

Carla: Good morning, and welcome to today's live, SBA web conference. With that, I'll turn the call over to Dwight Johnson. Dwight, please go ahead.

Dwight Johnson: Thank you Carla. Good morning everybody. Again, this is our first Wednesday virtual learning, 2016. I'm Dwight Johnson. Our presenter this morning is Dave Gordon, and we're going to talk about small business SBA size protests 2016. This is my contact information. SBAlearning@SBA.gov. Our colleague, Jan Kaiser is here to participate as well. I'm on slide three, I'm on slide four actually. What we're doing today is going through the standard slides we always cover, and we want you to be sure you know how to find us. I got a call yesterday about someone who simply didn't know where to send a subcontracting plan. The person was in North Carolina, and I directed her to this link at the top because subcontracting plans are supposed to go to this link.

Then, as a reminder, the women's program is driven by NAICS codes, SBA does not, it approves doing ventures of 8(a) firms only. About a week ago we got an inquiry from someone where an agency was saying that only service disabled veteran joint ventures approved by SBA would be considered. To digress just for a minute, again, welcome. We are going to cover a lot of material in one hour, and in the last ten minutes, we will take questions. We're available for questions at any time. We're hoping, in your busy day, that you can think about this, focus on this for just a little bit, just for an hour, and have a productive and enjoyable learning experience. You may note that we have a little bit here and there, of a tweaking of the colors of the template, and what you're seeing and what you're holding. The content is all the same. Parliaments and the technical, if you have technical problems, where to call. We have a quick reference that we always have at the end, which we won't cover. Be sure to remember to check out your local PTAC as a resource.

Now, we are on slide six. Something that's relatively new is that all of these programs are archived, and we have a means, thanks to the Association of Procurement and Technical Assistance Centers. People can access this training, and take it for credit at any time. All of this is recorded and posted there. That's our repository for the training. Also we have, at the Association, there's a link how PTAC's partner with federal agencies. Slide seven, along the subject of PTACs, we've had this before, but don't please promote private companies in your solicitations. If you promote any sort of small business, it should be the PTAC program, and we've run into this, and this is not, I don't think what anyone really intends to do.

Slide eight. This is our calendar. How time flies. On July 13th, we will be discussing the non-manufacture rule. With all of these subjects, they change all the time. There are all these little quirks and changes in the regulations. We want you to be updated on the latest and greatest. The subject may appear to be the same, but there are always differences. That's on again, July 13th.

Slide nine. This is the very important one. I'm somewhat of a broken record. If you are listening on phone only, because some of your systems, especially the Air

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Force, do not allow you to log into our system because of security matters. You may be listening from a hard copy of this, which is why we say the slide numbers. If you're doing that, for our record of attendance, we need you to email us, SBALearning@SBA.gov, so that we know you participated. If you're listening in groups, please send your participants, with names and emails, in an Excel document. Do that quickly please, so that we do indeed know that you are here. We have many people who just log into the system normally, and if you do that, then you are in the records and we have records of your participation. Also we do send a post program email with a transcript and everything else.

Slide ten is the certificate. This is a self-service certificate that many of you know how to complete already. With that, on slide 11, I will turn it over to our friend David Gordon, who is our size manager out of Chicago. David. Take it away.

Dave Gordon: Thank you Dwight. If I could have the next slide please. What we're going to talk about today is basically what a small business is, and how the size determination program works, which is the program whereby SBA deals with either protests or requests, in order to make a formal determination whether a business qualifies as a small business or not. I'm going to use the skeleton, or the structure, of the protest process. I am not going to go into too much detail about the actual tests we use to determine when a business qualifies as small and how we make that determination, because that's easily another whole presentation.

Instead, I'm going to try to tailor this a little more to procurement personnel, in the sense of knowing what you need to know when a protest comes in. Knowing where it goes, what you need to send in, how the process works. What you're going to get at the end of it, when you're going to get it. A little bit of an explanation about how determinations are conducted, because I think understanding a couple of the most common tests will give you a good insight into things that might raise a red flag in your day to day work dealing with set asides.

The first place to begin obviously is, what is a small business? There is a formal definition. It's actually more complicated than this slide suggests. This slide has the fundamental elements. The first one of which is, it has to be organized for profit. Not for profit entities are automatically unable to be considered small businesses. If it's not organized for profit, there's no way it can qualify. However, the parenthetical, which looks a little cryptic, simply means a for-profit subsidiary of a not for profit may qualify, assuming that it meets the other elements in the definition. It also has to have a place of business in the United States, and it has to meet the size standard. When I say it has to meet the size standard, I don't mean just it. I mean it and its affiliates. That's really the core of what the size determination program is all about.

