

SBA Size Protests: Powerful Tool to Challenge Competitor's Contract Award; How to Minimize Risks When Targeted

By Douglas P. Hibshman



The federal government sets aside a significant portion of its procurement dollars each year for purchasing goods and services from small businesses. In 2010, government agencies allotted \$97.9 billion—nearly 23 percent of all federal procurement dollars—to small business contracts.¹ These set-asides present substantial opportunities for qualifying small

business concerns (SBCs) to compete for and perform federal contracts. This also means, however, that small business set-asides are frequently subjected to size protests filed under the US Small Business Administration's (SBA) size regulations, especially because SBA size protests can be filed by just about any SBC, so long as the challenger was an offeror on the contract.²

The evidentiary bar to trigger an SBA investigation of the size of a protested concern is incredibly low. The SBA size regulations merely require a protesting SBC to demonstrate that there is "some basis for the belief" that the protested concern is other-than-small in order for the SBA to initiate an investigation of the protested concern's size.³ Any SBC with access to the Internet can find and provide the SBA with the required evidence. The SBA readily accepts business profiles, newspapers articles, contract and subcontract histories, publicly available corporate filings, and affidavits as evidence when determining whether to initiate a size investigation.⁴ Rarely does the SBA find that a size protest does not meet the low evidentiary threshold required to initiate a size investigation of the protested concern.

Once a size investigation is triggered, the SBA demands that the protested concern turn over—within three days—

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* "Top Sheet" is used in construction and other fields to denote a condensed overview of essential information about a bid or project. The Construction Division's Top Sheet articles are similarly crafted to be succinct examinations of key aspects of a case, law, or other issue.

some of its most intimate business information, including: corporate formation documents and annual reporting documents; ownership information and the names of all directors and officers; income statements for the past three years; and tax returns and audited financial statements for the past three years.⁵ Further, the SBA directs protested concerns to reveal all business, financial, or familial relationships between the concern, its owners, or its directors and officers and any other business concern.⁶ In other words, the SBA conducts a comprehensive audit of a protested concern's ownership, business structure, relationships, and financial standing during a size investigation. Size investigations can be incredibly taxing on SBCs due to the sheer volume of information and documentation demanded by the SBA within a three-day time frame.

The existence of any business, financial, or familial relationships between the protested concern and any other business may cause a finding of affiliation between the two concerns and lead the SBA to rule that the protested concern is other-than-small.⁷ Such a finding causes a procuring agency to disqualify the protested concern from competing for or receiving small business set-aside contract awards under the same or lower size standard until the concern is recertified as small by the SBA.⁸ Accordingly, SBA size protests may be used by an SBC to challenge the eligibility of its competitors to receive small business set-aside contract awards. Indeed, the seemingly gradual increase in size protests over the past several years suggests that SBCs may be taking advantage of this tool to challenge large concerns masquerading as small businesses, to eliminate competition for set-aside awards, and to exercise leverage over the procurement process.

This article describes size protests and how they are filed with the SBA, how the SBA conducts size investigations, reasons why an SBC offeror might file a size protest, how the SBA determines whether affiliation exists between a protested concern and another business, and how an SBC can protect itself from being disqualified from a set-aside contract award due to a substantiated SBA size protest.

What Is an SBA Size Protest?

All procurements set aside for SBCs by federal procuring agencies have a size standard established by a North American Industry Classification System (NAICS) code.⁹ A procurement's size standard is represented in terms of a

concern's annual receipts or the number of employees employed by the concern.¹⁰ A procurement only has one size standard assigned to it by the procuring agency based on the type of goods or services being acquired by the agency.¹¹ Size standards based on gross annual receipts range from \$750,000 to \$35.5 million and size standards based on number of employees range from 100 to 1,500 employees.¹²

