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Small Business Size Representations and Protests

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Overview

Small businesses contractors self-certify or "represent" their size, attesting that they do not exceed the Small Business Administration's (SBA's) established size standards. Businesses that meet this criteria may receive federal contracting preferences, such as contract set-asides, and be eligible for other kinds of federal assistance (see CRS Report R45576, *An Overview of Small Business Contracting*). There is no SBA issued certification of small businesses. While an agency contracting officer reviews a contract bidder's size "representation," the agency does not ensure that a firm qualifies as a "small" business. Instead, the SBA relies on a size protest process as a key means of preventing the abuse of small business contracting preferences.

In general, competitor contractors, agency contracting officials, or other interested parties may file a size protest in connection with a particular contract with an agency contracting officer. The contracting agency forwards the protest to the SBA. Size decisions are made by the SBA and may be appealed. Firms found to have knowingly misrepresented their size may be suspended or debarred and/or face civil or criminal penalties. Size protests concern only a firm's size representation. (Contract *bid* protests are objections to the conduct of a government agency during the procurement process and may be handled by the Government Accountability Office or the Court of Federal Claims. For more information, see CRS Report R45080, *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments*.)

Details on Size Standards

Size Standards

The SBA's industry-specific size standards determine firm size limits, specified for over 1,000 industrial classifications (North American Industry Classification System (NAICS) codes). The limits are generally expressed in terms of either annual revenue or total number of employees. Revenue limits currently range from $2.25 million to $47 million, while employee count limits currently range from 100 employees to 1,500 employees (see the SBA table of size standards at 13 C.F.R. §121.201.)

Revenue is measured by a firm's annual average receipts over the past five years (13 C.F.R. §121.104(c)). SBA generally relies on a firm's federal income tax return in determining revenue (13 C.F.R. §121.104(a)). If using an employment-based size limit, the firm would use the average number of full or part-time employees per pay period in the previous 24 months (13 C.F.R. §121.106(b)).

To be considered a small business in general, a firm cannot exceed the size limit for its *primary* industry. A firm's primary industry is based on the "distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year" (13 C.F.R. §121.107). The SBA provides guidance for certain NAICS codes about the kinds of firm activities required for a firm to identify a code as its primary industry (footnotes at 13 C.F.R. §121.201). Some firms may be engaged in activities that span more than one industry; they may indicate multiple secondary NAICS codes in the System for Award Management (SAM).

To qualify as a small business contractor for a particular federal contract, a firm must not exceed the size standard for the NAICS code specified in the contract solicitation (13 C.F.R. §121.402(a)). When soliciting offers for a contract, agency contracting officers assign a code to the contract, "selecting the single NAICS code which best describes the principal purpose of the product or service being acquired" (13 C.F.R. §121.402(b)).

Size Representation

If a contractor wishes to compete for a small business contracting preference, the firm must represent itself as small in accordance with the SBA size standards, and self-certify its size in SAM. A contractor must update its size representation annually, or possibly more frequently if there are changes in a firm's ownership or control (FAR 4.1201). When bidding on a contract, a small business represents itself at the time of initial offer on a contract, per the Federal Acquisition Regulation (FAR 19.301-1(b)).

Small Business Status Advisory Opinions

A small business status advisory opinion is a written opinion that a firm is "entitled to represent itself as a small business concern for purposes of federal government procurement opportunities," issued by either a Small Business Development Center or Apex Accelerator (formerly known as a Procurement Technical Assistance Center) (13 C.F.R. §121.109(a)). A firm can rely on its advisory opinion until "undergoes a significant change in its ownership, management, or other factors bearing on its status as a small business" (13 C.F.R. §121.109(d)). However, the firm's size may still be protested, and formal size determinations may still be requested.

Size Determination Requests

Several types of entities may request that the SBA make a formal size determination, which is a written statement issued by the SBA documenting its findings and conclusions about a firm's size (either small or "other than small"). Certain contract offerors and government officials may request a size determination about a contractor (13 C.F.R. §121.1001). A contractor "that is the subject of a small business status advisory opinion holding that it is other than small" may itself request a size determination (13 C.F.R. §121.1001(b)(11)). Socioeconomic program applicants and program directors may also request size determinations, and so may the Government

Contracting Area Director or the Director of the Office of Government Contracting "when sufficient information exists that calls into question a firm's small business status" (13 C.F.R. §121.1001(b)). Additionally, the SBA Inspector General may request a formal size determination (13 C.F.R. §121.1001(b)(13)).