It would be a very simple thing to measure any individual company and determine whether or not it was a large business or a small business. A grade school kid could do it. It would be simply taking the size of the company, measuring it against the standard and there's your answer. What makes the size determination process very

complex and difficult, and time consuming, is determining who exactly a small business' affiliates are, or are not. When it comes time to measure, we measure the small business plus its affiliates. One of the most common questions I get at this very elementary stage of the process is, "I've got a small business, it's the apparent successful offeror but its parent is in Germany." Or it's parent is in Argentina. "It can't be a small business, can it?" The short answer to that is, the location of its parent is irrelevant.

It has to meet these tests. Again, it has to be organized for profit. It has to have a place of business in the US. Presumably, your offeror has a place of business in the US. If it's owned by a foreign entity, we apply a couple other criteria. It has to operate primarily in the US, and by that I don't mean the parent operates primarily in the US, I mean the entity that's the offeror, or the bidder, on the particular procurement operates primarily in the US, and it makes a significant contribution to the US economy. That is very rarely an obstacle, because the test is a relatively low bar. It's simply, does the company pay US taxes, or does it use American products, or materials, or labor?

If they're hiring American citizens, or they're using American products or materials, or they're paying US taxes, and virtually any business offeror you get is going to be doing one of those things, then they're almost certainly going to be eligible to be considered a small business assuming they meet all the other relevant criteria. Obviously most of what this presentation is going to focus on, other than the actual process of a protest itself, is how we determine affiliation.

Before we get to that, the next slide talks about another basic element. That has to do with certification. Dwight, if I could have the next slide please.

Dwight Johnson: Slide 13.

Dave Gordon: We need to do a tangent already, this early in the presentation. There's no good place for this slide, and so I've stuck it here, partly to get it out of the way, and partly because it's a very important tangent. We see this less than we used to, but it still comes up from time to time. You cannot assign a wholesale, or a retail, code to a federal procurement for supplies. Notice I said, "A federal procurement for supplies." If you have a procurement for services, I'm not talking about that. If you want to procure widgets, you have to use the widget manufacturing code. The reason for that is simple, the policy of the United States is to get the best price and quality, et cetera, that it can on any given procurement. One of the ways to ensure the best quality and the best price, is to have the largest possible group of people offering. One way to get the largest possible group of offerors is to open up a procurement for supplies to not only the people that make the supply, but also people who don't make it, but sell it, such as wholesalers and retailers.

Now, if you've assigned a manufacturing code to the procurement, obviously any manufacturer can bid under that procurement, because they manufacture the widgets whose NAICS code you've assigned. Wholesalers and retailers are also

going to be able to bid, even though they're not the manufacturers. They're able to bid through an important exception known as the non-manufacturer rule. They bid as non-manufacturers, and in order to qualify, they have to meet the conditions of the non-manufacturer rule, which is the next slide. I'm not going to go through all of the elements. You'll have this presentation available to you to study it. You'll notice in the bottom right hand corner, just under the elements, I've given you the citation. I have tried, throughout the presentation, to give you either the code of federal regulations citation to SBA's regulation, or the far citation, or both if both have a relevant provision.

These are the conditions a small business must meet to qualify as a non-manufacturer to bid on a supply procurement, even though it's not making the item that you're procuring. There is a whole other presentation to be given on the non-manufacturer rule and on waivers that are available. This is not that presentation, but it's an important subject, and it's one you should be familiar with to the extent you often issue procurements for supplies. The key takeaway from these couple of slides is, please do not assign a wholesale or a retail code to a procurement for supplies. The law prohibits it, and it creates all kinds of problems, because there's no reverse non-manufacturer rule that would allow a manufacturer to bid when you've assigned a wholesale code. Let's put that behind us and move on to the general subject of certification as a small business.

Dwight Johnson: Slide 15.

Dave Gordon: Another topic that comes up frequently. I get a lot of calls from small businesses saying, "We need a copy of a document that certifies that we're a small business." SBA doesn't do that. We do not certify businesses as small. As a matter of fact, nobody does. The only people that can certify that an entity is small is that entity itself. It's called self-certification. SBA has a couple of programs that are, I don't want to call them complicated, but set up as programs with admission criteria that are designed to assist small businesses in certain ways. Those are the 8(a) program and the HUBZone program. They involve a formal application. They involve a decision by SBA headquarters in Washington, then formal admission to that program.

