

[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 this will be addressed by Deborah Crumity during the Q&A. To submit a written question, please use the chat panel on the right-hand side of your screen, choose all panelists from the sent to drop down menu. If you require technical assistance please send a note to the event producer. I would now like to formally begin today's conference and introduce Chris Ishan. Chris, please go ahead.

**Chris:** Thank you Carla. Hello everyone and welcome to SBA's first Wednesday webinar series. Today we're focusing on SBA size regulations and affiliation and by the end of today's session you should have a better understanding of this topic as well as the resources available to you. We appreciate you taking this time to join us on the April addition of SBA's first Wednesday webinar series and hope you find this information beneficial.

Now if you are new to our event. This is a webinar series that focuses on getting subject matter experts on specific small business programs. In this case, SBA size regulations and affiliation and having them provide you with valuable information you can use in the performance of your job as an SBA employee, a member of the federal acquisition community or PTAC employee.

We periodically get emails asking if small business concerns can be invited to participate in the First Wednesday program and unfortunately the answer is no. The training you're about to receive is focused on you and is not applicable to small business vendors. SBA hopes to directly train these small business concerns through other methods. Now I'm just going to give you a little brief background on the first one state program.

The program was initially created for contracting staff which is why the training was called 1102 First Wednesday. The 1102 designated government series for contracting personnel was later dropped to be more inclusive of other JS series as federal agencies increased the requirements for non-1102's to obtain their [0:02:10 inaudible] or fact

C certification. Additionally, other federal buying activities SBA staff, PTAC, SPDC personnel who after hearing about the training requested access and were added to the list of participants. So that is why SBA's first one state program is aimed at federal government employees and our resource partners like PTAC and SPDC's. Thank you to those of you who are repeat attendees and welcome to those of you who are new to the program.

Slide two; As Carla mentioned I'm Chris Ishan and I am a procurement center representative or PCR with the small business administration and I am located in Kansas City, Missouri. Additionally, Miss. Deb Crumity who is the PCR located in the [0:02:58 inaudible] Arsenal will be reading your questions submitted during the program for our speaker to address at the end of today's session. Slide two includes [0:03:05 inaudible] information.

Under slide three, please note that all lines are on mute. However, you may submit questions any time during today's session by entering them into the chat box on your screen and these questions will be addressed at the end of our speakers' presentation. As most of you know we have transitioned to the new WebEx application and have been informed that some users may experience a few issues such as block website or other error messages when attempting to access the conference login from their computer.

It is our understanding that your internal IT security settings are restricting your access in the AT&T helpdesk or the SBA PLC's identified on the login will be unable to resolve this issue for you. If you're affected by this issue, please make sure you're dialed in and follow along with the slides provided in the email. We will ensure the page numbers are clearly stated so you can follow along. We're hopeful this issue will be resolved by our next session 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. If you by chance didn't get that phone number for the AT&T support desk, it is located on the email invitation for today's program and on slide three of the PowerPoint presentation that accompany the SBA email notifying you of today's training. Otherwise just keep listening in and follow along with the PowerPoint that accompany the invitation for today. As I

mentioned earlier we will continually announce the page number so you can follow along. For more SBA small business program training, you can also visit the SBA learning center at [www.sba.gov](http://www.sba.gov).

Now under slide four. The Association of Procurement Technical Assistance Center or APTAC also website where they post the First Wednesday Programs. Since these sessions are recorded you can relook into this program as well as the previous sessions by visiting the website which is provided here on slide four. Procurement Technical Assistance Centers or PTAC's are a great resource and partnering with your local PTAC for an industry day, sharing a [0:05:23 sources] and our fine notices or referring small business concerns to PTAC are just a few reasons why they are such a useful resource for acquisition personnel. Please contact your local PTAC for additional information.

Now onto slide five. Slide five is the current program schedule for our fiscal year 2018 and today's session on size and affiliation is the seventh topic of the series. As you'll see we have added a couple of new topics to our program list and improved on other topics that have been presented in the past. Last month's session of the women on small business program was a huge success. As over 1000 individuals participated in the training program. Your participation and positive word of mouth is appreciated and we hope you find these topics interesting and applicable for your job.

Slide six; I'm sure that many of you will want to receive credit for attending today's training, so fortunately today's session is worth one CLP. I'll go into more of this detail on the next slide, so on slide seven is the certificate you'll complete with your name. First you will manually fill in your name and then print the certificate from the PowerPoint to request credit for Today's session. The PowerPoint was part of the SBA email invitation that you received for today's session. SBA does not track your CLP's or communicate with your training program regarding your CLP achievements. Several of you may have received information for this training from a friend or colleague but if you want to receive an email directly from us notifying you of upcoming First Wednesday Webinar events, just email us at [sbalearning@sba.gov](mailto:sbalearning@sba.gov), so that's [sbalearning@sba.gov](mailto:sbalearning@sba.gov). In the subject line please enter the words add to list and we'll ensure you're added to the...

