

# **SBA PROTESTS: WHEN SIZE OR STATUS COMES INTO QUESTION**

You may download these slides at  
[www.pilieromazza.com/presentations](http://www.pilieromazza.com/presentations)



**A PilieroMazza Webinar**  
May 13, 2015



## **PRESENTED BY**

### **Pilieromazza Government Contracts Group**

**Jon Williams, Partner**  
[jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com)  
(202) 857-1000



**Alex Levine, Associate**  
[alevine@pilieromazza.com](mailto:alevine@pilieromazza.com)  
(202) 857-1000





## ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

**Sign up for our newsletters and blog at**  
**[www.pilieromazza.com](http://www.pilieromazza.com)**

*PM Legal Minute* – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

*Legal Advisor Newsletter* – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decision, legislative and regulatory rule-making as well as other newsworthy events.

*Weekly Update* – an email sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

*Webinars on YouTube* – all of our past webinars can be found on the PilieroMazza YouTube channel.

Follow us on:  @pilieromazza



PilieroMazza Channel



## **OVERVIEW**

- ❖ **Key aspects of SBA size and eligibility protests**
  - Why to file
  - Who and when to file
  - What to file
  - How SBA processes protests
- ❖ **Tips for filing SBA protests**
- ❖ **Tips for defending SBA protests**
- ❖ **Overview of SBA appeals**



# **KEY ASPECTS OF SBA SIZE AND ELIGIBILITY PROTESTS**



## **WHY?**

- ❖ **SBA protests offer advantages over GAO protests**
  - Less time consuming and costly to prepare/file
  - If successful, the awardee or presumed awardee becomes ineligible, so the agency must go to the next-in-line offeror
- ❖ **SBA protests are relatively easy to file and may take on a life of their own after filed**
  - Protester must offer “specific facts,” but that bar is low
  - For example, a protester does not need to know the identity of the awardee’s subcontractor to allege affiliation with the subcontractor
  - SBA may investigate issues not raised in the protest
  - Once the protest is filed, the burden is on protested entity to prove it is eligible



## **WHO AND WHEN?**

- ❖ **May be filed on set-aside contracts and task orders**
  - For task orders under multiple-award contracts, check whether the RFP contains an explicit recertification requirement
  - May also be filed on subcontracts awarded under the Subcontracting Program
- ❖ **SBA protests may be filed by an eligible offeror, the contracting officer (“CO”), or SBA, plus:**
  - Large businesses when only one concern submitted an offer
  - Prime contractor or other eligible subcontractors for subcontracts awarded under the Subcontracting Program
- ❖ **Filing deadlines**
  - Five business days after you first learn the identity of the awardee or presumptive awardee
  - However, the CO and SBA may file an SBA protest at any time



## **WHAT TO FILE**

- ❖ **A size or eligibility protest is typically filed as a letter**
  - Letter should be addressed to the CO
  - Separate letters for protests involving size and eligibility issues?
  - Include supporting evidence
- ❖ **For size protests only, you can also file your protest via telephone, as long as you follow up in writing within 24 hours**





## **HOW SBA PROCESSES PROTESTS**

- ❖ After the protest is filed with the CO, the CO will forward it to the appropriate SBA office for processing
  - Size protests are handled by SBA area office serving the area in which the headquarters of the protested concern is located
  - WOSB, EDWOSB, and SDVOSB eligibility protests are handled by SBA's Office of Government Contracting
  - HUBZone eligibility protests are handled by the HUBZone Office



## **HOW SBA PROCESSES PROTESTS**

- ❖ Within a few days after receiving the protest from the CO, SBA will send a letter to the protested firm requesting a response
- ❖ SBA's letter typically requests:
  - A response to the protest allegations
  - Corporate records (i.e., operating agreement, proposal, etc.)
  - Financial statements and tax returns
  - Completed SBA Form 355 (for size cases)
- ❖ SBA usually gives protested firm three to five days to respond
- ❖ After communication with protested firm is completed, SBA will issue decision, typically within 15-30 days



