

(c) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

[67 FR 13716, Mar. 26, 2002, as amended at 84 FR 66579, Dec. 5, 2019; 87 FR 34120, June 6, 2022]

**§ 121.904 When does SBA determine the size status of a business concern?**

For compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

[67 FR 13716, Mar. 26, 2002]

**PROCEDURES FOR SIZE PROTESTS AND REQUESTS FOR FORMAL SIZE DETERMINATIONS**

**§ 121.1001 Who may initiate a size protest or request a formal size determination?**

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small businesses or a particular group of small businesses (including a partial set-aside), the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For competitive 8(a) contracts, the following entities may protest:

(i) Any offeror that the contracting officer has not eliminated from consideration for any procurement related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(3) For SBA's Subcontracting Program, the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

(v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) program and Small Business Technology Transfer (STTR) program, the following entities may protest:

(i) An offeror or applicant for that solicitation;

(ii) The funding agreement officer; and

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment Division, or the Associate General Counsel for Procurement Law.

(5) For the Department of Defense's Small Disadvantaged Business (SDB) Program, or any other similar program of another Federal agency, the

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following entities may file a protest in connection with a particular SDB procurement:

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; and

(iii) The responsible SBA Area Director for Government Contracting, the SBA Director, Office of Government Contracting, or the SBA Associate Administrator for Business Development;

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a certified HUBZone small business concern;

(iii) The contracting officer; and

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

(7) For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

(i) Any offeror;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

(i) Any concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(9) For SBA's WOSB Federal Contracting Program, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) pursuant to part 127 of this chapter;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

(i) The applicant for assistance; and

(ii) The SBA official with authority to take final action on the assistance requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by § 120.151 of this chapter.

(iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the SBIC program (*see* part 107 of this chapter) or the NMVC program (*see* part 108 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Director of the Division of Program Certification and Eligibility

or the Associate Administrator for Business Development.

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for Business Development.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or certified HUBZone small business concern; or

(ii) The Director, Office of HUBZone, or designee.

(9) For other purposes related to protecting the integrity of the Federal procurement process, including validating that firms listed in the System for Award Management database are small, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

(10) For purposes of the small business mentor-protégé program authorized pursuant to §125.9 of this chapter (based on its status as a small business for its primary or identified secondary NAICS code), the business concern seeking to be a protégé or SBA may request a formal size determination.

(11) For purposes of determining compliance with small business requirements for firms relying upon small business status advisory opinions, the Associate General Counsel, Office of Procurement Law may request a formal size determination. Additionally, any firm that is the subject of a small business status advisory opinion holding that it is other than small may request a formal size determination.

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

(13) The SBA Inspector General may request a formal size determination with respect to any of the programs

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identified in paragraph (b) of this section.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31907, June 11, 1998; 63 FR 35739, June 30, 1998; 69 FR 25266, May 5, 2004; 69 FR 29206, May 21, 2004; 69 FR 29420, May 24, 2004; 69 FR 44461, July 26, 2004; 73 FR 56947, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 76 FR 8253, Feb. 11, 2011; 77 FR 76227, Dec. 27, 2012; 78 FR 61132, Oct. 2, 2013; 80 FR 7536, Feb. 11, 2015; 81 FR 34259, May 31, 2016; 81 FR 48579, July 25, 2016; 84 FR 65239, Nov. 26, 2019; 85 FR 66182, Oct. 16, 2020]

### § 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

### § 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

### § 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts)*. A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid opening for

(i) The contract; or

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order.

(2) *Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts)*. A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee for

(i) The contract; or

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

(3) *Long-Term Contracts*. For contracts with durations greater than five years (including options), including all existing long-term contracts, Multi-agency contracts, Governmentwide Acquisition Contracts and Multiple Award Contracts:

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern.

(A) A contracting officer is not required to terminate a contract where a concern is found to be other than small pursuant to a size protest concerning a