As I mentioned earlier on slide seven this is the certificate that you will see and please note that the only way you have the ability to print this out is having the original PowerPoint from the email that was sent out and all you'd simply do is go to slide seven and state your name here. Remove that information, put your name there and you can either save as PDF or you can print it out and scan it in and submit it to your training coordinator however you need to do that. This is your one CLP, the certificate for that.

Under slide eight, the topic of SBA size regulations is receiving a lot of tension in the world of small business. And today's training has been assembled to address several aspects of this topic. Our speaker has braced to accept our invitation and he will be directing me to continue to the next slide. As mentioned earlier if you're unable to access the WebEx application please follow along with the PowerPoint presentation that was included in the email regarding 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 to slide changes on your screen.

I am pleased to introduce today's speaker to you who is the Size program manager for SBA's Office of Government Contracting in area four, and hails from the windy city. Mr. David Gordon. Dave, we appreciate that you can meet with us today and I'll turn the program over to you.

**Dave:**

Thanks Chris and thanks to everybody who's here. Just a couple of very quick preliminary notes and then we'll get to the presentation. It is possible that questions will occur to you after the session today or conceivably you may ask a question that we don't get to. I am happy to answer your questions individually if you want to get in touch with me either by phone or email either one is fine. I'd rather answer your questions in advance then wait till a problem arises and we need to solve the problems, so don't hesitate to get in touch with me if you have questions that weren't answered today or occur to you later after you have had a chance to process what we've done and think about it a little.

An hour is a long time to talk about size but even so we're only really going to scratch the surface. I went through my old presentations on this subject very carefully to make sure that the presentation was up to

date and it covered most of what I think arises in day to day dealings with issues relating to the SBA size regulations. There is no way we could possibly cover everything and I apologize in advance, I talk quickly and unfortunately, I'm going to need to talk quickly to get through everything that we've got.

With that apology out of the way, why don't we go to the next slide please Chris. What we're going to start talking about is; What is a small business? There is a basic definition in SBA regulations and just parenthetically note the bottom right of the slide I've given you the CFR section and on almost every slide I've tried to give you the section of the law CFR part 121 being the SBA size regulations and the far regulation when there is an applicable far regulation as well. So, I've tried to make it easy for you to follow up and see the exact language of the law on each particular item we're discussing.

First of all, in order to qualify as a small business a company has to be organized for profit. So, the parenthetical means for profit subsidiaries of not for profits are okay. Sometimes you'll run into a circumstance where the parent company is not for profit but it happens to have one or more for profit subsidiaries. The parent can't qualify by definition as a small business but the for-profit subsidiaries may. We determine whether business is smaller not by measuring its size plus the size of all of its affiliates. If it was simply a matter of measuring the size of a single company, size determinations would be simple. But the hard part of doing any size determination is determining whether the company that's at issue generally in the form of a protest has affiliates or not. That's a very complicated question. It often requires a lot of time and it certainly requires expertise as you'll see from some of the slides that we discuss.

One topic that has come up often on over the years but seems to be coming up with increasing frequency is; can a foreign owned company or a foreign based company qualifies a small business. And the answer is, maybe. And what I mean by that is the pure fact, the simple fact rather, that it's a foreign owned company or a foreign based company does not in and of itself disqualify the concern. For example, you may have a company that's based in Germany and they have offices and or office or a manufacturing plant or some sort of entity in the United States. It can be considered a small business so long as there is fundamentally and first of all a place of business located in the United

States and a place of business doesn't have to be a factory, it can just be a sales office.

They just have to have a place of business and then they need to meet one of two other requirements, either they operate primarily in the United States or they make a significant contribution to the US economy. Now significant contribution is relative. Obviously, a small business is not going to be able to make the kind of contribution to the American economy that Microsoft can. So, it has to be considered significance has to be considered as measured against the company's revenues. You compare the company if you will to itself. Is its contribution in terms of its own income significant?

If I measure its contribution compared to Microsoft income, there's not going to be a small business in the world that would qualify as being able to make a significant contribution. But if it has a place of business in the United States and it makes a significant contribution to the American economy and the way that's determined is by paying US taxes or using American products or using American employees. Anyone of those will qualify. But as you know it's a multi part test and the concern has to meet each of the required parts in order to qualify.

