

SBA SIZE PROTESTS

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**HOW DO I FILE A SMALL BUSINESS SIZE PROTEST?
WHAT DO I DO IF I AM PROTESTED BECAUSE OF MY SIZE?**

Knowledge provides Competitive Advantages for Small Businesses.

1. You just spent thousands upon thousands of dollars and an enormous amount of time preparing a proposal or bid on a set aside project for a Federal Agency. They choose another contractor, who you know is not small. Or that small contractor is controlled by a business that is not small.

What can you do?

2. You just won a contract award, and a competitor has protested that your company is not small due to your affiliation with a large subcontractor.

What do you do now?

3. Regarding a slightly different size issue, a Federal Solicitation you want to bid on is set aside for a specific Small Business NAICS code. You consider the NAICS code chosen by the Contracting Officer to be improper based on the requirements of the solicitation.

Do you have any recourse?

You have the right to request an investigation by the U.S. Small Business Administration (“SBA”) for a determination that a competitor is other than small, or that a solicitation is using the wrong NAICS code for the Federal contract. These protests are reasonably simple by legal standards, and actually good for the Federal Government. In essence, by filing a reasonable Size Protest you can assist the Federal Government in monitoring or policing the qualifications of businesses competing for contracts the Federal Government has set aside for Small Business participation.

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While the rules for filing a Small Business Size protest are fairly clear, the reality and practical applications are not so clear. Deadlines are VERY short to file a protest. You cannot simply allege a company is small, you must provide actual proof for the SBA to consider.

If the SBA agrees and decides that your competitor is not a legitimate small business under the size standard assigned to the contract, the procuring government agency will terminate the contract award.



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This article is intended to provide general information regarding filing a Size Protest to request an investigation and determination by the SBA of another business's size based on the SBA's Laws, Regulations and Rules. This information is not all inclusive and is not intended to replace competent legal counsel. For specific questions regarding Size Protests, please contact an attorney with experience in Federal Contract Law.

How do I file a Size Protest?

Your size protest will be filed with the Contracting Officer that awarded the Contract, who will then forward it to the SBA's Government Contracting Area Office for determination.

First, you must determine whether you are able to protest. This is called "standing", and refers to the legal proposition that you must have an interest in the case before you have the right to complain about another business. Your company must have submitted an offer as the prime contractor on the solicitation in question, and must not have been eliminated from the competition for reasons unrelated to size. For example, when the agency evaluates your proposal as technically unacceptable and eliminates your company from the competition, you would not have standing to file a size protest against the successful offeror.

Second, your protest must be filed against the successful offeror. Therefore the protest cannot be filed until the Contract has been awarded.

Third, you must file the protest within 5 days of the Notice of Award (or Notice of Intent to Award) to the successful offeror.

Fourth, as noted above, you must provide concrete examples of why the successful offeror is other than small. An SBA size protest must identify detailed reasons the competitor is not small. If there are no supporting documents attached as evidence, the SBA may dismiss the Protest. These documents can include copies from SAM (all entity records from CCR/FedReg and ORCA and exclusion records from EPLS, active or expired, were moved to SAM), and other Federal representations and certifications; Dunn and Bradstreet documentation; state or local filings; website information regarding size or contracts received, business entities creating affiliation; or ostensible subcontracting examples.

If there are no supporting documents attached as evidence to the protest, the SBA may dismiss the Protest.

Merely stating your belief that the competitor is large, without providing supporting documentation, is not enough. Without sufficient documentation, the SBA will deny the protest. However, if your size protest alleges that your competitor is not a small business because it is affiliated with a large subcontractor and you attach evidence showing its website identifies multiple federal contracts clearly exceeding its size standard, or the state filings indicate ownership by large companies, the SBA may find that business to be large.



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Affiliation is a term of art used by the SBA to decide that a small company can be large when all affiliates are considered. This includes common ownership interests and management control by others, examples include: bank accounts controlled by a large business, small business is not providing day to day management, and small companies that use the office space, equipment, and personnel of large companies at no cost. A common issue is the “ostensible subcontractor,” represented by a large subcontractor that actually controls the small prime contractor, or performs the primary or vital contract clauses. Ostensible Subcontracting occurs when the small prime is “unusually reliant” on the large subcontractor, as in the case where the Federal contract is for extremely sophisticated electronic equipment manufacturing, and the small prime does not have the capabilities or resources to perform the contract without the large subcontractor.

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Fifth, your size protest should provide as much information as possible supporting your claims, including any specific Federal or SBA rules, regulations, or case law as well as attaching any documentary evidence you located. Once again, the SBA may dismiss your size protest if you do not attach any third-party support for your allegations.