For example, procurements set aside for small business general construction contractors under NAICS code 236220 (Commercial and Institutional Building Construction) have a \$33.5 million size standard.¹³ Concerns with gross annual receipts below \$33.5 million are considered small for a procurement assigned NAICS code 236220 and are eligible to compete for and receive the contract award.¹⁴ Concerns with gross annual receipts that exceed the \$33.5 million size standard are other-than-small for the procurement and ineligible to compete for the set-aside award.¹⁵ The same analysis applies to procurements with size standards based on the number of a concern's employees. Concerns that have fewer employees than the applicable size standard are small for a particular procurement, whereas concerns that have more employees than the applicable size standard are other-than-small and ineligible to compete.¹⁶

SBCs are able to self-certify their size when competing for small business set-aside awards.¹⁷ Self-certification is generally done in an offeror's proposal and through the government's Online Representations and Certifications Application (ORCA) Internet database. The self-certification aspect of the set-aside process makes it possible for firms that do not actually satisfy the size standard of a procurement to compete for and receive the set-aside award. In other words, a concern whose gross annual receipts exceed the \$33.5 million size standard assigned to a NAICS code 236220 general construction procurement may intentionally or inadvertently self-certify that it satisfies the size standard. This enables businesses that are not SBCs to fraudulently or inadvertently receive small business set-aside awards. In order to ensure that small business set-aside contracts are awarded only to SBCs, the SBA size regulations allow a host of "interested parties" to challenge a contract awardee's size through a size protest.¹⁸ The SBA has exclusive jurisdiction over all size protests and is the only federal agency capable of making a formal size determination regarding a concern.¹⁹

While the SBA does not publish statistics regarding the number of size protests that it receives each year, anecdotal evidence indicates that size protests are becoming increasingly more common. The economic downturn in many industries has caused many contractors, especially SBCs, to make their way into the federal market to pursue contracts and work. Procuring agencies are receiving two or three times as many bids and proposals for procurements as they did just a few years ago. As more contractors seek to compete for small business set-aside awards, SBA size protests will continue to increase. Contracting officers on most small business set-asides expect that they will receive one or more size protests challenging the contract awardee's size.

How Is a Size Protest Filed and What Is Required?

The procedures for filing a size protest are found in 13 C.F.R. § 121.1001 *et seq.* The SBA size regulations allow a wide range of "interested parties" to file a size protest, including the contracting officer, any offeror not eliminated from an award competition for reasons unrelated to size, and, in limited circumstances, a large business concern.²⁰ The fact that almost any offeror for a set-aside contract award may file a size protest, regardless of whether the offeror is next in line for the contract award, significantly increases the pool of potential protestors.

Size protests must be filed quickly—within five business days of bid opening (for nonnegotiated procurements) or from the date the protestor receives notice of the identity of the contract awardee (for negotiated procurements).²¹ Failure to file within the five-day time frame results in the automatic dismissal of the protest by the SBA.²²

The level of specificity required in a size protest is minimal. A protest need only be "sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned."²³ As long as the protest provides "some basis for the belief or allegation stated in the protest," the protest will be sufficient to trigger an SBA investigation into the protested concern's size.²⁴ While a protestor needs to do more than merely allege that a protested concern is small, not much more is required because the "some basis for belief or allegation" threshold is an exceptionally easy hurdle to overcome.

The SBA accepts all manner of documentary evidence when determining whether a size protest meets the "some basis for belief or allegation" threshold. Business profiles of the protested concern from sources such as Dun & Bradstreet, Manta, or governmentcontractswon.com are useful to show a concern's estimated revenue or number of employees.²⁵ Newspaper articles, trade publications, and publicly available business filings can also be used to show a concern's ownership structure, management, and relationships with other concerns. Affidavits from individuals with knowledge of a protested concern's size can also be used to support a size protest. Internet content is often the most fertile source of information regarding a protested concern's size. Many times a protested concern's own website will contain information regarding affiliation relationships between the concern, its owners, or its directors and officers and another business. Accordingly, SBCs should be wary of the information it puts on its website regarding teaming partners and business relationships to avoid having its own website used against it as evidence during a size protest.