Can we go to slide 11 Chris? How do you know a business is small or not? We depend in the first instance on them. They have to self-certify when they submit an offer or a bid or a quote on a procurement. And the law requires that a contracting officer accept their representation unless the CO has a reason to believe otherwise. So, if they have a listing in some where they represent their small, shall means must. Shall is a lawyer's word for must, so if they say they're small you have to take them at their word unless you have a reason to believe otherwise. And a reason to believe otherwise has to be something specific.

You can't say, "G well, I'm not sure that they really qualify, I think I may have heard something." That doesn't work; it has to be a specific reason to believe that the representation in some is wrong. A contracting officer has the ability to protest a small business's representation but it has to be a specific reason, a specific piece of evidence, a trade journal, a newspaper article, something that you can point to. The reason doesn't have to be right, in other words you're entitled to make a mistake but you have to be able to point to something. And the process

is one that is intended to determine the size of the company that's in line for awards.

If you have a group of four or five finalists and you're not sure that one or two of them really is a small business. You can't use the process to vet the offerors to give yourself a smaller pool of finalists. The only time that a competitor or a contracting officer can file a protest against another firm is to protest their nomination if you will as an apparent successful offeror it's premature. If you haven't opened the bids you haven't determined in the apparent successful offer is and so it's not timely to protest them at that point.

Now one other point... this doesn't really go here but it's important enough to mention, so I've stuck it in here. We get a fair number of protests as well as from competitors as well as questions occasionally from procurement personnel saying the company doesn't have the NAICS listed for this procurement in its SAM profile. That is irrelevant, it does not, there is no federal law regulation that requires a company to risk to make to sign to the procurement in SAM unless the solicitation actually requires it.

I can tell you I've never seen that happen, it certainly could happen, most solicitations don't address the issue at all, the few that do, only say that the company has to have the appropriate names listed before award. So, you tell them that award is contingent upon their updating their SAM profile and others they'll put this required NAICS code into their profile. But it's not a prerequisite to offer or bid on a procurement.

Next slide please 12, Chris. Again, this slide doesn't really fit right here but it's too important a topic to not address. It was a big issue for a while, it seems to be quite and dumb but that first bullet is critical. A wholesale or a retail NAICS code cannot be assigned to a federal procurement for supplies. The reason is a simple policy and that is the government wants the largest possible audience of potential offerors of potential bidders.

If you just put down a wholesale or a retail code then you're omitting manufacturers. But if you list a manufacturing code in the first place you're opening the procurement up to anybody who manufactures widgets. The non-manufacturer rule which is a specific SBA rule designed to address this situation provides that wholesalers or retailers

or distributors can bid on a procurement which has been assigned a manufacturing code if they meet certain criteria. We're not going to have time to go through the non-manufacturer rule today as a matter of fact I think Chris has arranged earlier this year for an entire presentation to be given on the subject it's not a terribly complicated rule but it's a very important one and it's one you should be familiar with **[0:21:18 inaudible]** simple sense of knowing that it exists.

It exists again for the policy reason of making the potential bidding or offering pool as large as possible. This last bullet I don't want to mislead you by saying that the size standard for procurements of supplies he knows NAIC sectors is 500 employees. All that means is if a wholesaler or a retailer is going to bid on a procurement under the non-manufacturer rule their size standard is going to be 500 employees regardless of what the manufacturing size standard is assigned to the procurement.

Okay, Chris slide 13 please. This topic comes up from time to time both from procurement personnel and from small businesses themselves. SBA does not certify businesses as small. There is something like 27 or 28 million small businesses in the United States. I have about ten colleagues who do the same kind of size work I do. I don't know what ten into 28 million is but it's a bigger number than I could do in a year. And so we have self-certification. SBA relies on well two things, relies on the honesty, I'd like to think of small businesses and it also relies on federal perjury statutes. But the more important point here is small business as a general rule self-certify SBA will not certify them. The exception is the two programs that involve an entire formal application process. It can be done online; it can be done on paper but the 8A program which is a minority small business development program and the hub zone program which stands for historically underutilized business zone.

Both of those programs require as a criterion for admission that the company demonstrate that it's a small business, so in those two programs alone as part of the admission process, SBA personnel in those programs will be checking to make sure that the company qualifies as a small business before it can even get into those programs. So as a general rule and I'll explain the exception in a second. You can depend on this acted who's an 8A firm or a hub zone firm has already been reviewed by SBA and found to be small. Now the reason I say that



there is an exception is those are multi year programs. Things have a tendency to change. And so it is possible that a company be qualified as a small business when it entered the program no longer qualifies. So, looking on SAM and seeing that they're an 8A or a hub zone is a pretty strong indication that they qualify as a small business it's not an absolute guarantee however. You are entitled to rely on it if they self-certify that they're small, you see if they say they're an 8A firm. You can rely on all that. I'm just pointing out that on occasion and it's a pretty rare occasion. There may be a circumstance where a company is no longer in compliance.