If companies apply for, and are accepted into those programs, SBA will certify that the firm is an 8(a) participant, or is HUBZone certified. That's it. We will not certify that a business is a woman owned small business. We will not certify that a veteran owned firm is veteran owned. These are all matters of self-certification, and you can either get that certification directly from the business itself, or indirectly through its certification in SAM. Next slide Dwight.

Dwight Johnson: 16.

Dave Gordon: This has to do with the validity of the certification. By that I mean, if a small business certifies itself as small, most commonly in SAM, but occasionally through other means directly to the contracting officer, both the FAR and SBA's regulations

require that the contracting officer accept that certification. In other words, the default position in the law is, we take them at their word, in good faith, that their certification is correct. Unless we have a reason to question it. You can't say, "Gee, you know, I've heard people talking, and I really wonder whether or not they're small." That's nothing you can point to. That is not a reason to question. A reason to question involves evidence. Your evidence doesn't have to be correct, but you have to be able to point to something and say, "Because of this evidence, I have serious doubts whether the business really is small or not." We'll talk about that a little more when we talk about specificity as a requirement for a small business size protest.

The other issue that comes up from time to time, it certainly comes up in protests, it also comes up occasionally on phone calls from either a small business, or from contracting personnel, is this company bid on this procurement, but they do not have the NAICS code that's assigned to the procurement listed in their SAM profile. Short answer is, it doesn't matter. There is no legal requirement that they have to have the NAICS code that's assigned to the procurement in their profile, unless the solicitation actually requires it as a condition of the offer. For what it's worth, I've never seen that happen. I'm not saying it can't, and you put together the solicitations, you know what's in them better than I do.

What usually happens is there may be a provision in the solicitation that says, "The apparent successful offeror must have the NAICS code assigned to the procurement in its profile prior to award." Not prior to offer, but prior to award. They don't have the code in their profile, they are notified by the procuring activity that they're in line for award, and one of the conditions for award is they update their SAM profile to include that NAICS code. That's almost always the way it's resolved. Just for what it's worth, the fact that they don't have it in at the time of offer is almost never an obstacle, because as I say, in practice, I've simply never seen a solicitation that requires it. Next slide Dwight.

Dwight Johnson: 17.

Dave Gordon: We have, and by we I mean SBA, we have the authority to determine the size of a small business only in those instances where Congress has given it to us. In other words, someone can't come in off the street and say, "I'm protesting the size of ABC Co. Because I don't think they're small." Maybe they even have lots of evidence. We don't have the authority to accept that kind of a protest.

First of all, there are two categories in which we are granted that authority. One is where there are, what we call, programmatic requests. People in a program request a determination of size for the purposes of administering that program. Usually involves internal SBA programs, such as the 8(a) program says, "We have an applicant, we want to make sure that they're a small business before we proceed with their application." There are certain exceptions. For example, we used to do it for the Food and Drug Administration. We still do it for the Patent and Trademark office. There are a few other, and I mean a very few other provisions where

requests can be filed with SBA, but they make up, I would say, easily less than 1% of the work.

Protests are 99% of the work. Even when it's a protest, it has to be a protest that fits into one of the categories where Congress has given us the authority to accept a protest. The general section dealing with protests in CFR is 121.1001A. There is a list there of nine different categories, and under each category it lists the parties who have standing, in other words who are allowed legally to file a protest. A protester must qualify as someone entitled to file a protest in order for us to accept the protest and to proceed to a determination. Next slide Dwight.

Dwight Johnson: 18.

Dave Gordon: Okay. There's all kinds of protests. Not all of them are size protest. As you can see here, a protest can be made against a firm's status. For example, "We don't believe they're a validate A firm." Or, "This is the wrong NAICS code for the solicitation." All of these protests are valid protests, but they're not size protests. My office, and the office of my colleagues around the country, don't handle these kinds of protests. Each one of them has different requirements, it has different deadlines. The next slide, which Dwight will leave on the screen for about 10 or 15 second and then move on to the next one, is simply a list of contacts for status protests. Dwight, you want to go to that next slide?

Dwight Johnson: 19.