Size protests should be as detailed as possible and should include copies of any relevant evidence that sheds lights on the protested concern's size. The SBA considers the totality of the evidence presented with a size protest and no one piece of evidence needs to definitively show that the protested concern is other-than-small.²⁶ While using an attorney to prepare a size protest is sound strategy to ensure that all possible arguments are fleshed out, legal counsel is by no means required. Size protests that are carefully

prepared by the owners or project managers of an SBC are often sufficient to demonstrate that a protested concern is other-than-small.

When the SBA determines that sufficient grounds exist on the face of a protest to investigate the size of the protested concern, it proceeds to conduct an investigation of the protested concern's ownership, business structure, relationships, and financial standing. The SBA's first order of business is to provide the protested concern a copy of the protest and demand all of the concern's pertinent business and financial data.²⁷ This includes corporate formation documents and annual reporting documents, ownership information and the names of all directors and officers, tax returns and audited financial statements for the past three years, and all information regarding relevant relationships between the protested concern and other business entities.²⁸ A size protest ultimately shifts the burden of proof to the protested concern to demonstrate that it is small under the applicable size standard.²⁹

The SBA demands information from the protested concern by directing the concern to complete SBA Form 355, the "Application for Small Business Size Determination."³⁰ Form 355 contains 29 questions and requires the protested concern to provide comprehensive information regarding its ownership, business structure, relationships, and financial standing. Form 355 is similar to many Internal Revenue Service forms in complexity and correspondingly provides little guidance for the layperson on how to properly prepare the form, or sufficiently answer its questions. Form 355 must be completed and returned to the SBA within three business days.³¹ This incredibly short deadline requires the protested concern to divert much of its attention and effort during that three-day time frame to chase down documents and information in an effort to prove that it is small. This is especially burdensome on concerns that are truly small businesses because they must expend significant time and effort proving to the SBA that they are small. Failure of a protested concern to actively respond to the protest allegations or to properly prepare Form 355 may lead the SBA to presume that the protested concern is other-than-small.³²

Why File a Size Protest?

The primary benefit of a successful size protest is that it provides an SBC the ability to disqualify an other-than-small contract awardee from performing a set-aside contract award. The contracting officer must terminate the contract award where the SBA issues a size determination finding the contract awardee to be other-than-small, unless the awardee files a timely appeal with the SBA's Office of Hearings and Appeals (OHA).³³ The disqualification of an other-than-small contract awardee generally causes the procuring agency to award the contract to the offeror that is next in line. Accordingly, it may be worthwhile for an SBC offeror to file a size protest in the hopes of wresting the contract award from a disqualified contract awardee, even where the size protest may have a limited chance of success. A size protest—much

like a post-award bid protest filed with the Government Accountability Office (GAO) or the US Court of Federal Claims (COFC)—potentially provides an unsuccessful offer or another chance at the contract award. So long as the protestor has a reasonable and good-faith basis for the protest, even a small chance of obtaining the contract award may be enough to justify filing a size protest in the hopes of proving the contract awardee to be other-than-small and forcing the awardee to disgorge its award.

A protestor need not rely solely on the evidence that it is able to uncover regarding a protested concern's size. As long as the protestor provides sufficient evidence to persuade the SBA to initiate a size protest, the SBA may uncover evidence from the protested concern or from other sources during the size investigation that shows the protested concern to be other-than-small.³⁴ For example, a size protest may allege that the protested concern is other-than-small based upon its joint venture relationship with a large concern. However, the SBA may discover through the tax returns and financial data provided by the protested concern that its own gross annual receipts cause it to exceed the procurement's size standard. Accordingly, an SBC should consider not only the strength of its own evidence, but also the evidence that the SBA may uncover during its size investigation when weighing whether to file a size protest.