If not 8A and it's not hub zone, all other types of businesses self-certify. SBC stands for Small Business Concern, women owned and veteran owned SBC's all are responsible for certifying themselves as small.

Slide 14 Chris. Congress granted SBA the authority to conduct formal sized determinations in two categories cases, requests and protests. Requests for the most part are internal to SBA, there are certain provisions in the request portion of the regulation that cove out exceptions like we can do small business determination for the pertinent trademark office. But as a general matter request relate to inter SBA program matters, the portion of the regulation that will be most important to use the protest portion of the regulation. And here again, let me emphasize, we can only do determinations where congress has given us the authority to do a determination. So for example congress has not given us the authority to take a protest off the street.

If ABC small business for any reason has evidence that XYZ small business may not be small, they cannot simply send a protest into SBA and say, "We want a Size [0:27:01 inaudible]." We can't do that kind of determination because we don't have the legal authority to do that kind of determination. There is a provision that allows SBA to initiate its own determinations and on occasion that kind of off the street protest may be picked up by an area office depending on the nature and probativeness of the evidence but it's a fairly rare thing. For the most part protests relate to the 13 categories... relate to the nine categories of protests authorized by our regulations. And the only people who are eligible to file a protest are going to setout for each one of those nine categories. So for example, small business set aside plain vanilla, total small business set asides. There are four categories of parties that have

the ability to file a protest. Basically, the first one is competing offerors who didn't get an award. The CO certain parties at SBA and other interested parties and in this case interested parties relates primarily to a very peculiar situation involving large businesses and shouldn't be construed as sort of a catch off or anybody who has an interest in the procurement.

Slide 15 Chris. Which protest has to be sent to SBA and the answer which size protest. The answer is all of them. You may be absolutely convinced looking at a protest that they neither nailed it and they were 100% correct or conversely that the person filing the protest is completely wrong and that there is absolutely no way that they protested firm could not qualify, it doesn't matter. Size protests are handled exclusively by SBA, contracting officer does not have the right to decide a size protest. Procuring agencies have the ability to decide part 33 protests they're also status protests for example a protest comes in and says, "They're claiming to be an 8A firm, we don't think they're a bonified 8A firm or we don't think they're a bonified eligible hub zone firm."

Those protests are handled elsewhere not in the area offices but size protests are handled only in SBA area offices. So that's why I have in parens and in capital bold red letters 'not district offices.' From time to time procurement people don't consult the far and say, "Well, I know it's SBA, so I'm going to send you to the local SBA office." Please don't. Please read the far. The far and the CFR both are absolutely clear on when, on where size protest get sent, and that's only one place. It's the area office that has jurisdiction over the state where the protested firm is located. It doesn't matter where the protestor is, it doesn't matter where the contracting officer is, doesn't matter where performance is going to be, it's the state where the protested firm is located.

And if a protest is sent to another office, multiple things can happen. I have had them look at the package in the district office and say, "What's this, I don't know what to do with this." A month went by in one case. You're going to save everyone brief if you send it to the right office in the first place and that's always only going to be an area office.

Okay, Chris next slide, slide 16 please. Most sized determinations take 15 business days, that's what the law prescribes both in the far and in the CFR. If it's a fairly simple straight forward dismissal, we will talk

about those in a minute. They generally take a lot less time. It's going to depend in part on how busy the office is and how complex the case is. There are increasingly cases that are so complex, they can easily take more than 15 business days. As you all know my third bullet says, if you've waited 15 business days and cannot wait any longer, the **[0:32:10 fallout]** provides and I've given you the site that if there is a formal decision in writing that there is an immediate need to award and that waiting will be disadvantageous to the government. You can go ahead and make the award without waiting for SBA.

I am not aware of more than a tiny handful of those cases ever happening. It's not to say that the procurements aren't important and don't need to be made timely. But size determinations can be extremely complex and they don't always lend themselves to artificial deadlines. Sometimes the small business will request an extension to submit its initial paperwork. Sometimes the SBA office you're dealing with will request an extension. We try to get things done as quickly as we can but we can't always do it within 15 business... only you know how imperative your procurement is.

