

Keep Your Eyes on the Size: Small Business Size Protests

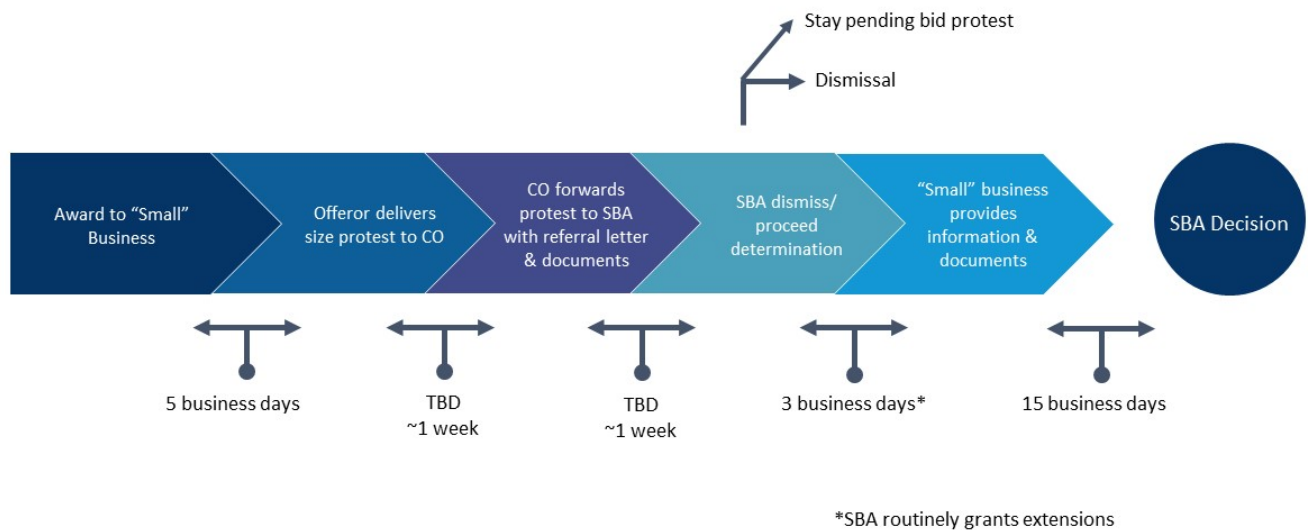
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While most contractors think of the Government Accountability Office and Court of Federal Claims (or even the agency) when considering whether to challenge a government contract award, there are additional options for small business set-asides – small business size and status protests. The government, recognizing the importance of small businesses to the American economy, provides small businesses certain preferences in government contracting, including only allowing eligible small businesses to compete for certain contracts (referred to as small business set-asides). But in order to be eligible for this exclusive federal marketplace (that was worth more than \$178 billion dollars in FY 2023), a small business has to qualify as “small” under federal regulations. Small businesses are generally responsible for calculating their own size. But, a protester (usually a disappointed offeror), may bring a size protest alleging that the awardee on a small business set-aside contract is not actually a small business (and is thus ineligible for award) because it exceeds the applicable size standard. Below is the nuts and bolts of the size protest process.

Timeline of a Small Business Size Protest

Timeline of a Small Business Size Protest Filed by Disappointed Offeror



Small Business Size

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The government assigns each solicitation a North American Industry Classification System ("NAICS") code which provides the applicable size eligibility standard for each procurement. The size standard varies by industry and is based on either the contractor's number of employees or the business's annual receipts. The number of employees is calculated by averaging the number of employees of the company for the preceding two years. Annual receipts is the average over the last five years. An offeror's size is generally determined at the time the company submits its initial offer with price.

The size of a business and its affiliates must, when combined, be at or below the applicable size standard. When a small business and another entity or individual have a particularly close relationship or share control, they may be considered "affiliated." Generally, affiliation exists when one business controls or has the power to control another or when a third party controls or has the power to control both businesses. Affiliation is determined based on the totality of the circumstances and may be created based on, for example, common ownership, management, interests, or investments; family or contractual relationships; shared resources (staff, facilities, etc.); stock options or agreements to merge; joint ventures; or economic dependence. Small business size protests often allege that the awardee is large because the "small" business did not include its affiliates. Determining affiliation can be complicated and is not necessarily based on whether another entity actually exerts control over the small business. For example, affiliation may be established if corporate documents give another person or entity veto power over how the small business conducts business, even if that power has never been used.