After an "adverse size determination" in which a firm is found to be not small, a firm cannot self-certify as small under the same or lower size standard, though it may be recertified as small by SBA. After SBA issues a final size determination, a firm must update its size status in SAM or SBA will do so within two days (13 C.F.R. §121.1009(g)(5)).

Socioeconomic Program Certification

In contrast to self-certification, the SBA's "socioeconomic" contracting programs for certain types of small businesses require SBA certification, as well as certification maintenance. These programs include the service-disabled veteran-owned small business program, women-owned small business program, HUBZone program, and 8(a) Business Development program.

Each socioeconomic program has its own eligibility and certification requirements outlined in regulations. Firms may obtain certification through the SBA's online certification platform at certifications.sba.gov. A firm wishing to compete for a contract set-aside for certain types of small businesses must be certified at the time of initial offer on a contract and firms must maintain their SBA certifications through renewal processes.

When certifying firms for each of these programs, the SBA accepts a firm's size representation "unless there is evidence indicating that the concern is other than small," and SBA requests a formal size determination when information calls into question that representation (13 C.F.R. §121.404(d)).

Interested parties may challenge a firm's socioeconomic status, a process distinct from the size protest process that varies by the type of status being challenged (e.g., service-disabled veteran status). These non-size based protests may be filed concurrently with a size protest, or alone, and are handled by the SBA.

Size Protest Process

Certain contract competitors and contracting officials, as well as other interested parties, may make a size protest (13 C.F.R. §121.1001). Who exactly is eligible to make a size protest depends on whether the contract at issue is a prime contract or subcontract; criteria also vary across the socioeconomic programs. Size protests may be made to contracting officers associated with a particular contract, within a certain timeframe that depends on the type of procurement. Contracting officers forward protests to the SBA Government Contracting Area Office (Area Office) serving the area in which contract offeror (the firm subject to the protest) is located (13 C.F.R. §121.1005-121.1006).

For a "sealed bid" contract, a size protest must be received by the fifth day after bid opening; for a "negotiated procurement," it must be received by the fifth day after the contracting officer gave notice about the identity of the prospective contract awardee (13 C.F.R. §121.1004(a)).

In addition to meeting specified deadlines, protests must be "specific" and "pertain to a particular procurement or sale" (13 C.F.R. §121.1007). Facts and supporting materials may make a protest sufficiently specific, whereas "merely alleging" that a business is not small or is affiliated with other businesses would be insufficient (13 C.F.R. §121.1007(b)).

If a contract offeror's size is challenged, the contracting agency's contracting officer is generally not allowed to award the contract until the SBA has made a size determination or 15 business days after the SBA receives the protest, whichever occurs first (FAR 19.302(g)(1)).

The Area Office serving the area in which the offeror is located is required to determine the offeror's size status within 15 business days after receipt of the protest, or "within any extension of time granted by the contracting officer" (FAR 19.302(f)(1)). If the SBA does not make a determination within the required time, the contracting officer may award the contract after "determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government" (FAR 19.302(g)(2)).

Appeals of Size Decisions

Any interested party, including anyone "adversely affected by a size determination," may file an appeal of the Area Office's decision with the SBA's Office of Hearings and Appeals (OHA) (13 C.F.R. §134.302). Appeals must be filed within 15 days after receipt of the formal size determination. The OHA judge must issue an appeal decision within 60 days, and the decision is the "final decision of the SBA and becomes effective upon issuance." If the appeal is dismissed, the Area Office size determination remains in effect (13 C.F.R. §134.316).

If the OHA accepts the appeal for consideration and finds the protested firm to be ineligible for the contract, the contracting officer must "terminate the contract unless termination is not in the best interests of the Government" (FAR 19.302(h)). However, the contracting officer may not "exercise any [contract] options or award further task or delivery orders" (FAR 19.302(h)).

Potential Size Protest Outcomes

The SBA or the federal agency may suspend or debar a firm from future government contracts for misrepresenting its size status. In addition, individuals that knowingly misrepresent a business's size to secure a federal contract can be subject to civil and criminal penalties. A firm cannot become eligible for a specific award after the SBA has determined that it is not a small business, even if it takes action to meet the definition of a small business (FAR 19.301-1(g)). Various penalties for the misrepresentation of firm size status are described at 13 C.F.R. §121.108(e). For more information on potential penalties for contractors, see CRS Report R45322, *Selected Legal Tools for Maintaining Government Contractor Accountability*.

R. Corinne Blackford, Analyst in Small Business and Economic Development Policy

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