19.302 Protesting a small business representation or rerepresentation.

(a)

(1) The SBA regulations on small business size and size protests are found at 13 CFR part 121 .

(2) An *offeror*, the *contracting officer*, SBA, or another interested party *may* protest the small business representation of an *offeror* in a specific *offer* for a contract. However, for competitive 8(a) contracts, the filing of a protest is limited to an *offeror*, the *contracting officer*, or SBA. See 13 CFR 121.1001(a).

(b) Any time after *offers* are received by the *contracting officer*, or in the case of bids, opened, the *contracting officer may* question the small business representation of any *offeror* in a specific *offer* by filing a *contracting officer*'s protest (see paragraph (c) of this section).

(c)

(1) Any *contracting officer* who receives a protest, whether timely or not, or who, as the *contracting officer*, wishes to protest the small business representation of an *offeror*, or rerepresentation of a contractor, *shall* promptly forward the protest to the SBA Government *Contracting* Area Director at the Government *Contracting* Area Office serving the area in which the headquarters of the *offeror* is located.

(2) The protest, or confirmation if the protest was initiated orally, *shall* be *in writing* and *shall* contain the basis for the protest with specific, detailed evidence to support the allegation that the *offeror* is not small. The SBA will dismiss any protest that does not contain specific grounds for the protest.

(3) The protest *shall* include a referral letter written by the *contracting officer* with information pertaining to the *solicitation*. The referral letter *must* include the following information to allow SBA to determine timeliness and standing:

(i) The protest and any accompanying materials.

(ii) A copy of the size self-certification.

(iii) Identification of the applicable size standard.

(iv) A copy or an electronic link to the *solicitation* and any amendments.

(v) The name, address, telephone number, email address, and fax number of the *contracting officer*.

(vi) Identification of the bid opening date or the date of notification provided to unsuccessful *offerors*.

(vii) The date the *contracting officer* received the protest.

(viii) A complete address and point of contact for the protested *concern*.

(d) In order to affect a specific *solicitation*, a protest *must* be timely. SBA's regulations on timeliness are contained in 13 CFR 121.1004. SBA's regulations on timeliness related to protests of disadvantaged status are contained in 13 CFR part 124, subpart B.

(1) To be timely, a protest by any *concern* or other interested party *must* be received by the *contracting officer* by the close of business of the fifth business *day* after-

(i) Bid opening for sealed bid *acquisitions*; or

(ii) Receipt of the special notification from the *contracting officer* (see 15.503(a)(2)) that identifies the apparently successful *offeror* for negotiated *acquisitions*, including—

(A) Partial set-asides and reserves of *multiple-award contracts*;

(B) Orders that are set-aside under an unrestricted *multiple-award contract* (except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and paragraph (d)(5) of this section)); and

(C) Orders placed under *multiple-award contracts* where the *contracting officer* requested rerepresentation for the order; or

(iii) Receipt of notification using other communication means when written notification is not required.

(2) A protest *may* be made orally if it is confirmed *in writing* and received by the *contracting officer* within the 5-*day* period or by letter postmarked no later than 1 business *day* after the oral protest.

(3) A protest *may* be made *in writing* if it is delivered to the *contracting officer* by hand, mail, facsimile, email, express or overnight delivery service.

(4) Except as provided in paragraph (d)(6) of this section, a protest filed by the *contracting officer* or SBA is always considered timely whether filed before or after award.

(5) A protest under a Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(6) A protest filed before bid opening, or notification to *offerors* of the selection of the apparent successful *offeror*, will be dismissed as premature by SBA.

(e) Upon receipt of a protest from or forwarded by the *Contracting Office*, the SBA will-

(1) Notify the *contracting officer* and the protester of the date it was received, and that the size of the *concern* being challenged is under consideration by the SBA; and

(2) Furnish to the *concern* whose representation is being protested a copy of the protest and a blank SBA Form355, Application for Small Business Determination, by certified mail, return receipt requested.

(f)

(1) Within 15 business days after receipt of a protest or request for a formal size determination or within any extension of time granted by the *contracting officer* the SBA Area Office will determine the size status of the challenged *concern*. The SBA Area Office will notify the *contracting officer*, the

protester, and the challenged *concern* of its decision by a verifiable means, which *may* include facsimile, electronic mail, or overnight delivery service.

(2) Award *may* be made to a protested *concern* after the SBA Area Office has determined that either the protested *concern* is an eligible small business or has dismissed all protests against it.

(3) If SBA's Office of Hearings and Appeals (OHA) subsequently overturns the Area Office's determination of eligibility or dismissal, and contract award has not been made, the *contracting officer may* apply the OHA decision to the *procurement* in question.

(g)

(1) After receiving a protest involving an *offeror* being considered for award, the *contracting officer shall* not award the contract until the SBA has made a size determination or 15 business days have expired since SBA's receipt of a protest, whichever occurs first; however, award *shall* not be withheld when the *contracting officer* determines *in writing* that an award *must* be made to protect the public interest.

(2) If SBA has not made a determination within 15 business days, or within any extension of time granted by the *contracting officer*, the *contracting officer may* award the contract after determining *in writing* that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.

(3) SBA *may*, at its sole discretion, reopen a formal size determination to correct an error or mistake, if it is within the appeal period and no appeal has been filed with OHA or, a final decision has not been rendered by the SBA Area Office or OHA.

(4) If a protest is received that challenges the small business status of an *offeror* not being considered for award, the *contracting officer* is not required to suspend contract action. The *contracting officer shall* forward the protest to the SBA (see paragraph (c)(1) of this section) with a notation that the *concern* is not being considered for award, and *shall* notify the protester of this action.

(h) An appeal from an SBA size determination *may* be filed by any *concern* or other interested party whose protest of the small business representation of another *concern* has been denied by an SBA Government *Contracting* Area Director, any *concern* or other interested party that has been adversely affected by an SBA Government *Contracting* Area Director's decision, or the SBA Associate Administrator for the SBA program involved. The appeal *must* be filed with the Office of Hearings and Appeals, Small Business Administration, Suite 5900, 409 3 rd Street, SW., Washington, DC 20416, within the time limits and in strict accordance with the procedures contained in Subpart C of 13 CFR 134. It is within the discretion of the SBA Judge whether to accept an appeal from a size determination. If a post-award appeal is submitted to OHA within the time limits specified in Subpart C of 13 CFR 134, the *contracting officer shall* consider suspending contract performance until an SBA Judge decides the appeal. SBA will inform the *contracting officer* of its ruling on the appeal. SBA's decision, if received before award, will apply to the pending *acquisition*. If the *contracting officer* has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the SBA rulings is received after award, and OHA finds the protested *concern* to be *ineligible* for award, the *contracting officer shall* terminate the contract unless termination is not in the best interests of the Government, in keeping with the circumstances described in the written determination. However, the *contracting officer shall* not exercise any *options* or award further task or *delivery orders*.

(i) SBA will dismiss untimely protests. A protest that is not timely, even though received before award, *shall* be forwarded to the SBA Government *Contracting* Area Office (see paragraph (c)(1) of this section), with a notation on it that the protest is not timely. A protest received by a *contracting officer* after award of a contract *shall* be forwarded to the SBA Government *Contracting* Area Office with a notation that award has been made.

(j) When a *concern* is found to be other than small under a protest concerning a size status rerepresentation made in accordance with the clause at 52.219-28, Postaward Small Business Program Rerepresentation, a *contracting officer may* permit contract performance to continue, issue orders, or exercise *option*(s), because the contract remains a valid contract.

Parent topic: Subpart 19.3 - Determination of Small Business Size and Status for Small Business Programs