Dave Gordon: This is a list of people to contact, to send protests to, and the issue is the status of a firm. Nothing else to say on this, so why don't we go to the next slide, which comes up surprisingly often. If a size protest comes in, do I have to send it to SBA? Short answer, only answer, yes. All size protests must be sent to SBA. It doesn't matter how certain you are that the protest is untimely. It doesn't matter how certain you are that the protest is wrong. It doesn't matter how certain you are of anything. Only SBA has the authority to decide the size protest. Unfortunately, I have run into circumstances in which CO's, or buyers, or other procurement personnel, thought that the answer was so simple that they disposed of it with a letter, and either dismissed, or decided the protest. No one except SBA has the authority. If you are in doubt about whether something that came in is really a size protest, and that question can legitimately arise. It's not always clear from the language of a protest what it is, call the area office that's involved, ask them for assistance.

Never decide a protest on your own. You can't decide it. You can't ignore it, because I guarantee you it's not going to go away. If somebody has taken the time to file a protest, sooner or later they're going to call somebody and say, "What happened to that protest?" Sadly, I had to include that third little check mark there. You can't tell a protester, "There's a problem with your protest, please rewrite it, or revise it. Do this to it, or do that to it and resubmit it." The only authority you have is to forward it to SBA. Having said that, protests go to area offices.

This is absolutely clear in the FAR, unfortunately a lot of people don't take the time to read the FAR. Protests go to the SB Area office that has jurisdiction over the state where the protested firm is located. Not where the protester is. Not where the CO is. Not where the contract is going to be performed. All that matters is, where is the protested firm located? Then you send it to the appropriate area office. The last slide in my presentation gives a list of states and the area office contact information for each one of those. Let's go ahead to the next slide Dwight.

Dwight Johnson: 21.

Dave Gordon: How do you refer it? Well the first thing I would suggest is, don't award the contract. Wait five days. Pre-award notification is required for RFP's and RFQ's, and even though it's not required for invitations for bid, it's a great idea. It's a great idea for a very simple reason. If you award a contract, under any type of procurement, and a protest comes in, and the protest is timely, and it's specific, and worse still, it's correct, that means you're in the unfortunate position of having awarded a contract to a company that is not eligible to receive that contract. All that's going to mean is a lot more work.

You have to undo the award. You have to terminate the contract. You have to re-solicit, because you can't award a small business set-aside to a company that's not a small business. It's a pain in the neck sometimes to wait five days, and the reason I say five days is because that's what's written into the law as the amount of time a protester has to submit a protest. Wait five days, and then make the award. If no protests come in, wonderful. If a protest comes in, you have the maybe satisfaction's not quite the right word, but you have the advantage of not having awarded, so you don't have to worry about whether the protest is going to be sustained or not.

Last comment on the referral procedure. I've already talked about which area offices have jurisdiction. All area offices share a common checklist. Some have tweaked that checklist by adding or subtracting one or two things. Several area offices require hard copy referrals. There's a very good reason for that, but we're not going to talk about that now. I'll simply say, some area offices, including mine, require hard copy referrals. Others don't require that all documents be in hard copy, but require that some documents be in hard copy. Always check with your area office before you send it. You will save yourself and the area office time. Time is a key element when we're talking about size determinations. Next slide Dwight.

Dwight Johnson: 22.

Dave Gordon: Very simply, FAR prohibits award for 15 business days, until SBA issues its formal determination. The exception is if the CO determines, in writing, that an award must be made to protect the public interest. You'll notice again, I've given you the citations there. Likewise, the CO can award if 15 days have elapsed and SBA still hasn't finished. Again, you need to make a formal written finding. There's an immediate need for award, and waiting would be disadvantageous to the

government. Again, the best thing to do, work with the area office, see if you can get an idea when the determination will be issued. That would eliminate the need to make these kinds of findings. Next slide Dwight.

Dwight Johnson: 23.

Dave Gordon: There are kinds of protests we can take, and there are kinds of protests we can't take. One of the kinds we can't take is when you've got the file narrowed to four or five, or three or six, finalists, and you have suspicions about some of the finalists, and you'd like to eliminate them from consideration. We can't take that protest. We can only accept a protest against an apparent successful offeror. The company must be in line to receive the award, and if the protest is rejected on any grounds, or dismissed, the contract will go to that company. Protests have to be in connection with a particular procurement.