If a size protest is successful, the protested concern will be ineligible to compete for small business set-asides until it is recertified as small by the SBA. Specifically, the SBA size regulations state that "[a]fter an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA."³⁵ An adverse size determination against a protested concern terminates that concern's ability to compete as an SBC for all federal small business set-aside procurements, except those with higher size standards than the procurement for which the size determination was issued.³⁶ A protested concern found to be other-than-small may never be able to recertify as an SBC if its gross annual receipts or number of employees significantly exceed applicable size standards. Further, it may take concerns deemed to be other-than-small by the SBA months or even years to recertify as an SBC. Thus, the ability of an SBC to potentially exclude competitors from future small business set-aside competitions provides increased incentive for SBCs to file size protests challenging concerns believed to be other-than-small.

Additionally, size protests allow protestors to exercise some leverage over the protested procurement. The SBA size regulations indicate that size determinations should be issued within 15 business days after the SBA's receipt of the protest.³⁷ However, a significant portion of size determinations are not decided by the SBA within this 15-day time frame. The SBA may take several weeks or sometimes several months to issue a size determination. Because the SBA size regulations generally prohibit a procuring agency from permitting the protested concern to perform the contract award while a size protest is pending, the procure-

ment process is stayed until the size determination is issued by the SBA.³⁸ This procurement delay may be a collateral benefit for the protestor. For example, a protestor that is the incumbent contractor on the protested procurement may be able to obtain a contract extension until the size determination is issued. Further, the delay caused by a size protest may be useful in providing the protestor additional time to weigh its options for filing a possible bid protest with the GAO or COFC (although GAO bid protests, like size protests, generally have short filing deadlines). In sum, a size protest allows the protestor to not only challenge a suspected other-than-small concern, but to also exercise some leverage over the procurement at issue.

SBA Affiliation Rules

How to Avoid Being Targeted for a Size Protest. An SBC must aggregate its gross annual receipts or number of employees with those of its affiliated businesses.³⁹ The SBC's aggregated annual receipts or employees, including those of its affiliates, are used by the SBA to determine if the SBC is other-than-small under the applicable size standard. For example, an SBC with annual receipts of \$25 million and its affiliated company with annual receipts of \$20 million will exceed the \$33.5 million size standard of a NAICS code 236220 (Commercial and Institutional Building Construction) procurement under the SBA affiliation rules.⁴⁰ Protested concerns that exceed the procurement's size standard due to affiliation will be disqualified from a set-aside procurement and forced to forfeit the contract award.

The SBA finds affiliation between two concerns when one concern controls or has the power to control the other, or a third party controls or has the power to control both.⁴¹ Control of one concern over another may be based on common ownership, common management, identity of interest, joint ventures (including the ostensible subcontractor rule), the newly organized concern rule, or based upon a totality of the circumstances.⁴²

A finding of affiliation between an SBC and an other-than-small concern causes the SBC to lose its small business status, even though the SBC is small based upon its own annual receipts or number of employees. The aggregation of the other-than-small concern's gross annual receipts or employees with those of a SBC will cause the SBC to exceed applicable small business size standards. In other words, the finding of affiliation between an SBC and other concerns is generally the kiss of death for the SBC's ability to compete for small business set-asides. Accordingly, affiliation ties between an SBC and other concerns should be avoided to protect the SBC from losing its small business status. SBCs can take a number of preventative steps to safeguard themselves from an adverse size protest finding. This section addresses the SBA's specific grounds for finding affiliation and how an SBC can protect itself from SBA size protests.