Who Can File a Small Business Size Protest?

In general, there are four potential sources of small business size protests of small business set-aside or reserved procurements:

1. a disappointed offeror that was *not* eliminated from consideration for a procurement related-

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- reason (i.e., non-responsiveness, technical unacceptability, or outside the competitive range);
 2. the contracting officer;
 3. the SBA Government Contracting Area Director responsible for the area in which the protested offeror's headquarters is located; the Director, Office of Government Contracting; or the Associate General Counsel for Procurement Law; or
 4. other interested parties (i.e., a large business when only one concern submitted an offer).

Some small business programs, including the SBA Subcontracting Program and Department of Defense Small Disadvantaged Business Program have slightly different requirements.

Where and How Is a Small Business Size Protest Filed?

A small business size protest by a disappointed offeror or other interested party is filed with the contracting officer. A protest may be filed multiple ways including by hand, mail, e-mail, or, interestingly, telephone (accompanied by a follow-up letter).

A protest must be sufficiently specific – in other words it must provide “reasonable notice as to the grounds upon which the protested concern’s size is questioned.” The protester must provide some basis for the belief(s) or allegation(s) in the protest. Non-specific protests are dismissed. Helpfully, the regulations provide basic examples of what does and does not constitute sufficient specificity to proceed. It is insufficient to make a general allegation that the awardee has more employees or higher annual receipts than the size standard or that the company has an affiliate, without providing any evidence or facts. But it is sufficient to allege that the awardee exceeds the size standard because (1) a named publication listed the company as having more employees; (2) the business received government contracts in excess of the size standard last year; or (3) the awardee is affiliated with a specific concern because one person is the majority shareholder in both companies.

What Does a Small Business Size Protest Look Like?

There is no required format for a small business size protest. It is often styled as a letter detailing the procurement background, the factual allegations supporting the protest (including attached exhibits) and a request for relief from the contracting officer and SBA.

When Is a Small Business Size Protest Filed?

A small business size protest from a disappointed offeror or other interested party must be received by the contracting officer before the close of business on the *fifth business day* after either bid opening (for sealed bids) or notification of the identity of the prospective awardee (for negotiated procurements). That timeframe applies to an award of a contract, order issued against a multiple award contract if the contracting officer requested a new size certification for that order, or an order or blanket purchase agreement (“BPA”) set-aside for small business where the underlying multiple award contract was awarded on an unrestricted basis (but excepting Federal Supply Schedule orders or BPAs). Similarly, for long-term contracts of more than five years (including options), the protest must be received by the contracting officer before the close of business on the fifth day after either receipt of notice of the identity of the prospective awardee or award, or for option periods, of the size certification made by the protested concern. A protest of a size certification made in response to a contracting officer’s request for an individual order also has a five-day window after receipt of notice of the identity of the prospective awardee or award.

Note that the five-day clock starts when notice of award is made electronically, including posting on the Internet. But, when there is no notice of award, the protest period starts upon oral notice or other means of notice by the contracting officer or authorized representative of the apparent successful offeror.

Contracting officers and the SBA may file a protest at any time after bid opening or notification of the apparent successful offeror. They are not constrained by the five-day window that applies to contractors.

Due to the quick turnaround time for size protests, offerors may want to consider whether they have any reason to believe that their likely competitors are not small. And, if so, whether they may want to begin gathering evidence to potentially support a protest if they are not awarded the contract. Offerors cannot, however, protest before award to try to preemptively eliminate a competitor – the protest will be dismissed as premature. Likewise, a contractor cannot bring a general challenge that a competitor is large – the protest must be connected to a specific procurement. But if the offeror waits too long to protest after an award, any protest filed after the five-day limit will be dismissed as untimely (the contracting officer, however, is still required to forward it to the SBA). If a competitor misses the five-day timeframe, it may still be able to convince the contracting officer or SBA to bring the protest. Experience indicates, however, this is a difficult path, even if there is evidence the awardee is, in fact, a large business.

Can a Small Business Size Protest and Small Business Status Protest Be Filed Together?

No, a small business size and status protest must be filed separately, although both are filed with the contracting officer. Each type of protest has its own applicable regulations laying out the timing and process.

What Happens After a Small Business Size Protest Is Filed?

