.6

Size change during performance?

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

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

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

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

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

If exception (iii) applies, the CO must request recertification.

13 CFR §121.404(g)(3)

Size change during performance part 2

If a merger, sale, or acquisition occurs **after offer but before award**, the offeror **must recertify** its size to CO before award.

If the merger, sale or acquisition occurs within 180 days of the offer and the offeror is unable to recertify as SB, **it will not be eligible** to receive award.

If the merger, sale or acquisition occurs more than 180 days after offer, award can be made, but it **will not count as SB award**.

13 CFR §121.404(g)(2)

This is a very technical area and there are many additional regulations governing recertification.

This was just an overview

There are many important topics we did not cover because of time constraints. A number of them are also very important, such as

- certain tests for control (such as agreements to merge and identity of interest);
- the non-manufacturer rule (and waivers);
- the time used for a determination;
- teaming;
- subcontracting.

The subject is complex and, unfortunately, becoming even more complex. Which means determinations will continue to take time.

Where to send size protests

If the headquarters of a protested concern
is located in:

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

DE, DC, MD, PA, VA, WV

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

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

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

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

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

Carolyn Clark (212) 264-3231
carolyn.clark@sba.gov

Vincent Mazzotta (610) 382-3196
vincent.mazzotta@sba.gov

Jessica Abioye (407) 335-9578
jessica.abioye@sba.gov

David Gordon (312) 353-7674
david.gordon@sba.gov

Stephanie Lewis (817) 684-5303
stephanie.lewis@sba.gov

Esmeralda Sanchez (415) 744-4242
esmeralda.sanchez@sba.gov

DO NOT SEND STATUS/ELIGIBILITY PROTESTS TO AREA OFFICES