Affiliation Based on Common Ownership or Management. The SBA finds affiliation between an SBC and another concern where common ownership exists between

the concerns.⁴³ The SBA size regulations hold that common ownership exists where an individual, concern, or other entity owns or has the power to control 50 percent or more of a concern's voting stock or a block of voting stock that is large compared to other outstanding shares; or two or more individuals, concerns, or other entities can combine their minority stock holdings to control a concern.⁴⁴ The SBA also finds affiliation between an SBC and another concern where common management exists, which occurs "where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns."⁴⁵

Ownership and management ties between an SBC and other concerns must be carefully regulated by the SBC to ensure that the relationships do not adversely affect the SBC's size. SBCs should analyze their ownership and management structure before submitting a bid or proposal for a small business set-aside. Likewise, an SBC must analyze the ownership and management interests that it, its owners, directors or officers, and other key personnel hold in other concerns. SBCs should minimize or dissolve any ownership or management ties with other concerns that may be viewed as affiliation with that other concern if they want to maintain their SBC status. For example, the owner of an SBC should divest itself of all ownership interests in another concern that exceed 49 percent of the overall ownership interests of the other concern. The owner of an SBC that owns 50 percent or more of another concern will cause the SBC to be affiliated with the other concern based on common ownership.⁴⁶ The smaller the percentage of common ownership that exists between an SBC and other concerns, the less likely the SBC will be found affiliated with those other concerns.

Directors and officers and key personnel of SBCs may also want to divest themselves of management positions in other concerns to minimize the risk of a finding of affiliation. The SBC's corporate and other business documents and filings should be regularly reviewed and updated to ensure that the documents do not list owners or managers that are affiliated with other concerns due to common ownership or management. Ties between an SBC and dormant or defunct affiliates should be severed by dissolving the affiliates before the SBC submits a bid or proposal for a set-aside procurement. OHA, the appellate body responsible for hearing size determination appeals, held in one recent appeal that an SBC was affiliated with its dormant yet still existing related business because the SBC failed to formally dissolve the related concern before submitting a proposal for a set-aside procurement.⁴⁷

Identity of Interest. The SBA finds affiliation between an SBC and another concern where there exists "identical or substantially identical business or economic interests" between the two concerns.⁴⁸ This occurs when an SBC fails to maintain arms-length relationships with its subcontractors, suppliers, and other business partners; is economically dependent on another concern; or has relationships with

other concerns that suggest a lack of independence. The SBA routinely finds that businesses that share resources, such as employees, equipment, office space, administrative staff, bonding capacity, lines of credit, phone numbers, and other ties are affiliated due to an identity of interest. For example, OHA has held that the leasing of office space in the same building, sharing a common reception area, telephone system, and a receptionist are clear indicators of affiliation between two concerns based on an identity of interest.⁴⁹

Familial relationships also can lead to an identity of interest between an SBC and other concerns. OHA has repeatedly held that it is presumed that “family members have identical interests and must be treated as one person.”⁵⁰ This “presumption arises not from active involvement in each other’s business affairs, but from the family relationship itself.”⁵¹ Therefore, the SBA presumes that an identity of interest exists between spouses, siblings, parents, and children for affiliation purposes.⁵² This presumption is rebuttable by the family members by showing the SBA that a “clear line of fracture” exists between the family members.⁵³ A protested concern may show a clear line of fracture “by proving there is no business relationship or involvement with each other’s business concerns” or that the family members are “estranged.”⁵⁴

OHA found in a recent appeal that a father and son who each operated separate and independent construction companies were affiliated based upon familial identity of interest.⁵⁵ OHA found that the protested concern failed to rebut the presumption of familial identity of interest because the son’s company listed his father as vice president in the company’s corporate documents. The father had no active role in managing the affairs of his son’s company and the father’s vice president title was merely an “honorary position” based on his previous history with the company. However, this familial connection was enough to find an identity of interest and affiliation between the two concerns and to force the son’s company to forfeit a small business set-aside contract award.

Affiliation based upon an identity of interest can be avoided by ensuring that an SBC enters only arms-length relationships with other concerns and is capable of standing on its own two feet. SBCs that are dependent upon other concerns for employees, equipment, lines of credit, office space, or other resources will likely be found affiliated with those other concerns. SBCs should not share resources of any kind with another concern unless that relationship is based upon an arms-length contractual relationship and the SBCs pay fair market value for the resources obtained. Even where a SBC’s relationships with other concerns are arms-length, those relationships should be minimized to the extent possible because resource sharing creates the appearance of affiliation between two concerns.