After receiving a disappointed offeror's protest, the contracting officer forwards the protest to the SBA Government Contracting Area Office responsible for the area in which the protested offeror's headquarters is located. Along with the protest, the contracting officer provides the SBA information about the procurement, such as the solicitation, and the awardee's self-certification of size. The SBA must notify the contracting officer, protested awardee, and the protester upon receipt of the protest. If the protest involves specific programs like HUBZone, WOSB, SBIR, STTR, SDBs, 8(a), etc. the SBA must make other specified notifications.

The SBA will dismiss the protest if it is premature, untimely, or non-specific.

Otherwise, the SBA provides the protested business with a copy of the protest and asks for a response to the protest's allegations and a completed SBA Form 355, Application for Small Business Size Determination within *three working days* of receipt. The SBA may also request additional information. If the protested business either fails to respond to the SBA's requests or submits incomplete information, then the SBA may presume the missing information would establish the awardee is not a small business. As a result it is essential that a protested business provide thorough, complete responses to SBA's queries. SBA has the discretion to – and usually does – grant an extension if requested. So it is better to promptly ask for an extension and provide a more comprehensive response than to quickly gather and submit potentially incomplete information that is

readily at hand. Further, the protested company *must* submit information about alleged affiliates, even if those other parties claim privacy or confidentiality, because SBA does not disclose such information (except as permitted by law). Contacting alleged affiliates and gathering their information may take several days, so do not be shy about asking for an extension if one is needed.

What Is the Basis for the SBA's Size Determination?

The protested concern has the burden of establishing it is small.

The size determination is based on the record, including reasonable inferences therefrom. It is primarily based on the information provided by the protester and/or the protested company. The SBA may, however, also address additional grounds or use other information. The SBA may request additional information from any of the parties or alleged affiliates. The SBA gives greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. What this means in practice is that a signed declaration of facts is better than merely broadly making or contesting allegations. If a party refuses or fails to provide requested information within a required time period, the SBA “may assume” that disclosure would be contrary to that party's interests. The SBA will issue a written size determination that states the bases for its findings and conclusions.

When Does the SBA Issue a Size Determination? And How Is the Timing Impacted by a Concurrent Agency, GAO, or COFC Bid Protest?

The SBA generally issues a written size determination within 15 business days. The decision is sent to the contracting officer, protester, and protested business.

If there is a bid protest involving the procurement, however, the SBA will suspend a valid, timely, and specific size protest until the bid protest is resolved.

If, in response to the bid protest, the agency decides to voluntarily take corrective action, the SBA generally will dismiss the size protest. If the protest is dismissed, a new five-business-day clock begins tolling when the agency announces the awardee after reevaluation – whether it is the same or a different contractor. The agency can also request that the SBA complete the size determination anyway when the corrective action does not change the apparent awardee (unless the protest involves size issues determined as of the date of final proposal revision regarding the nonmanufacturer rule, ostensible subcontractor rule, or joint venture agreements).

If the bid protest proceeds to a decision, however, then the SBA Area Office will recommence the size determination when the decision is issued. If the bid protest is denied, the SBA will issue a size determination within 15 days of the decision (if possible). If the decision results in award cancellation or change of apparent awardee, then the SBA will dismiss the size protest as moot. If the decision requires re-evaluation of offers or other corrective action, but the award is not cancelled, then the SBA will continue to suspend the size protest while the corrective action is pending. Once the corrective action occurs, if the protested concern is still the apparent awardee, the SBA will issue a size determination within 15 days of notification of the apparent successful offeror (if possible). But, if the corrective action results in a different apparent awardee, SBA will dismiss the size protest as moot. If an interested party wants to challenge the size of the new awardee, then a new five-business-day clock begins.

Can the Contracting Officer Award the Contract While the Small Business Size

Protest Is Pending?

Generally no; the award is stayed pending the SBA's determination. The contracting officer may, however, determine that the award must be made to protect the public interest. If the SBA does not issue a decision within 15 days (or longer if a requested extension is granted), then the contracting officer may award the contract with a written determination there is an immediate need to award the contract and that waiting for the SBA's determination "will be disadvantageous to the Government."

Can the Size Determination Be Appealed?

Yes, an interested party may appeal the size determination to the SBA Office of Hearings and Appeals ("OHA"). While the size determination is a final decision, an OHA appeal must be exhausted before judicial review.

What Happens After the SBA Issues a Size Determination?

