



Size and Affiliation

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Topics Covered

- ▶ Size
 - Size standards
 - NAICS Codes
 - Limitations on subcontracting and NMR
- ▶ Affiliation
 - Types of affiliation
 - Joint Ventures
 - Mentor–Protégé programs
- ▶ Size Protests and Appeals



Size

Why is size important?

1. Set-aside of contracts
2. Assigning NAICS codes to contracts, subcontracts, and task orders
3. Other situations
 - Programs of other agencies – patents and licensing
 - Certifications – VIP, 8(a), WOSB
 - Obtaining federal property

What is a Small Business?

1. Organized for profit
2. Place of business in the U.S.
 - And operates primarily in the U.S., or makes a significant contribution to the U.S. economy
i.e. jobs, taxes, US products
3. Each NAICS has a receipts-based OR employee-based size standard
 - Each North American Industrial Classification System (NAICS) code has a small business size standard
 - Wholesale and retail NAICS are not used in government procurements.

13 CFR 121.105

SBA Size Standards



Sector 54 – Professional, Scientific and Technical Services

Subsector 541 – Professional, Scientific and Technical Services

541110	Offices of Lawyers	\$	11.0
541191	Title Abstract and Settlement Offices	\$	11.0
541199	All Other Legal Services	\$	11.0
541211	Offices of Certified Public Accountants	\$	20.5
541213	Tax Preparation Services	\$	20.5
541214	Payroll Services	\$	20.5
541219	Other Accounting Services	\$	20.5
541310	Architectural Services	\$	7.5
541320	Landscape Architectural Services	\$	7.5
541330	Engineering Services	\$	15.0
541330_a_Except	Military and Aerospace Equipment and Military Weapons	\$	38.5
541330_b_Except	Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992	\$	38.5
541330_c_Except	Marine Engineering and Naval Architecture	\$	38.5
541340	Drafting Services	\$	7.5
541350	Building Inspection Services	\$	7.5
541360	Geophysical Surveying and Mapping Services	\$	15.0

It's important to recognize that a firm can be small for some NAICS while at the same time be 'other than small' (large) for others.

www.sba.gov/tools/size-standards-tool

How SBA sets size standards

- ▶ SBA has exclusive authority to set size standards
- ▶ Rolling reviews every five years
- ▶ Adjusted for inflation
- ▶ Changes apply to new solicitations (or mods before offer at discretion of agency)
- ▶ Changes can be reconsidered by OHA
- ▶ 2017 NAICS/Size Standards

Average Annual Receipts (AAR)

- ❑ Use Federal Tax Returns
- ❑ Cost of Goods Sold plus Total Income
- ❑ Average of last three completed fiscal years

Number of Employees

- ❑ Count all individuals employed on a full-time, part-time, or other basis.
- ❑ Numbers of employees for each of the pay periods for the preceding completed 12 calendar months (running average).

Exclusions

1. Interaffiliate transfers
 - SBA Size Policy Statement No. 3 – exclude “all proceeds from transactions between a concern and its affiliates, **without limitation**”
2. Some amounts collected for another as an agent (listed in 13 CFR 121.104(a))

Inclusions

- ❑ Receipts or employees of an affiliate

Recognizing a small business

- ▶ General rule: CO “shall” accept self-certification unless there is “a reason to question” the firm’s self-certification.
- ▶ SAM self-certification
 - Must be updated every 12 months
 - Effective at time of offer
 - Can use date adjustment field to look up size for previous dates

Assigning NAICS codes

- ▶ Best describes the principal purpose of the product or service being acquired
- ▶ For subcontracts
 - Determined by prime contractor
 - Reflects product or service provided by subcontractor → NOT just to make sub small
 - Nonmanufacturer rule does not apply
 - No size recertification requirements

Limitations on Subcontracting

Supplies: 50% of amount paid to it (excluding costs of materials)

Services: 50% of the amount paid to it

General Construction: 85% of the amount paid to it (excluding costs of materials)

Specialty Construction 75% of the amount paid to it (excluding costs of materials)

Work performed by similarly situated entities (SSEs) does not count toward the percentage

13 CFR 125.6

“Similarly situated entities”

- ▶ An SSE is a firm that meets the same size and status requirements as the prime for the subject procurement.
- ▶ Firms that are “similarly situated entities” (SSEs) will not be found to have an ostensible subcontracting relationship.