The next bullet, number three, I get this question from time to time from CO's. There is no such thing as a secret SBA database where we know, or we can consult and know, the size of every small business in the country. We have access to SAM, just like you do. We do not have anything else. I appreciate the desire to check and make sure, but we're not going to have any more information about any business more recently than you are. Finally, premature protests are going to be dismissed, even if they're made by a CO. If there has been no determination of who's in line for award, we can't take a protest, for the simple reason that nobody's in line for award. Next slide Dwight.

Dwight Johnson: 24.

Dave Gordon: There are two absolutely basic requirements for any protest to get past the front door. It has to be timely, and it has to be specific. If it's not received by the CO within five business days after notification to unsuccessful offerors, or bid opening, then it's not timely. The date of the debrief is irrelevant. It doesn't matter when the debrief was held. The debrief has nothing to do with timing for protests. The second element that every protest must have to get past the front door is specific, detailed evidence to support the allegation. Again, the evidence doesn't have to be right. You can point to an article in a trade journal. You can point to a press release. You can point to a newspaper article.

There are all kinds of things you can cite to as the basis for a belief that a company is not small, but there has to be evidence. Without that evidence, a protest is not specific, and if it's not specific, it will be dismissed. As I alluded to before, when I was talking about 121.1001, which lists all the categories of protests we can accept, the protester has to have standing. Let's go to the next slide, Dwight.

Dwight Johnson: 25.

Dave Gordon: A protest, assuming that it's timely and specific, has a very tight time schedule. We notify that firm that they've been protested, and they only have three business

days to respond to that protest. SBA then has 12 business days to complete its determination. When I first started doing determinations, many years ago, lawyers were involved in a small percentage of them. I would say lawyers are now involved in the overwhelming percentage, on both sides. Both defending against protests, and in filing protests. I can say this because I'm a lawyer myself. All that does is eat up more time. Lawyers are very good at eating up time. 12 days may sound like a lot to do a formal determination, but I can assure you, it can be exceedingly insufficient. Sometimes there will be requests for extensions from the small business, because three days is an obviously very short time to put together their response.

Sometimes there will be a request from SBA to get an extension. If you can, I would encourage you to grant the extension, understanding that there are some procurements where time is of the essence and you simply can't. Generally people, and by people I mean both the small business and SBA, are not going to be requesting extensions unless they really. SBA does not have the authority, on its own, to take more time or to grant an extension or decline an extension request from a small business. Because the procurement is yours, the decision on whether to extend the time allotted, is also yours. Contracting offices come up with every possible answer under the sun. From, "You can't have another ten seconds." To, "Take another two weeks." And everything in between. It's entirely up to the CO.

One thing I can tell you is, don't ask for us to expedite the determinations. Believe me, we are doing everything we can to get them done as quickly as possible. It's very rare that your protest is the only protest that's pending. You wouldn't want us to jump somebody else's protest that came in later ahead of yours, so please don't ask us to jump yours ahead of someone else's. These can be extremely time consuming and difficult to do, and asking us to expedite them, I can't say we have never expedited them, but I can tell you that it's extremely rare, simply because practical considerations make it virtually impossible.

Likewise, it's very hard to provide a status update other than, "We expect the case will take another two or three days, or another week." Cases often, depending on the evidence in the office at the time, go back and forth. On Monday I might think the case is going this way. On Tuesday I might think it's going that way. There is no way I can tell you how I think it's going to turn out. That's not fair to me, it's not fair to the protester. It's not fair to the protested concerned. Other than asking for a general notion of how much time you expect the size specialist to take, it's very hard to provide status updates. Keep in mind, once the decision is rendered, copies will be sent immediately. Next Dwight.

Dwight Johnson: 26.

Dave Gordon: Processing a size protest, and determining the date of size. The first sentence there is the key, when do you determine the size of a company? As of the date that it certifies that it is a small business. That is the answer, in a nutshell. Since I'm running up against time here, let's go to the next slide Dwight.

Dwight Johnson: 27.

Dave Gordon: The general rule is that if a concern is small at the beginning of a contract, it is small for the life of that contract, including options. There are three exceptions when re-certification is required. If there's an ovation. If there is a merger or acquisition of the small business, without an ovation. If the contract is a long term contract, meaning more than five years, including options. In those cases, the contractors have to re-certify. What that means basically is, the contracting officer has to ask the small business to re-certify. Again, I've given you the rules down there. They will probably answer a lot of your questions, so take a look at those rules. That's the general rule about how to deal with a business that becomes large at some point during performance. Next Dwight.

