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Navigating Size Protests: From Area Office to Appeal

Presented By:

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Your Presenters

- Laura Foster
  - Laura is Of Counsel at Outlook Law, LLC. Prior to joining Outlook Law, Laura worked as an Attorney Advisor in the Office of Procurement Law at the SBA in Washington, DC. Laura is experienced in administrative litigation before SBA's Office of Hearings and Appeals (OHA) and the Government Accountability Office (GAO).
- Meagan Guerzon
  - Meagan has been practicing procurement law at the SBA, Office of General Counsel, since 2009, and in that time has represented the agency before the OHA, GAO, and the Civilian Board of Contract Appeals. Meagan works primarily with SBA program offices and agency contracting officers, and supports SBA's Area Offices of Government Contracting with size protest and appeal matters.

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Size Protest and Appeal Process

- Set-aside procurement
- Size protest
- Size determination
- Size appeal
- Judicial Review

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Size Status for Set-Aside Procurements

- Small Business Size Status
  - NAICS-based size standards – 13 CFR 121.201
  - Know the NAICS code before certification
- How size is calculated
  - Receipts-based size standards: 3 year average annual receipts
  - Employee-based size standards: 12 month employee average
  - Nonmanufacturer rule has additional requirements
  - SBIR/STTR has additional requirements
- When Size is Determined
  - General rule: initial offer including price and size certification
  - Exceptions: ostensible subcontracting, SBIR/STTR awards, nonmanufacturer rule
  - Multiple award contracts: size determined at contract level

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Affiliation

- General affiliation
  - Power to control (including negative control) – 13 CFR 121.103(a)
  - Common ownership/management – 13 CFR 121.103(c) and (e)
  - Identity of interest – 13 CFR 121.103(f)
  - Newly organized concern rule – 13 CFR 121.103(g)
  - Merger agreements – 13 CFR 121.103(d)
  - Entity-owned exceptions – 13 CFR 121.103(b)
- Procurement-specific issues
  - Ostensible subcontractor rule – 13 CFR 121.103(h)(4)
  - Nonmanufacturer rule – 13 CFR 121.406
  - Joint ventures – 13 CFR 121.103(h)

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Size Certifications

- Annual SAM certifications
- Submission of signed bid/proposal/offer
- Recertification requirements
  - Multiple award/IDIQ contracts
  - Mergers and acquisitions
  - Long-term contracts (more than 5 years)

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Size Protests

- Interested Parties – 13 CFR 121.1001
  - Offerors not eliminated from consideration for procurement-related reasons
  - Contracting Officers
  - SBA Government Contracting Area Directors
  - Large businesses when only one offer
  - These rules can vary depending on the type of procurement at issue
- Timeliness – 13 CFR 121.1004
  - Within 5 days of identification of apparent awardee
  - No time limits for Contracting Officers and SBA
- Specificity – 13 CFR 121.1007(b)
  - Sufficient detail with some basis for allegations

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Other Requests for Size Determinations

- Certificates of Competency
- 8(a) Program Eligibility
- HUBZone Eligibility
- Mentor Protégé Program
- Financial Assistance Programs/SBIC – 13 CFR 121.301-305
- SBIR/STTR – 13 CFR 121.701

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Size Protest Process

- Protest received by Contracting Officer
- Referral to SBA
- SBA Area Office notifies protested concern and requests documents
  - Form 355
  - Proposal – depending on type of allegation
  - Specific questions from size specialist
  - Federal income tax returns and/or financial statements
  - Written response specifically addressing the allegations
- SBA Area Office issues size determination within 15 business days (if possible) – 13 CFR 121.1009(a)

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Size Appeals

- Interested Parties – 13 CFR 134.302
  - Anyone adversely affected by the size determination
  - SBA
  - Contracting Officers
- Timeliness – 13 CFR 134.304
  - Must be filed within 15 calendar days after receipt of size determination
- Appeal Petition – 13 CFR 134.305
  - Required elements include “full and specific statement” as to why the size determination is wrong
- No new evidence or arguments – 13 CFR 134.308 and 13 CFR 134.316(c)

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Judicial Review

- Exhaustion of administrative remedies
  - OHA must review size determination before court
- U.S. Court of Federal Claims
  - Exclusive jurisdiction in cases related to procurements
- Standard of Review
  - Arbitrary and capricious standard
  - Deference to SBA's OHA as subject matter experts
- Relief available
  - Preliminary/permanent injunctions
  - Declaratory judgments

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Questions?

Slide 12