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Manufacturing Contracts

- ▶ On a small business set-aside contract, the offeror must be the Manufacturer or meet the requirements of the NonManufacturer Rule

- 13 CFR 121.406

Non-manufacturer rule

If the contract is over \$150,000, a small business must:

- ▶ (i) have **less than 500** employees;
- ▶ (ii) be **primarily engaged** in the retail or wholesale trade and **normally** sells the type of item being supplied;
- ▶ (iii) take **ownership or possession** of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and
- ▶ (iv) supply the **end item** of a small business manufacturer made in the United States **OR** obtain a waiver of such requirement...

13 CFR §121.406(b)(1)

Waivers (which may waive subsection (iv) only) may be either class or individual and must be in place **before** receipt of offers.

Procedures are contained in 13 CFR §121.1204.



Affiliation

Two types of affiliation

▶ General Affiliation

- On-going basis

▶ For a specific procurement

- Joint venture
- Affiliated only for the contract at hand

AFFILIATION

THE KEY TO SIZE IS AFFILIATION

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

13 CFR §121.103(a)(6)

Separate divisions, subsidiaries, locations, CAGE codes, NAICS codes, product lines, state of incorporation, payment of taxes have **no bearing** on whether affiliation exists.

THE KEY TO AFFILIATION IS CONTROL

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

13 CFR §121.103(a)(1), FAR §19.101



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Affiliation Factors

- ❑ Common ownership
- ❑ Common management
- ❑ Identity of Interest (family members, common investments, dependent through contractual relationships)
- ❑ Joint Ventures/Teaming

For instance...

- I own all of the following :
 - ✓ 100% an ice cream parlor in Chicago
 - ✓ 50% of a furniture manufacturing plant in Paraguay
 - ✓ 75% of a machine shop in Algeria and
- None of them do any business with each other or have any connection with the others.
- But they are all affiliated because the same person **controls** all of them.

*Is a Teaming Agreement a
Joint Venture or a
Prime/Sub Relationship?*

Can be either

Prime/ Sub Contractor Relationship

- ▶ A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract



JOINT VENTURES (JV)

- JV must be in writing and registered in SAM
- Organized for a specific and limited purpose
- Joint Venture cannot be populated with contract-performing employees
- Each joint venture member must qualify as small for the NAICS code assigned to the procurement
SB1 (\$7 million) + SB2 (\$4 million)
Size Standard \$10 million



8(a) mentor-protégé JVs

An SBA-approved mentor and 8(a) protégé (per §124.520) may bid on a federal procurement as a SBC **if** the protégé is small....

13 CFR §121.103(h)(3)(iii)

SBA must:

- ✓ approve both mentor-protégé and JV agreements.
- ✓ written SBA approval of M/P agreement must be given before **offer**
- ✓ written SBA approval of JV agreement must only be given before **award**

SB mentor-protégé JVs

An SBA-approved mentor and protégé may bid on a federal procurement as a SBC **if** the protégé is small....

13 CFR §121.103(h)(3)(iii)

SBA must:

- ✓ Approve the M/P agreement before **offer**

Ostensible Subcontracting

A subcontractor is an ostensible subcontractor if:

- ☐ The subcontractor performs the **primary and vital requirements**, or
- ☐ The prime contractor is **unduly reliant** upon the subcontractor.

Treated as a Joint Venture



Size Protests

Which size protests must be sent to SBA?

ALL OF THEM

- ▶ Protests must be filed with CO, **not** SBA.
- ▶ COs must forward to SBA.
- ▶ COs/agencies do not have the legal authority to:
 - ✓ decide a size protest;
 - ✓ ignore a size protest; or
 - ✓ advise the protester to modify, change, or resubmit the protest.

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

Size protests **ALWAYS** go to SBA **Area Offices**. Not to SBA District Offices, not SBA Regional Offices, not SBA HQ.



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Referral procedure

Notify unsuccessful offerors and then **wait five days** before making award. Pre-award notification is required for RFPs/RFQs and a great idea for IFBs.

FAR §15.503(a)(2)

Which Area Office?

The one that has jurisdiction over state in which HQ of **protested** concern is located.