Dwight Johnson: 28.

Dave Gordon: As I mentioned before, the key to size is affiliation. If there are separate divisions, or subsidiaries, or locations, or states of incorporation, all of those things are irrelevant. The key to deciding whether a firm has affiliates is whether the firm and the alleged affiliate have common control. If one concern controls, or has the power to control, the other, or if some third party has the power to control both. Next slide, Dwight.

Dwight Johnson: 29.

Dave Gordon: We'll skip over this quickly. This is simply a list of the various tests that we look at when we're trying to decide who is, and who is not, an affiliate of the firm being protested? As you can see, there are a lot of ways control can be exercised. These are the most common tests to determine control. Next slide Dwight.

Dwight Johnson: 30.

Dave Gordon: Let's say I own the listed percentages of the firms there. I will talk about the 25% in red in just a second. None of those businesses do any business with each other. You'll notice they're in four very different places. None of them have any connections to businesses with any others, but they're all considered to be affiliated with each other for one simple reason, I control them all. Since I control them all, they're all affiliated. If, theoretically, the furniture manufacturing plant in Paraguay is the apparent successful offer/or, or a subsidiary of it in the United States is the apparent successful offer/or, when I measure the size of that manufacturing plant, I have to add the size of the Chicago ice cream parlor, the Algerian machine shop, and the Montreal Construction company. That will help me determine. That is the only way I can determine the size of the furniture manufacturing plant.

Now, 25%, how on earth can a 25% ownership be sufficient to control the company? You can all imagine a situation where there's two shareholders. One's

49%, the other is 51%. In that case, 49% clearly does not control the company, 51% does. What if you've got one block that's 49% and 51 blocks that are each 1%? In that case, clearly the 49% block controls. It's not a simple matter sometimes, when there's no majority owner, to determine who controls. I use this 25% to highlight an important rule in SBA's regulations, which says, "If you have a number of owners who each own an equal, or substantially equal share, each one of them controls. If you have four owners, each owning 25% of a firm, each one of them is considered to control that firm. That's why I listed the 25% for the construction company in Montreal. Next slide Dwight.

Dwight Johnson: 31.

Dave Gordon: Probably the most important rule you're going to run up against, in terms of our affiliations rules, is the ostensible sub-contractor rule. What this basically says is, if you've got a situation where the tail is wagging the dog, you've got a problem. The government wants a small business prime to be the prime. They want it to perform on the contract. They want it to meet its obligations. They do not want it to be a front for a large business to get a contract. This rule simply says, "If a small business prime has a large business sub, and the large business sub is performing the primary and vital requirements of the contract." Which as you can see means a fairly detailed analysis of what the contract requires and who's doing what.

If the prime is unusually reliant on the sub, then we're going to find what's called ostensible sub-contracting. In that case, the prime and the sub will be considered affiliated, and what that in turn means is the small business prime will lose the contract. It arises not infrequently. It is a severe test, and it is an important test because of its consequences. It means that the small business prime can very easily lose the contract. Please note, it does not mean that a small business prime cannot have a large business sub. It just means that if it has a large business sub, the small business prime needs to run the contract. They need to perform the primary and vital requirements of the contract. They can still have Microsoft or General Motors as a sub-contractor, but the sub has to be acting as a sub. Next slide Dwight.

Dwight Johnson: 32.

Dave Gordon: There is a brand new rule. I've got it in green. It literally was published yesterday. Takes effect June 30th. This rule is going to change the landscape of contracting because what it says is, if a small business prime sub-contracts to a similarly situated entity, those two entities, or three entities, or four, depending on the number of sub-contractors, will be exempt from a finding of affiliation. In other words, if you have an 8(a) prime, its 8(a) subs will not be considered affiliated. If you have a service disabled veteran owned small business prime, and it sub-contracts to other service disabled veteran owned small businesses, they will all be exempt from a finding of ostensible sub-contracting. It is a significant change in the regulations. You can see my second bullet defines what a similarly situated entity is. The third bullet, the prime and the SSE must perform the required amount of work among themselves. They cannot, in other words, in turn sub-contract out to

second tier subcontractors. They have to do the work themselves. If they do, they will not be found affiliated. Next slide, Dwight.

Dwight Johnson: 33.

