



SMALL BUSINESS COMPLIANCE GUIDE SIZE AND AFFILIATION

A Guide to the SBA's Size Program and Affiliation Rules

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U.S. Small Business Administration

A handbook for small businesses and Federal officials interested in learning about the SBA's size program.

This document is published by the U.S. Small Business Administration pursuant to the National Defense Authorization Act of Fiscal Year 2013 (NDAA), Pub. L. 112-239, § 1681(c). The NDAA requires that SBA publish this compliance guide to assist business concerns in accurately determining their status as a small business.

This guide has no legal effect and does not create any legal rights. Compliance with the procedures described in this guide does not establish compliance with the rule or establish a presumption or inference of compliance. The legal requirements that apply are governed by SBA's size regulations, which control if there is any inconsistency between the rule and the information in this guide.

OVERVIEW

Why is size important?

In order to be eligible for certain Federal programs and certain Federal contracts and subcontracts, you must be a “small business concern.” SBA’s size regulations, which are set forth at 13 CFR part 121, are used to determine eligibility for all SBA and Federal programs that require a concern to be small. For example, a business must be small for the following government contracting or business development programs:

- Small business set asides;
- Small Business Innovation Research (SBIR) program;
- Small Business Technology Transfer (STTR) program;
- Certificate of Competency (COC) program;
- Historically Underutilized Business Zone (HUBZone) program;
- Women-Owned Small Business (WOSB) and Economically Disadvantaged Women-Owned Small Business (EDWOSB) programs;
- Service-Disabled Veteran-Owned Small Business program;
- Small business subcontracting;
- 8(a) Business Development program; and
- 7(j) Management and technical assistance program.

SBA’s size rules also apply to small business loan programs and grant programs. A number of government agencies, including the Food and Drug Administration and the Department of Veterans Affairs, operate programs for which small business status is a requirement for eligibility. The size rules apply to these programs, as well.

How do I know if my business qualifies as a “small business concern”?

To be a “concern,” your business entity must: (1) be organized for profit; (2) have a place of business located in the United States; and (3) make a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials or labor.

In general, to be considered small, concerns must meet a particular size standard that corresponds to a six-digit North American Industrial Classification System (NAICS) code. Each size standard is stated in terms of either receipts or employees, and in limited cases a basis other than receipts or employees (e.g., megawatt hours). SBA considers the receipts or employees (or other measure) of an applicant/participant/offeror, and all of its domestic and foreign affiliates, when determining a business concern’s size.

For example, in order to qualify as a small business concern for a set-aside, partial set-aside, reserve, or set-aside of orders against a multiple award contract, the business must meet the size standard that corresponds to the NAICS code assigned to the solicitation and contract.

Example: The contracting officer assigns NAICS code 541519, Other Computer Related Services, to a solicitation. NAICS code 541519 has a size standard of \$25.5 million dollars. In order to be considered a small business for this solicitation and the resulting contract, the business would need to calculate its annual receipts over its most recently completed three fiscal years and divide by three. If the business has any affiliates, it would need to add its average annual receipts with the average annual receipts of each affiliate to ensure it does not exceed the \$25.5 million size standard. If it exceeds the size standard, it is not a small business concern for purposes of this solicitation and contract.

Where can I find the size standards?

To help small business owners assess their small business status, SBA has established a Table of Small Business Size Standards which is matched to the [North American Industry Classification System \(NAICS\)](#) for industries. The current table of size standards is based on the 2012 NAICS. A list of the small size standards can be found at <http://www.sba.gov/content/small-business-size-standards>.

BUSINESS CONCERN

How does SBA define the term business concern?

A business concern eligible for assistance from SBA as a small business is a business entity:

- organized for profit,
- with a place of business located in the United States,
- **and** which operates primarily within the United States **or** which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

How does SBA define a business concern that is an agricultural cooperative?

A small agricultural cooperative is an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C. 1141j) whose size does not exceed the size standard established by SBA for other similar agricultural small business concerns. A small agricultural cooperative's member shareholders are not considered to be affiliates of the cooperative by virtue of their membership in the cooperative. However, a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative.

Can a small business concern be a corporation, LLC or sole proprietorship?

A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

How are predecessor entities treated?

A firm and its predecessor entity will be treated as one business concern if a substantial portion of its assets and/or liabilities are the same. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size of the new business concern.

Where can I find the regulations about the definition of business concern?

They are located at 13 C.F.R. § 121.105.

AFFILIATION

What is an “affiliate”?

As stated above, SBA determines whether an entity qualifies as a small business concern by counting its receipts, employees, or other measures including those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit. 13 C.F.R. § 121.103(a)(6). SBA has a specific set of rules that explain when another person, business or entity is considered an affiliate for size purposes.

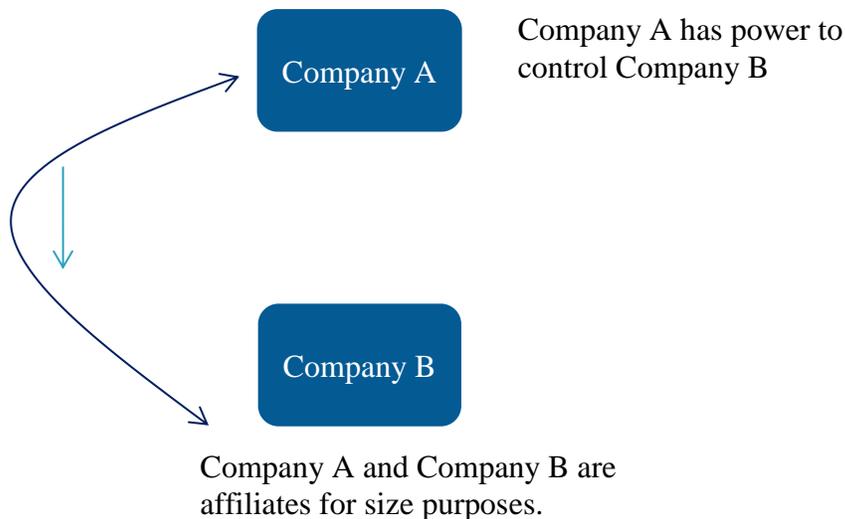
Where do I find SBA’s affiliation rules?