If you get a request all I will suggest is please consider it carefully, there is generally a very good reason for the request. If you can spare some time, great, if you can't you can't. I'm not asking, we're not asking for the impossible but we are asking for consideration when it's reasonable to grant an extension. My experience has been everything from not another ten seconds to take another two weeks. It all depends on the procurement, only you know how urgent the procurement is and that's why SBA does not have the authority to grant an extension, only the procuring activity can do that.

Slide 17 please Chris. I've already mentioned the first bullet, we can't use sized protests to vet finalists. The second one I've also mentioned they cannot come off the street because we don't have the authority to take them from off the street. They have to be made in connection with a particular procurement. That's the language the regulation. We also get calls or at least this office does from time to time saying, "Hey, we're looking at these companies, we don't need a formal determination but can you consult your secret database and tell us whether this company is small or not." And the answer is, "Love to help you, I can't, we don't have a secret database." When I have questions, I go to SAM just like you do. And even if I've done a sized determination

on the same company last year, the results of that determination were valid for when that determination was done. Anything could have happened in the meantime, they could have been acquired by Microsoft. They could have acquired other companies themselves, all kinds of stuff could have happened, so the fact that we may have recently done a determination won't tell us a thing.

Okay slide 18 please Chris. A protest has to be timely and in that regard, I have to point out that the protest goes to the CO. Protests do not get mailed at SBA, it doesn't happen often and every once in a while you've got a protestor who doesn't know quite what's going on. And they may call the CO or call procurement people and say, "What do I do with this?" The answer is, the protest has to go the CO and the CO has to get it within five business days of either notification to unsuccessful offerors in the case of our FRP's and FRQ's or five business days after bid opening. I suppose there is probably a third category that doesn't fit either one of these when sometimes depending on the size of the procurement, depending on the agency.

There is no actual notification to unsuccessful offerors but notice of award is posted. In that case it's five days from the time notice was posted. As I said before a protest has to be specific, if a protest is not specific we will dismiss it. An example of a protest that's not specific ABC company is not a small business and that's the gist of the protest. I should say that there are no magic words, you don't have to use the word sized protest in the protest itself. You just have to allege or the person protesting has to allege that the business being protested is larger than the size standard assigned to the procurement.

There has to be some specific basis. Again, don't have to be right but have to be able to point to something and the reason boils down to due process. The protested firm has a right to know what the claim against it is and without know what the claim against it is, it has no way to respond. If it sees that your claiming that they're large because of X article, then they know what the issue is that they're addressing. But a protest that just comes in and says, "I don't think they're small." Doesn't specify why they're not small and so will be dismissed.

Slide 19 Chris. Generally speaking an area office is handled... different area office is handled slightly differently. In Chicago, we will make sure in the first place that the protest is timely and that it's specific. Only at

that point will we contact the firm. If it's not timely or it's not specific we'll dismiss it, there's no need to talk to the company because the protestor didn't meet the basic criteria to get in the door. Now from time to time we get calls or emails or questions from procurement personnel, "Could you please expedite this, it's a critical procurement." The answer is no, I can't. And the reason is number one the odds are there are a handful if not a large handful if not in some cases an extremely large number of protests pending in the office at the same time.

You don't want me to jump ahead of all the other protests that came in before yours because it's not fair and it's not right. You wouldn't want to be jumped over and neither does any other procuring officer who's got to protest pending want to be jumped ahead. We do our best to get to them as quickly as possible but saying expedited is really asking for a next to impossible thing. Because basically it's saying, "I don't care that you have other procurements in front of ours. Ours is more important." Well, yes, I understand that and yes, it is to you but no more important than the protests and case is pending for the CO's who already have matters pending here. We do our best to get it done on time.

As a matter of fact, there is a metric that we are all judged on, dealing with our timeliness in handling size protests and issuing determinations. We will get to it quickly as we can, but we can't work miracles and that's the next bullet. It's very difficult. It's not flat out impossible to give any kind of a useful update, and that's because the facts change. It is typical in the course of a determination, for questions to be sent to the protested concerned to clarify things. And I can recall more than one or two cases where literally, the direction that the determination was taken, changed from day to day. There's no way to predict how it's going to turn out until it's done.

The only conceivable update we could give you, is that there are 15 cases ahead of yours or there's one case ahead of yours. In terms of where it's going to go, or how it's going to turn out, it's really impossible to say. When it's done, copies are sent automatically to the protestor, to the protested concerned, and to the CO. As soon as it's done, we send them out.