Dave Gordon: This is coming back into vogue, teaming arrangements. For reasons I don't quite understand, procuring activities love them. There is no such thing as a teaming arrangement. A team is either a joint venture, or it's a prime sub. Calling it a team, for all intents and purposes, means nothing. It has no legal effect. There's no such thing in the law as a teaming arrangement. You can have questions about a team, but I can't answer any questions about that team until I know how it's organized. Is it a joint venture, or is it a prime sub? Because telling me it's a team tells me nothing about it.

One other point, dealing not only with teaming arrangements, but with other contracting arrangements between primes and subs. There's a difference between subs and suppliers. Suppliers are not subs. Subs are not suppliers. Suppliers supply goods. Subs perform a service. They are different. Don't confuse them. Next slide, Dwight.

Dwight Johnson: You know we're behind here. We're on slide 34. If we could move faster.

Dave Gordon: Only got a few more, so I'll talk as fast as I can. Joint ventures. All members of a joint venture are affiliated. The biggest exception is the relaxed rule, which I'll discuss in 15 seconds. There is another rule that no joint venture can receive more than three awards in two years. Again, I've given you the citation at the bottom of the slide. Let's go to the next one Dwight.

Dwight Johnson: 35.

Dave Gordon: The relaxed rule. Relaxed rule simply says, if each of the partners to the joint venture is individually small, then the joint venture itself, as an entity, is small. Until June 30th, those three check marks apply. Those are the conditions under which the relaxed rule will apply. After June 30th, the relaxed rule is true in all cases. Important new change. The relaxed rule will apply in all cases as of June 30th. Next slide, Dwight.

Dwight Johnson: 36.

Dave Gordon: Okay. 8(a) mentor-protégé joint ventures. Actually I think we're going to skip this. It's here for anybody to consult. It's too technical really to get into without spending a fair amount of time on it. Size determination is binding. When we issue a size determination, it can either be accepted, or it can be appealed. If it's accepted, it is the law. You cannot say, "Well, I disagree, I'm not going to apply it." A size determination is binding, it has the force of law. If it's appealed, there are different rules governing when it's appealed, how you have to consider whether or not to wait for the appeal. The rules again, I've given you the citation. They're fairly

detailed, not worth going into. Please consult 121.1009, it will give you general rules here on the size determinations. The last slide is simply all the topics I've left out. As fast as I've talked, as many things as I've covered, I've left a ton of stuff out. With that, since we're behind, Dwight, if you want to start with some of the questions you've accumulated.

Dwight Johnson: I'm going to turn it over to Janice Kaiser now to take our questions.

Janice Kaiser: Okay. Let's get started with the first one, and that is, for VA procurements, if we get a SDVOSB size protest, do we send to both SBA and the VA [Osdeboo 00:52:56], or just VA?

Dave Gordon: If it's a size protest, it just comes to SBA. If it's a status protest, it just goes to VA. Depends on the kind of protest. Size protests only ever come to SBA. Next.

Janice Kaiser: Right. If it's a size protest, just SBA. If it's an SDVOSB, question about whether or not, if you're disabled, you're going to just send that to VA, if you're a for VA procurement company.

Okay, the next question is, this is really a comment that someone made. When an entity registers in SAM, the system does not recognize them as small when they indicate a foreign owned parent company.

Dave Gordon: I've never run into that before, and I don't know what to say because they're supposed to be entering all of the relevant receipts and employee numbers, so the system should indicate. If it doesn't, it's because they're not entering the right information.

Janice Kaiser: What is the CFR, or far reference, for the new SSE, or similarly situated entity rule?

Dave Gordon: It's in the rule. I don't have it off the top of my head, and I haven't printed out the rule yet. You can go to yesterday's federal register and get it. It's in the existing sections. It's not new section numbers, I don't believe. I don't have it because I did not know it was coming out yesterday. I apologize for not having the exact citation yet.

Dwight Johnson: I have the May 31, volume 81, number 104, Thursday, May 31, regulation 34243.

Janice Kaiser: In the federal register?

Dwight Johnson: Yes.

Janice Kaiser: Okay, so is the ostensible sub situation applicable with mentor/protégée situations?

Dave Gordon: Generally, a mentor and a protégée, assuming that they're all kosher under the 8(a) program rules, are going to be exempt from a finding of affiliation for anything that

falls under the terms and conditions of the mentor/protégée agreement. In other words, the protégée is getting certain kinds of advice and assistance from the mentor. Anything that falls within the boundaries of the approved mentor/protégée agreement is not going to cause affiliation. However, it is conceivable that they could be found affiliated for reasons unrelated to the assistance under the mentor/protégée agreement.