13 CFR §121.1003; FAR §19.302(c)(1)



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Area Office Jurisdiction

If the headquarters of a protested concern is located in:

Forward the protest to the SBA
Office of Government Contracting:

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

10 Causeway Street, Room 265
Boston, MA 02222-1093
Janette Fasano (617) 565-5622

DE, DC, MD, PA, VA, WV

1150 First Avenue, Parkview Towers
King of Prussia, PA 19406
Vincent Mazzotta (610) 382-3190
vincent.mazzotta@sba.gov

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

100 S. Biscayne Boulevard, 7th floor
Miami, FL 33131
Ivette Bascumbe (305) 536-5521, x182
Ivette.Bascumbe.mesa@sba.gov

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

500 West Madison Street, Suite 1150
Chicago, IL 60661
David Gordon (312) 353-7674
David.Gordon@sba.gov

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

4300 Amon Carter Boulevard, Suite 116
Fort Worth, TX 76155
Stephanie Lewis (817) 684-5305
Stephanie.Lewis@sba.gov

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

455 Market Street, 6th floor
San Francisco, CA 94105
Esmeralda Sanchez (415) 744-4242
Esmeralda.sanchez@sba.gov

Status of award during protest

May not make award for at least 15 business days (until SBA issues its formal determination) unless CO “determines in writing that an award must be made to protect the public interest.”

13 CFR §121.1009(a)(2); FAR §19.302(g)(1)

CO can award after 15 days—even if SBA’s size determination is not finished—by making a formal finding “in writing that there is an immediate need to award the contract **and** that waiting...will be disadvantageous to the Government.”

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

Advisory, premature, “particular” contract protests

- ▶ Size protests cannot be used to vet potential awardees.
- ▶ Protests must be in connection with a “particular” (i.e., pending) procurement.
- ▶ There is no “secret” SBA database listing all 28 million small businesses; we use SAM.
- ▶ Premature protests (i.e., before notification of successful offeror) will be dismissed, even if made by CO.

Timeliness and specificity

- ▶ CO must receive a written protest five business days after
 - (i) notification to unsuccessful offerors (RFPs/RFQs)
 - (ii) bid opening (IFBs)

13 CFR §121.1004; FAR §19.302(d)

- ▶ Date of debrief is irrelevant for protest purposes.
- ▶ A protest must contain “specific, detailed evidence to support the allegation that the offeror is not small.”

FAR §19.302(c)(2); 13 CFR §121.1007

- ▶ Protester must have standing to protest or will be dismissed.



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Processing a size protest

- ▶ If timely and specific, SBA (not CO) will notify the protested concern; firm has three business days to respond.
- ▶ SBA has 15 workdays to render its determination—assuming there is no extension.
- ▶ Copy of final determination will be sent to the protester, the protested concern, and the CO.

As of what moment is size determined

“...as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.”

13 CFR §121.404(a)

A small business which becomes large after written self-certification is still considered small for the life of that contract (including options) unless recertification is requested/required.

13 CFR §121.404(g)

In recertification, size is determined as of the date the concern self-certifies to the order/contract.

13 CFR §121.404(g)



What if a SBC becomes large during contract performance?

GENERAL RULE: if the concern is small at the beginning, it is small for the life of the contract (including options).

EXCEPTION: recertification of size is required if there is a:

- ✓ novation **or**
- ✓ merger or acquisition without a novation **or**
- ✓ “long-term contract” (over 5 years including options; includes MAS, MAC, and GWACS).

For long-term contracts, contractors must recertify before the end of the fifth year **and** every time an option is exercised thereafter.

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

“Other than Small” Determinations

- ▶ Companies found “other than small”:
 - Are prohibited from self-certifying as small on any procurement with the same or a lower size standard
 - Must be recertified as small by SBA before self-certifying as small again;
 - Must notify contracting officers with pending procurements; and
 - Must amend their size status in SAM and any other databases.
 - UNLESS determination was contract specific.



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Office of Hearings and Appeals

- ▶ Any person adversely affected can appeal the size determination to OHA.
- ▶ Contracting Officer can also appeal.
- ▶ File within 15 calendar days after receipt of the size determination.
- ▶ Judge shall issue a size appeal decision, insofar as practicable, within 60 calendar days after close of the record.



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