Slide 20 please Chris. Size is determined as of the date that the company submits its written self-certification, that it is small to the procuring

activities as part of its offer. What that means is, that the date that the company signs its offer. Or the date that it submits its bid. It might become large after that, and still be eligible for award. As you see in my parents' article, there may be some wriggle room there for cases involving larger negotiations but as a general matter, if it was small on the date it self-certified, it will still be eligible for award if it becomes large after that date.

Slide 21 Chris. The exception, the important exception is, I have listed them there. There's three of them: novations, mergers or acquisitions without novations and long-term contracts. If it's no longer small because of a novation, or a merger or acquisition, the CO cannot count the contract toward the agency's small business goals, but our regulations don't contain any requirements to terminate the contract. That's up to you. We can't tell you to terminate a contract if a company becomes large. If exception three applies and that's by far the most common exception. It's a long-term contract. Let's say toward the end of the 5-year period before the first option is exercised, the CO has to go back to the company and say, "We need you to recertify yourselves as small." Or, "We need you to recertify yourself whether you are small or not, we need some sort of an answer." And again, in that case it's up to the contracting officer what he does with the contract. But the recertification has to be made by the small business, in the circumstance of a long-term contract.

Slide 22, please Chris. Size as I mentioned early on, is determined by adding together the size of the small business form it's being protested, plus the size of all its affiliates. How do you know who its affiliates are? The key to affiliation is control. Concerns are affiliated with each other. If one concern controls or has the power to control the other or if a third party can control both. Please note the bottom bullet there, separate divisions, subsidiaries all of those things are irrelevant.

Slide 23 Chris. Those are the tests we go through when we are determining whether control exists with relation to other firms. That the people who control the protested firm, control other firms. We look at questions of negative control, potential control, identity of interest, common management. All of these are potential ways for control to arise and therefore for affiliation to arise.

Chris, go ahead to slide 24 please. Here's the simplest kind of analysis: stock ownership. I own those specified interests in each of the following companies. 100% of an ice cream parlor in Chicago. 50% of a furniture manufacturer in Tibet. 75% of a machine shop in Ohio and 45% of a construction company in Montreal. None of those businesses do any business with the other. The only thing they have in common, is that I own them all. I control them all and because I control them all, they are affiliated with each other. It doesn't matter that they are in different countries. It doesn't matter that they do different things, doesn't matter that they don't do business with each other.

Now, you'll notice that I highlighted the 45% in red. Because as you can imagine and are probably saying to yourself. Well, it depends. If I own 45%, the other 55% is split among 55 different other people, clearly, I have the power to control because my block is 45 times larger than the next largest block. If I own 45% and someone else own 55%, then they control. If I own 45% and somebody owns 25% and somebody owns 20%, it gets a little greyer and you can imagine, any time there's no single majority owner, the analysis can get fairly complicated. The rules themselves with relation to stock ownership, are fairly complicated because unless you have a single majority owner, the circumstances can be very complicated. But the point of this slide is simply to illustrate that it's control that matters.

Slide 25, please Chris. Joint ventures and teaming. Let me take teaming first, which is the last bullet point. The lawyer in me hates the idea of teams and the reason is very simple. There is no legal entity called a team. A team is an artificial construct. A team can be either a joint venture or it can be a prime and a sub. There's nothing else it can be but telling me that there's a team tells me nothing. It tells me that there are firms related to each other somehow and telling me that it's a team doesn't tell me what I need to know. What I need to know is, is it a joint venture or is it a prime and a sub?

Teams exist. There was a period of a number of years where SBA actually took all references to teaming out of its regulations, because it's such a nebulous word and because it doesn't really help, but it's creeping back in. I know it's a fairly popular concept out there. That's fine, but teaming in and of itself is not a useful description, because it doesn't tell me about the nature of the relationship between the firms involved in the team. Now, if we're talking of a joint venture, that's

different. A joint venture is a legal concept, it has a certain definition and it's fairly easy to understand how joint ventures work. For purposes of SBA and size rules and size determinations, on procurement of the offer rule, is a joint venture? First of all, a joint venture has to be in writing. A joint venture agreement has to be in writing and the entity has to do business under its own name. It has to be identified as a joint venture in SAM. It can be organized in multiple of ways. It can be a corporation, it can be a partnership, it can be an LLC. The form of legal entity doesn't matter, but the entity has to be its own separate legal entity. Now, it can only be populated by individuals who are going to perform administrative functions. In other words, not people that are going to perform the contract itself.

You can have the book keepers employed by the joint venture, but you can't have the construction engineers employed by the joint venture. There was a change in the rules, about a year, a year and a half ago. The third bullet. It's an extremely important change. It used to apply in a subset of cases. Now it applies across the board. If each joint venture partner, whether it's two joint venture partners or five, if each one of them individually qualifies as a small business, under the size standard assigned at the procurement, then the joint venture itself will be considered to be small. I've have given you the citation there.