SBCs should also ensure that a “clear line of fracture” exists between it and familial interests to avoid affiliation based on familial identity of interest. The easiest way to establish a familial line of fracture is for an SBC to avoid business relationships with family member-owned concerns. If avoid-

ance is not possible or desirable, an SBC should only engage in arms-length transactions with family member-owned concerns. Familial involvement in an SBC’s ownership and management should be avoided altogether, or significantly controlled if that involvement may lead to affiliation with another concern. The presumption of identity of interest between family members is difficult to rebut. Accordingly, an SBC should monitor and limit the involvement of family members or family-owned concerns in the SBC’s business affairs to avoid the appearance of affiliation.

The “Ostensible Subcontractor” Rule. The SBA finds affiliation between an SBC and its ostensible subcontractor. An “ostensible subcontractor” is defined as a subcontractor that “performs primary and vital requirements of a contract” or a subcontractor that an SBC is “unusually reliant” upon to perform a contract.⁵⁶ It is common and permissible for an SBC to enter teaming agreements with key subcontractors to perform a set-aside contract. These agreements allow an SBC and its subcontractors to take advantage of each other’s capabilities and to pursue federal work they would otherwise not be able to perform individually.

However, SBCs that enter teaming arrangements must take care to avoid affiliation under the ostensible subcontractor rule by becoming overly reliant on any one subcontractor. This may occur by allowing a subcontractor to perform the “primary and vital requirements of a contract,” which may include providing the lion’s share of project management, essential equipment, or key employees. There is no bright-line test to determine when a subcontractor becomes an ostensible subcontractor based on the work or services provided.⁵⁷ The SBA analyzes all aspects of the relationship between an SBC and its alleged ostensible subcontractor for affiliation purposes, to include the terms of the SBC’s contract proposal, the terms of the teaming agreement between the two concerns, and whether the subcontractor is an other-than-small business concern.⁵⁸

To avoid affiliation under the ostensible subcontractor rule, an SBC should ensure that its proposal-related documents and teaming arrangement do not, on their face, show the existence of an ostensible subcontractor relationship; not oversell the capabilities, assets, or work to be performed by a subcontractor in its proposal; and ensure that the SBC will perform the primary and vital requirements of a contract. SBCs must also ensure that they control the relationship with their subcontractors and make the key decisions on a procurement. The mere appearance that a large subcontractor is carrying an SBC or calling the shots for an SBC on a procurement may lead to a size protest alleging affiliation under the ostensible subcontractor rule.

The “Newly Organized Concern” Rule. The SBA finds affiliation between an SBC and its newly organized concern. Affiliation under the newly organized concern rule arises where former directors or officers, principal stockholders, managers, or key employees of an SBC organize a new concern in the same or related field of operation, serve as the new concern’s managers and key personnel, and share resources or provide assistance to the SBC.⁵⁹ The

presumption of affiliation between an SBC and its newly organized concern may be rebutted by showing a clear line of fracture between the two concerns.⁶⁰

An SBC should fully analyze the pros and cons of creating a new concern because the new concern could be deemed affiliated with the SBC if they share current or former managers, key employees, or resources. SBCs that form or spin off new concerns should ensure that they only maintain arms-length relationships with those new concerns.