Janice Kaiser: I skipped a question that someone had asked earlier. How does the offeror know where they fall in the order of potential awardees?

Dave Gordon: I have no idea.

Janice Kaiser: Yeah, that's not something the offeror will know typically, unless maybe they are in an IFB situation. When you're talking about, I think Dave was mentioning that the apparent offeror, not something that the contracting offeror's going to know when they're submitting a size protest question. Does that help, Dave?

Dave Gordon: You'd have to ask the person who asked the question.

Janice Kaiser: Okay. Another question we got was, doesn't the recent addition to the SAM Core information requiring an answer to the question, does any other entity own the entity you are registering? Make the size determination and affiliation situation much more of a real legal/self-certification issue?

Dave Gordon: Short answer, yes, but it doesn't preclude the need for a formal size determination. In other words, the answer that they give on the date that they're self-certifying in SAM is not necessarily going to be an accurate answer for the date that we determine their size for a particular procurement. It's obviously going to be relevant, and it's going to be a subject we pursue, but it doesn't eliminate the need for a formal determination, it just adds factors.

Janice Kaiser: Okay. We had asked this earlier question. It says, Dave indicated that a size protester must be in line for award. How do they know if they were in line?

Dave Gordon: No, not size protester, the company being protested. Wait a minute. I'm sorry, say that again. How does a protester know if they're in line for award?

Janice Kaiser: Right.

Dave Gordon: I see. Because the contracting officer has given unsuccessful offerors notification of who the apparent successful offeror is.

Janice Kaiser: Got it.

Dave Gordon: You don't know that you're necessarily ... If you haven't gotten the award, or haven't been identified as the apparent successful offeror, you generally don't know where in line you are, but you do know that someone else was identified and

that you have the right to file a protest if you wish.

- Janice Kaiser: That's right. Okay. If a contracting officer receives a size protest after the five day period has expired, and award has been made, is that office ...
- Dave Gordon: You still have to forward the protest. We will dismiss it unless there is some kind of extenuating circumstances, or some strange exception applies that might make a difference. Even if the protest is late, it has to be forwarded to SBA. Even if it looks like it's completely unspecified, it has to be forwarded to SBA. Only SBA can address the protests, even if the address is simply to dismiss them.
- Janice Kaiser: The contracting officer cannot just determine that it's untimely?
- Dave Gordon: No. You can say so in your cover letter, forwarding it to me, but only SBA can dismiss it as untimely.
- Janice Kaiser: Here's a comment. The SBA offices are treating size protests differently. Some will accept and process, and others have stated that it's untimely and rules accordingly.
- Dave Gordon: I honestly don't understand the question.
- Janice Kaiser: That was their comment. That SBA offices are treating size protests differently. Some will accept a late, or untimely, protest.
- Dave Gordon: We'll all accept it in the sense of having to deal with it, but we will all dismiss it if it's untimely. I find it hard to believe that different offices are handling late protests differently. I would invite whoever asked the question to give me a call, or shoot me an email.
- Janice Kaiser: Suppliers are not subcontractors. If a masonry business supplies a federal agency with precast culverts, and they purchase from a large culvert manufacturer, that large culvert manufacturer would not be considered a subcontractor?
- Dave Gordon: No, it's a supplier. Now, if the non-manufacturer rule applies, we may have some problems. What they're doing is buying from a large manufacturer and supplying the government. They're buying supplies from the large business. The large business is a supplier, it's not a subcontractor, it's not providing any services, it's simply selling goods.
- Janice Kaiser: That's all the questions we've received.
- Dwight Johnson: Well great. We're three minutes over, and we liked the questions. I can see where there would be many more, but guess what, you know what to do. When you have a question, contact us. Go to SBAlearning@SBA.gov. Send us that question any time. We try to actually have excellent customer service. I'm not sure we succeed. If you don't hear from us, then ask again, because we want to be assertive in getting this information out. We're a few minutes over. We had a whole lot of

excellent information. As you saw, we're going to have some big changes coming very soon. We'll be addressing those in future presentations. In the meantime, until July 13th when we reconvene, thank you so much Dave and Jan. Thank you so much Carla. Thank you all for joining us today. I thought this was such an interesting presentation myself. Have a great week and a great month. We shall reconvene on July 13th. We are adjourning.