Okay, can we go to the next slide there Chris, 26? There's all kinds of complicated and detailed rules dealing with 8A joint ventures. There's even all kinds of detailed rules dealing with meta-protégées, but I want to hit it very briefly because it does come up frequently and it's worth hitting briefly, so you've got some very basic understanding of what this is. If an 8A participant in the 8A program, gets together with its SBA approved mentor, it can create a joint venture to bid as a small business for any federal procurement. So long as the protégée is small, which it should be by definition because the protégée is an 8A firm and it should be small to be in the 8A program.

Even if you've got a small 8A protégée in the 8A program, it can partner with its mentor. Microsoft, or General Motors or General Dynamics, to perform and still be considered as a small business. So long as several things happen. First, SBA has to approve the agreement between the mentor and the protégée. Talking about among other things, the kind of assistance the mentor is going to provide. And, the joint venture agreement also has to be approved by the SBA before the deed or the



offer is submitted. Approval afterwards, is not good enough. If it's not approved before they submit their offer it doesn't get the protection of the safe harbor.

Now, another thing to keep in mind. It's a safe harbor and it's a pretty expansive one but it only applies to the assistance that the mentor provides under the agreement. The agreement is required to specify certain kinds of assistance and as long as the assistance is limited to what the agreement provides, no affiliation will be found. However, affiliation could be found for other reasons. If for example there's common management, or common ownership, the possibility of affiliation in spite of the mentor-protégée agreement still exists. Please remember too, within the past year or two, we've started on all small mentor-protégée programs for non-8A firms as well as retaining this program for 8A ones.

Slide 27 please, Chris. Very important rule. I'm talking it out of obscurity. Well, maybe not obscurity. If you have a prime-sub arrangement where the prime is a small business and they are basically a pass through. Where in other words, the ostensible, the sub-contractor is the tail wagging the dog, that is prohibited by SBA regulations. The rule is, the prime has to perform the primary and vital requirements of the contract. The prime cannot be unusually reliant on the sub-contractor. If the parties violate that rule, they will be considered affiliated and may not qualify as a small business. The key is, who is doing what? Is the tail wagging the dog? Is the sub really running the contract? We look at a whole slew of things. These are extremely complicated cases. There is no simple way to look at a prime-sub arrangement and tell who is running things. But remember if the sub is running things and it's a large business, it's going to be affiliated with the small prime and be ineligible for award.

Next slide please, 28 Chris. There's also another change, last major change, to the regulations recently. Similarly situated entities, firms that meet the same size and status requirements as the prime contractors. So, if you have a HUBzone certified or an 8A certified and they engage a sub-contractor who is similarly situated, in other words, another 8A firm or another HUBzone that qualifies as small under the size standard assigned to the contract, they will be exempt from a finding of affiliation with the prime under the ostensible sub-contractor rule that I just mentioned. It's a very important exemption. It applies only to similarly

situated entities, and I have given you the regulatory sites so you can read the definition.

Slide 29 Chris. Actually, I'm not going to take the time to go through this. It's important. It tells you once the determination is issued. What is that determination mean? How does it affect the small business? How does it affect your procurement? Take a look at that slide. Take a look at those regs. Very important stuff there.

Slide 30 Chris. I think that's it. I've left out some incredibly important stuff. I haven't talked really about the non-manufacture rule. Limitations on sub-contracting. I haven't talked about the adverse influence there. There's a lot of stuff out there and as fast as I talk, and as much as we've covered. We have very little time left and I apologize for that. I think the next couple slides are simply contact information. Tells which area office has jurisdiction over which states, on that slide and the last slide tells you who has jurisdiction for status for eligibility protests that we talked about before. And with that, I'll stop talking for a minute.

**Chris:**

Okay, Dave. Thank you so much for that. Deborah, I think we are ready for some questions. We can knock some out. We have a few minutes. So, if you want to start reading some of those.

**Deborah:**

Sure Chris. Thank you. We did have a question from the beginning about verifying a self-certification if they don't have a particular MEX code listed in SAM and I think you've mentioned that about the solicitations. Can you clarify that a little bit?

**Dave:**

The odds are you've got some MEX codes listed in SAM. If they're small for any MEX code that has the same size standards, the odds are going to be small for the same size standard with a different code. So, look for any code that has the same exact size standard. If it's not there, you're going to need to tell them to either, enter the code and certify in SAM. Or to get some sort of certification to you some other way. Okay Deborah.