Totality of the Circumstances. The SBA may also find affiliation between an SBC and another concern based upon the “totality of the circumstances.”⁶¹ Totality of the circumstances is not an independent basis of affiliation.⁶² Thus, affiliation may exist under a totality of the circumstances theory even though affiliation may not exist under an independent basis of affiliation, such as common ownership, common management, identity of interest, the ostensible subcontractor rule, or the newly organized concern rule.⁶³

Totality of the circumstances allows the SBA to consider the entirety of the evidence introduced against a protested concern during a size protest to determine if reliance exists between the protested concern and another concern. In other words, totality of the circumstances acts as a “catch-all” for the SBA to find affiliation where many factors suggest that affiliation exists, but no one independent ground of affiliation is found.⁶⁴ SBCs may seek to avoid affiliation with another concern under a totality of the circumstances theory by implementing safeguards similar to those used to avoid affiliation based on common ownership, common management, identity of interest, the ostensible subcontractor rule, or the newly organized concern rule.

Conclusion

For SBCs seeking to minimize competition for small business set-aside contract awards, SBA size protests can be a powerful tool because they are relatively easy to file and will likely lead the SBA to initiate a comprehensive size investigation of the protested concern. The SBA turns a protested concern’s life upside down during a size investigation by demanding the protested concern’s intimate business, financial, and relationship data. Once a size investigation is initiated, you never know what the SBA may turn up on the protested concern. Accordingly, size protests may provide SBCs with another chance at obtaining a set-aside contract award if the protested concern is disqualified from the procurement as other-than-small.

If you are a potential target of such a protest, there are a number of steps that you can take to reduce the likelihood of disqualification. The preemptive steps addressed in this article are a good place to start. Common sense and a solid understanding of the SBA size regulations and affiliation rules will enable most SBCs to protect themselves from successful size protests and to maintain their small business status for years to come. 

Endnotes

1. See U.S. Small Business Administration, 2010 Small Business

Procurement Scorecard: Government-Wide Performance (2010).

2. See 13 C.F.R. § 121.1001(a)(i) (providing that “[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size” may file a size protest).

3. 13C.F.R. § 121.1007(b).

4. See, e.g., *Size Appeal of Allan Baker, d/b/a Korrect Optical*, SBA No. SIZ-4486 (Dun & Bradstreet reports sufficient to trigger a size investigation).

5. See 13 C.F.R. § 121.1008(c) & SBA Form 355, available at http://www.sba.gov/sites/default/files/inv_form355.pdf (last visited Aug. 3, 2011).

6. See *id.*

7. See 13 C.F.R. § 121.103.

8. See 13 C.F.R. 121.1009(g)(5) & 13 C.F.R. § 121.1010(a). However, recertification is not required nor does the prohibition against future self-certification on set-aside contracts apply if the SBA size determination is based solely on a finding of contract-specific affiliation under the so-called “ostensible subcontractor rule” or “non-manufacturer rule.” See 13 C.F.R. § 121.1010(b).

9. See 13 C.F.R. § 121.101(a).

10. See 13 C.F.R. § 121.201.

11. See 13 C.F.R. § 121.402(b).

12. See 13 C.F.R. § 121.201.

13. See *id.*

14. See 13 C.F.R. § 121.402(a).

15. See *id.*

16. See *id.*

17. See 13 C.F.R. § 121.405.

18. See 13 C.F.R. § 121.1001.

19. See 15 U.S.C. § 637(b)(6).

20. See 13 C.F.R. § 121.1001(a).

21. See 13 C.F.R. § 121.1004(a).

22. See 13 C.F.R. § 121.1004(d). Note that the time limits do not apply to protests filed by contracting officers or the SBA itself. See 13 C.F.R. § 121.1004(b).

23. 13 C.F.R. § 121.1007(b).

24. *Id.*

25. See, e.g., *Size Appeal of Bush Techs., LLC*, SBA No. SIZ-5242 (2011) (protester met specificity threshold by submitting information from a government website and the protested concern’s website); *Size Appeal of Flowsense Building Servs., Inc.*, SBA No. SIZ-5072 (2009) (similar).

26. See 13 C.F.R. § 121.1009(e) and (b).

27. See 13 C.F.R. § 121.1008(a).

28. See *id.*, & SBA Form 355, available at http://www.sba.gov/sites/default/files/inv_form355.pdf (last visited Aug. 3, 2011).