# **TIPS FOR FILING SBA PROTESTS**



## **TIPS FOR FILING SBA PROTESTS**

- ❖ **Make sure you file on time**
  - Pre-award notice starts the clock
  - Bid opening starts the clock
- ❖ **Follow-up with the CO to ensure CO forwarded your protest to SBA**
- ❖ **Using counsel lends credibility to your allegations**
- ❖ **Must be sufficiently specific in your contentions**
  - SBA gives greater weight to specific, signed, factual evidence, rather than general, unsupported allegations
  - Google is your friend
  - Helpful to include supporting documents
  - Cite relevant case law



## **TIPS FOR FILING SBA PROTESTS**

- ❖ You get one bite at the apple, so make it count
- ❖ For size protests, focus on different types of affiliation that may be implicated
  - SBA's affiliation rules look to whether one firm has the power to control another, or a third firm has the power to control both
  - Control can be affirmative or negative
  - Affiliation may arise based on things like stock ownership, common management, joint ventures, identity of interest between family members, firms with common investments, or economic dependence, ostensible subcontractor arrangements, and the totality of the circumstances



## **TIPS FOR FILING SBA PROTESTS**

- ❖ For eligibility protests, focus your arguments and evidence on the key requirements for the program
  - Cannot protest 8(a) status
- ❖ Common HUBZone protest issues:
  - “Principal office” not located within a HUBZone – compare address to SBA HUBZone map
  - Less than 35% of employees reside in a HUBZone – where are company’s contracts/satellite offices located?
  - SBA will investigate protest claims, including by conducting site visits of the purported principal office



## **TIPS FOR FILING SBA PROTESTS**

- ❖ **Common SDVOSB and WOSB/EDWOSB protest issues:**
  - Another entity or individual without qualified status has majority interest or controls the company on a day-to-day basis
  - Firm has significant reliance on another company or individual that prevents the veteran or woman from being in control
  - For EDWOSB, the owner does not meet the economic disadvantage qualifications
  - For SDVOSB, the owner is not a qualifying service-disabled veteran
    - However, the SBA does not review VA or DOD determinations pertaining to status of an individual as a veteran or a service-connected disabled veteran or a veteran with a permanent or severe disability



## PROTESTS AGAINST JOINT VENTURES

- ❖ Size
  - Firms must be small in the aggregate, unless the procurement is bundled or the dollar value exceeds half the size standard (for a receipts based size standard) or \$10 million
  - 3 in 2 rule – JV cannot be awarded more than three contracts within a two year period
- ❖ SDVOSB, WOSB, and EDWOSB: Does the JV agreement comply with the applicable SBA JV rules?
  - KRR Partners Joint Venture Petitioner, SBA No. VET-241 (2013) (SDVOSB JV lost contract because their JV agreement did not specify parties' responsibilities w/r/t contract performance)
- ❖ HUBZone: each JV partner must be a HUBZone firm
- ❖ 8(a): Currently, cannot protest but SBA recently proposed rule change to permit size protests only





# **TIPS FOR DEFENDING SBA PROTESTS**



# **#1 PROTEST DEFENSE TIP: BE PROACTIVE!**

- ❖ The best (and sometimes only) defense is a good offense
  - Many potential protest issues have to be addressed before the protest is filed
  - There is only so much we can do to defend circumstances that existed as of when you submitted your initial proposal w/ price



## **TIPS FOR BEING PROACTIVE**

- ❖ **Undergo annual and pre-bid checkups**
  - **Review corporate documents for negative control issues, particularly after a change in ownership**
  - **Complete all fracture steps if you recently broke ties with an affiliate**
  - **Take steps to diversify customers and revenue sources**
  - **Write your teaming agreement, proposal, and subcontract with an eye toward mitigating ostensible subcontractor affiliation**
  - **Be mindful of issues created by letters of intent**
  - **Implement and utilize written procedures for making size and eligibility representations**