**Deborah:**

Thank you. One more question. If a company say is small on the size standard based upon the number of employees. However, in reviewing documentation submitted, say more than a thousand employees mentioned, is that a valid reason to believe the self-certification is wrong in SAM?

**Dave:** It is absolutely a valid reason. What I generally advise COs to do in that case, is call them up and get some sort of written explanation. Sometimes it's a simple typographical error that has happened a number of times. People do make typing errors, transcription errors, whatever. But if they are unable to resolve the discrepancy to your satisfaction, that is sufficiently specific to go ahead with the protest.

**Deborah:** Okay. Thank you, Dave. Chris, should I continue? Hello?

**Chris:** Sorry, I was on mute. Sorry. Let's do a couple more if we can.

**Deborah:** Sure. Number three, Dave. I just want to talk about MEX 541519 the RTV, [0:59:53 mayflower]. It says I think in SBA size table, 150 employees instead of 500. Can you talk about that a little bit?

**Dave:** Not quite sure what there is to say, except that's a curve out and my recollection, I don't know it off the top of my head, is that there may be other language. There is a footnote to the size table that has that. And I think it talks about other some conditions. I could be wrong but yeah, 150 employees is 150 employees. For that particular curve out, for the nature of work done, that's described in that footnote, so long as it's precisely the work that is described in the footnote, then the size standard will be 150 employees.

**Deborah:** Okay. The SBA size table lays that out in the footnote. Is that specifically about the images or what? The next question. If a company registered in SAM using two different addresses and done, can those locations be HUBzone certified and 8A certified? If so how and why when only one location is HUBzone?

**Dave:** I don't know the answer to that. I don't see any reason why an 8A firm and a HUBzone. Why a firm couldn't be both. HUBzone is based in part on geographical criteria. 8A is based primarily on economic and social disadvantage, so their entry into the programs to my understanding, and I'm not an expert in this, is based on different criteria so I don't know any reason off the top of my head why a firm couldn't qualify as both.

**Deborah:** Okay. Thank you, Dave. This next question relates to joint venture. Review on past performance, is it allowed to specify that only test performance as the joint venture company, be allowed vs. a joint venture submitting past performance individually?

**Dave:** No. You cannot have required a joint venture to have a past performance for the simple reason that joint ventures are often created specifically for the purpose of bidding on that procurement. In fact if you go to 409.104 which talks about the criteria for responsibility, it specifically says you cannot require a past performance and hold the lack of it against an entity because an entity may be brand new. So, in that case, you can ask them or require them to submit evidence of past performance if they have any, but if they don't, which is certainly conceivable to me, then you'd have to ask them to submit past performance for the component entities to the joint venture.

**Deborah:** All right. Thank you, Dave. This next question I think you talk about it in your presentation but can you elaborate a bit more about if a contract is for 10 years, should the CO have been self-certified after five years?

**Dave:** I'm not certain I understand the question, but if it's a long-term contract where you have say a 5-year base period, and any number of options, they're required to request, the COs are required to request recertification, prior to exercising any option beyond that 5-year period. So, if it's five 1-year options, five 5-year options, each time there's an option, there has to be a request for recertification. If I understand the question correctly.

**Deborah:** I believe that that's correct. It says five years and then 10 years total, so I would think it's something like five years. They didn't really say. The next question. Can you clarify a non-profit? I have never seen one, small business must be known as large. I'm not really sure what this question means. If you can just add additional information, the person that asked this question? It's not really clear.

**Dave:** I'm looking at the question that was typed in too. And I don't understand it, honestly. A not for profit cannot by definition be a small business. That's something I think I said in the first to second slide. It's a definitional requirement. If you have a business that is organized as a not for profit under state law, they cannot qualify as a small business concern, period.

**Deborah:** Okay. Thank you, Dave. On the next question, could you please, Oh I think it's on the PowerPoint. I think that may be all of the questions, Chris could you see if I missed any? I think, let me just go back, just to make sure.

**Chris:**

I think we can do too. If we missed some, we'll reach out. I believe we have individuals who have their name and the email addresses also provided. So, that's one way we could follow up the two if we need to. We are a little over time Dave. Thank you so much for sharing your knowledge with us and all that great information. Like you said, it is only an hour and the slides showed us definitely more information. I know you could talk for multiple hours. Maybe next time we'll have two hours for you. Also, I want to appreciate all of the participants on our call, and who had to log in. Once again, appreciate your participation and look forward to the continued participation coming the next month. Thanks again.

**Carla:**

Thank you all for joining today's conference. The session has now concluded. And you may disconnect

**[END OF TRANSCRIPT]**