Where do I File the Protest

Your protest is filed with the Contracting Officer who issued the Solicitation. They will forward the size protest to the SBA. Your size protests will be dismissed if filed directly with the SBA.

I suggest you deliver the protest to the contracting officer by U.S. mail, facsimile, and email, and request confirmation of receipt of the protest. You may also deliver it personally to the Contracting Officer or use a delivery service such as Federal Express. It is always best to use a method that guarantees delivery by a certain date and provides third-party confirmation of timely receipt.

The Government Accountability Office (GAO) will not consider a size protest, even where you are protesting the award decision for reasons other than your competitor's size status. If you intend to protest the procurement on both size and non-size reasons, prepare separate protests.

When do I File the Protest

Time is critical in filing a Size Protest. Deadlines cannot be changed, are not extended by debriefings, and a late filing is fatal to your Protest. If you are late, the SBA will dismiss your size protest as untimely. (However, both the contracting officer and the SBA have the power to adopt an untimely size protest as their own.)

The contracting officer must receive size protests within 5 days (excluding Saturdays, Sundays, and legal holidays) after a specific event occurs, depending on the type of Solicitation.



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- **FAR Part 14:** For a non-negotiated procurement or sale (sealed bids), the size protest must be received by the contracting officer within 5 days after bid opening.
- **FAR Part 15:** For a negotiated procurement, the contracting officer must receive the size protest within 5 days after the contracting officer has notified your small business of the identity of the awardee or prospective awardee. (Typically a Notice of Intent to Award)
- **For other awards** (e.g. MATOC's) the contracting officer must receive the size protest within 5 days after the contracting officer provided notice of the identity of the awardee or prospective awardee.

If you file your protest late, the SBA will dismiss your size protest as untimely.

Any public notification by the Government may count as notification for size protest purposes. An email or telephone call from the contracting officer identifying the Awardee may count as notification. When in doubt, it is best to assume that notification has occurred and act accordingly. It is your obligation to keep an eye on any Government websites.

The SBA has 10 working days after a protest has been submitted to make a formal size determination if possible. While the SBA attempts to meet this deadline, they are not required to issue the determination in 10 days. The size determination will be primarily based on the evidence presented in the protest, but SBA may use outside information in their determination. SBA will give greater weight to supported factual information than unsupported allegations. The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

Appealing a SBA Size Decision

Any party with standing can appeal the determination of a SBA size protest at the SBA's Office of Hearings and Appeals (OHA). Once again, timing is critical and missing the Deadline is fatal to your appeal. Size appeals must be filed within 15 days of receipt of the size determination. 13 C.F.R. § 134.304(a).

A Size Appeal must be provided to OHA and received within 15 days. You must also send a copy of the appeal petition and all attachments to: (1) the SBA official who issued the determination; (2) the contracting officer for the procurement at issue; (3) the business whose size is at issue; (4) all persons who filed protests; and (5) SBA's Office of Procurement Law. 13 C.F.R. § 134.305(b).

Additional Rules are located at <http://www.sba.gov/oha/3396>.

Appealing a NAICS Code

Where you disagree with the NAICS code chosen by the Contracting Officer for a solicitation, you must prove that the Contracting Officer's NAICS code designation is based upon a clear error of fact or law. Contracting Officers must designate the NAICS code that best describes the principal purpose of the product or service being acquired in light of: the industry description in the NAICS MANUAL, the



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description in the solicitation, and the relative weight of each element in the solicitation. Where you believe the designation is improper based on the requirements of the solicitation, you may file an appeal of NAICS code directly with the Office of Hearing and Appeals.

NAICS appeals must be filed at OHA within 10 days of the issuance of the solicitation or within 10 days of the issuance of the amendment if the appeal relates to an amendment affecting the NAICS code. 13 C.F.R. § 134.304(a)(3). You must also send a copy of the appeal petition and all attachments to: (1) the SBA official who issued the determination; (2) the contracting officer for the procurement at issue; (3) the business whose size is at issue; (4) all persons who filed protests; and (5) SBA's Office of Procurement Law. 13 C.F.R. § 134.305(b).

For additional information see <http://www.sba.gov/oha/3396/13366>. Always make use of your free Federal Resources. Contact your local SBA Office <http://www.sba.gov/about-offices-list/2>, local Small Business Development Center (SBDC) <https://www.sba.gov/offices/district/fl/jacksonville> or local PTAC centers. Florida PTAC centers are listed here: <http://www.aptac-us.org/find-a-ptac/?state=FL#>. Remember: deadlines to file a Size Protest are critical.

For further information on Size Protests, contact James E. Krause by phone 904.353.5533 or by email jimkrause@krauselaw.net.



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