## **PROCEDURAL TIPS WHEN DEFENDING**

- ❖ Ask for an extension
- ❖ Start gathering documents right away
- ❖ Question specificity of protest?
- ❖ Question timeliness of protest?
- ❖ Ask for redactions/limits on the disclosure of proprietary and confidential information



## **GENERAL TIPS FOR YOUR DEFENSE**

- ❖ **Do not leave anything to chance**
  - SBA can look at issues beyond what was specifically raised in the protest
  - In addition, it is difficult to introduce new evidence on appeal
  - Therefore, if an issue is even arguably raised in or implicated by a protest, address it in your response
- ❖ **That said, due process requires that you are on notice and given an opportunity to respond**
  - Would come into play when protest is based on specific issue such as affiliation through family relationships, and SBA decides case based on completely different issue such as ostensible subcontractor affiliation



## **DEFENDING A SIZE PROTEST**

- ❖ **Identify any procedural issues that could allow for summary dismissal**
  - **For example, is it a task order solicitation where size is not required to be re-certified?**
- ❖ **Take care in completing the SBA Form 355**
  - **Important to consult with counsel on how to answer questions and draft any necessary explanations**
- ❖ **Use financial statements if tax returns are incomplete**
- ❖ **If you are still small even if the allegations of affiliation are true, tell SBA**
- ❖ **Can you get the necessary information from alleged affiliates?**



## **DEFENDING AN ELIGIBILITY PROTEST**

- ❖ **Critical for counsel to review JV agreement before the proposal deadline**
  - Several recent cases where an SDVOSB or WOSB JV lost an award because of problems with its JV agreement
  - It's too late to fix your JV agreement after a protest is filed
  - Don't lose a contract because of a foot fault in your JV agreement
- ❖ **Maintain a compliance file for HUBZone bids and awards**
  - Often the hardest part of defending a HUBZone protest is producing the supporting documents for your personnel on short notice
- ❖ **Make sure your corporate records reflect your current structure and that control rests with the right people**



# **OVERVIEW OF SBA APPEALS**





## **OVERVIEW OF SBA APPEALS**

- ❖ **SBA Office of Hearings and Appeals (“OHA”) handles appeals in size, SDVOSB, WOSB, and EDWOSB cases**
- ❖ **Size appeals**
  - **Must be filed within 15 calendar days**
  - **OHA will try to issue a decision within 60 calendar days after close of the record**
- ❖ **SDVOSB/WOSB/EDWOSB eligibility appeals**
  - **Must be filed within 10 business days**
  - **OHA will try to issue its decision within 15 business days after the close of the record**
- ❖ **Standard of review = clear error of fact or law**
- ❖ **Interested parties may intervene**
- ❖ **Opportunity to review the record**



## **EFFECT OF AN OHA APPEAL**

- ❖ A contractor that has lost a size or status determination is no longer eligible for the procurement and cannot be awarded the contract, unless the determination is successfully appealed or reconsidered
- ❖ While the SBA protest decision is on appeal at OHA, the CO must decide whether to proceed with the contract
  - Talk with your CO
- ❖ If OHA affirms an adverse SBA decision against the awardee, the agency must either terminate the contract or decline to exercise the next option



## **HUBZONE APPEALS**

- ❖ **HUBZone appeals go to the Associate Administrator, Office of Government Contracting and Business Development or his or her designee**
- ❖ **Must be filed within five business days**
- ❖ **Appeal decisions are made within five business days of receipt of the appeal, if practicable**
- ❖ **The standard of review is clear and significant error in the processing of the protest or if the decision completely failed to consider a significant fact supplied during the protest process**
- ❖ **The SBA will not consider additional information or changed circumstances not previously disclosed**



# Questions?

Thank you for joining us today.

If you would like to speak with Jon or Alex about SBA protests, please contact them at:

Jon Williams

[jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com)

(202) 857-1000

Alex Levine

[alevine@pilieromazza.com](mailto:alevine@pilieromazza.com)

(202) 857-1000