The outcome of the size determination drives its impact. If the SBA determines the protested company is an eligible small business (or dismisses the allegations), then the contracting officer may award the contract. But, if the SBA OHA later overturns the determination or dismissal, the contracting officer may – but is not required – to apply the OHA decision to the procurement.

If, on the other hand, the SBA determines the protested business is not an eligible small business, then the contracting officer is prohibited from awarding the contract to that contractor. Or, if the award was made, then the contracting officer must terminate the award if no OHA appeal is filed. When the size determination is appealed to OHA, however, the contracting officer has to decide whether performance can be suspended until the appeal is decided. Notwithstanding an appeal, if an award was made and OHA affirms a determination the business is ineligible, then the contracting officer can either terminate the contract or not exercise the next option.

The contracting officer is required to update the Federal Procurement Data System and other reporting databases with the final size decision (either the original size determination, or, if appealed, the OHA decision).

A business that is deemed ineligible for a contract cannot turn around and reduce its size to re compete for that procurement. Likewise, a contractor deemed other-than-small is ineligible for any procurement with the same or a lower size standard unless SBA recertifies the concern is small (a self-certification is insufficient) based on an updated SBA Form 355 or OHA reverses the size determination. Note, however, that a business may still qualify as small under a different, larger NAICS size standard (in other words, the adverse size determination may find that the business is not small under a 1,000 person size standard, but that does not necessarily mean the business exceeds a 1,500 size standard under another NAICS standard).

Additionally, if the business is deemed other-than-small and has already certified itself as small under a pending procurement or application for SBA assistance, then it must "immediately" inform the government of the adverse size determination. The newly "large" business must also update its SAM profile within two days of the SBA's final determination – or else the SBA will update it for them two business days later. The SBA retains discretion to reopen a size determination to correct an error or mistake within the appeal period when no appeal is pending.

After an Adverse Size Determination, Can the Contractor Become a Small Business Again?

Yes, an adverse size determination does not disqualify the contractor from future opportunities if it becomes small again. To qualify for procurements at or below the size standard in question, the contractor may submit application for size recertification, including a current SBA Form 355, to the applicable SBA Area Office. Recertification is not required, however, if the adverse size determination was based solely on a finding of affiliation due to a joint venture (e.g., an ostensible subcontracting issue) that is limited to a particular procurement, or if it was based on an ineligible manufacturer of a small business nonmanufacturer for a particular procurement. If the SBA denies the recertification, the contractor may request OHA review the determination – although OHA has discretion whether to conduct the review. A recertification is a formal size determination that only has future effect and cannot be used retroactively.

And, as noted above, a business may have an adverse size determination for one NAICS size standard but still be small for a different, larger size standard.

Conclusion

Small business size protests offer a relatively quick way to challenge – and stay – the award of a contract when there is reason to believe the awardee may be “large.” Often disappointed offerors choose to take a multi-pronged approach and bring a size protest (and/or status protest) as well as a GAO bid protest.

As noted above, because a protester has only five business days to file the protest, small businesses should consider whether there may be grounds for a size protest even before the award decision is made. Many set-asides have a limited field of offerors, in which case a contractor could perform some market research on the likely competition to see if there may be any indication a competitor is actually “large.” This could include reviewing articles about the businesses, searching for the number of employees on LinkedIn, or looking at publicly available ownership and property information. Of course, this assessment can also be done after award, but it would have to be done quickly.

On the other side of the coin, a small business that has consciously avoided affiliation and monitors (and maintains records of) its size would be ready to quickly thwart a baseless size protest. Many size protests focus on affiliation. So it is important that small businesses are aware of the many potential grounds for affiliation when drafting corporate documents, structuring ownership, and managing day-to-day operations. Moreover, particularly as small businesses grow (and approach the top of the size standard), it is a best practice to always confirm eligibility before bidding on any contracts. A small business does not want to be caught unaware that it inadvertently hired too many employees, had one order too many, or got too cozy with a supplier (creating affiliation) putting it above the size standard. And, of course, falsifying small business status could lead to False Claims Act liability. Ongoing diligence will ensure that a size protest is merely a bump in the road rather than a roadblock.

At the end of the day, small business set-asides offer unique opportunities, but come with significant regulatory strings. One of those strings is the possibility that an awardee has its size challenged by a competitor or the government through a size protest. These protests help ensure that only eligible small businesses are winning set-aside contracts, which, ultimately, promotes the government’s goal of fostering small businesses.

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