29. See 13 C.F.R. § 121.1009(c).

30. See 13 C.F.R. § 121.1008(b). (The SBA has discretion to extend the deadline. In practice, the SBA will often grant a short extension so long as the contracting officer agrees to the extension.)

31. 13 C.F.R. § 121.1008(c). (The SBA has discretion to extend the deadline. In practice, the SBA will often grant a short extension so long as the contracting officer agrees to the extension.)

32. See 13 C.F.R. § 121.1008(d).

33. See 13 C.F.R. § 121.1009(g)(2)(i). If the awardee files a timely OHA appeal, the contracting officer need not terminate the contract, but must consider whether performance can be suspended pending OHA’s decision. See 13 C.F.R. § 121.1009(g)(2)(ii).

34. See 13 C.F.R. § 121.1009(b).

35. 13 C.F.R. § 121.1009(g)(5). As noted above, recertification is not required nor does the prohibition against future self-certification on set-aside contracts apply if the SBA size determination is based solely on a finding of contract-specific affiliation under the so-called “ostensible subcontractor rule” or “non-manufacturer rule.” See 13 C.F.R. § 121.1010(b).

36. See *id.*

37. See 13 C.F.R. § 121.1009(a)(1).

38. See 13 C.F.R. § 121.1009(a)(3). The procuring agency need not

delay the award indefinitely. If the SBA does not issue its determination within 15 business days, the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until the SBA makes its determination will be disadvantageous to the government.

39. See 13 C.F.R. § 121.103(a)(6).

40. See 13 C.F.R. § 121.104.) (c). A concern's annual receipts for affiliation purposes are based on a three-year average of receipts.

41. See 13 C.F.R. § 121.103(a)(1).

42. See 13 C.F.R. 121.103.

43. See 13 C.F.R. § 121.103(c)(1).

44. See 13 C.F.R. § 121.103(c). If a concern's stock is widely held, the concern's board of directors and CEO or president will be deemed to have the power to control the concern in the absence of evidence to the contrary. See *id.*

45. 13 C.F.R. § 121.103(e).

46. See 13 C.F.R. § 121.103(c).

47. See *Size Appeal of Hallmark-Phoenix 8, LLC*, SBA No. SIZ-5046 (2009).

48. 13 C.F.R. § 121.103(f).

49. See *Size Appeal of Pershield, Inc.*, SBA No. 3952 (1994).

50. *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546 (2003).

51. *Size Appeal of Speegle Constr., Inc.*, SBA No. SIZ-5147 (2010).

52. *Size Appeal of Breiner Constr. Co., Inc.*, SBA No. 3316 (1990).

53. *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4764 (2006).

54. *Speegle Constr.*, *supra* n.52.

55. See *id.*

56. 13 C.F.R. § 121.103(h)(4).

57. See *Size Appeal of TKTM Corp.*, SBA No. SIZ-4885 (2008) (Ostensible subcontractor relationship existed where prime contractor indicated in its proposal that its subcontractor would perform approximately 25 percent of the work, the prime contractor was reliant on the subcontractor's "enormous capacity" and its heavy equipment, and the prime contractor would perform primarily administrative functions); *Size Appeal of Alutiiq Int'l Solutions LLC*, SBA No. SIZ-5098 (2009) (A subcontractor that was going to perform approximately 45 to 49 percent of the contract work was not an ostensible subcontractor).

58. See 13 C.F.R. § 121.103(h)(4).

59. See 13 C.F.R. § 121.103(g).

60. See *id.*

61. 13 C.F.R. § 121.103(a)(5).

62. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010).

63. See, e.g., *Size Appeal of Logmet, LLC*, SBA No. SIZ-5155 (2010) (totality of the circumstances is a basis for affiliation when the SBA "is unable to establish affiliation under any of the other specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation.").

64. See *id.*