SBA’s rules on affiliation for its programs (except SBIR and STTR) are found at 13 C.F.R. § 121.103. The regulations are available online at <http://www.ecfr.gov>. You may also contact any of the points of contact at the bottom of this document to receive a copy of the rules.

We note that for purposes of the SBIR and STTR program, SBA’s affiliation regulations can be found at 13 C.F.R. § 121.702. Further information about the specific affiliation rules for the SBIR and STTR programs, including a compliance guide and FAQs, is available at www.sbir.gov.

What are the general principles of affiliation?

Generally, affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through ownership, management, or other relationships or interactions between the parties.



Control may be affirmative or negative. Negative control includes instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

SBA will consider the totality of the circumstances when determining whether affiliation exists and may find affiliation based on the totality of the circumstances even though no single factor alone may be sufficient to constitute affiliation. If SBA determines that affiliation exists, then SBA will count the receipts, employees, or other measure of size for the concern whose size is at issue combined with the receipts, employees, or other measure of size for all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

SBA commonly receives questions about whether affiliation exists. The following is a summary of SBA's affiliation rules.

BASES FOR AFFILIATION

1. When may SBA find affiliation based on stock ownership (13 C.F.R. § 121.103(c))?

Control of 50% or more of voting stock. A person¹ is an affiliate of a concern if the person owns or controls, or has the power to control, 50% or more of the concern's voting stock. This is a non-rebuttable basis for finding affiliation.

Example: Company A owns Companies B, C and D (54.5%, 81%, and 60% respectively). Company A has the power to control Companies B, C and D. The companies are all affiliated. The receipts and/or number of employees of all four companies will be aggregated in determining the size of any one of them.

Control of less than 50% voting stock, but large compared to others. A person is an affiliate of a concern if the person owns and controls, or has the power to control, a block of voting stock that is large compared to all other outstanding blocks of stock even though it comprises less than 50% of the voting stock. This is a non-rebuttable basis for finding affiliation.

Example 1: Company A owns 40 percent of the voting stock of Company B and the next largest share is 2 percent. Company A controls Company B due to the fact that it owns the largest block of voting stock compared to all other outstanding blocks of voting stock. Company A and Company B are affiliates. In addition, all other companies controlled by Company A will be considered affiliates of Company B.

Example 2: Two individuals each own blocks of shares of Company A. One individual owns 46.67% of the business and the other owns 33.333%. The individual that owns 46.67% of the stock owns the largest single block, which is large compared to any other block, and therefore has the power to control the concern. This individual also controls Company B. There is affiliation between Company A and Company B.

Control of less than 50% voting stock by multiple minority owners. If two or more persons each owns or controls (or has the power to control) less than 50% of a concern's voting stock and (i) the minority holdings are all approximately equal in size and (ii) all of the minority holdings taken together are large compared to any other stock holdings, there is affiliation with each of those persons. However, a person may rebut the presumption by showing that it does not have control or the power to control.

Example: Investor X, Investor Y, and Company A each own 23% of Company B. No other stockholder owns more than 5% of Company B. All three persons will be presumed to control Company B. Each presumed affiliate may attempt to

¹ The term "person" used throughout this document and the regulations includes an individual, entity, or business concern. 13 C.F.R. § 121.103(c)(1).

rebut the presumption by showing that its control or power to control does not exist. If the presumption is not overcome, then Company A and Investors X and Y will all be considered affiliates of Company B. In addition, all companies controlled by Company A and Investors X and Y would be affiliates of Company B.

Voting stock is widely held. When a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the business concern's Board of Directors and Chief Executive Officer (CEO) or President are deemed to have the power to control the concern unless evidence is provided to show otherwise.

Example: In a corporation where no one stockholder has a block of voting stock sufficient to give it control or the power to control the concern, control instead rests in the Board of Directors and the CEO or President. This means that any business controlled by the Board or by the CEO or President is an affiliate of the business concern in question, unless the Board and CEO or President can rebut this presumption.

2. When may SBA find affiliation based on stock options, convertible securities, and agreements to merge (13 C.F.R. § 121.103(d))?

SBA treats stock options, convertible securities, and agreements to merge as though the rights granted have been actually exercised. SBA gives present effect to an agreement to merge (including an agreement in principle) or to sell stock. If these rights have been granted and they confer the power to control, affiliation exists.

Example 1: If Company A holds an option to purchase a controlling interest in Company B, the situation is treated as though Company A had exercised its rights and had become owner of the controlling interests in Company B. Company A and Company B are affiliates. In addition, all companies controlled by Company A will be considered affiliates of Company B.

Example 2: Company A and Company B are in discussion about a merger between the two of them. Both companies' representatives have met several times over the past two months. There is neither a formal nor informal agreement to merge. Unless the two companies have an agreement in principle, SBA will not find affiliation between the two companies based on these open and continuing discussions of merger alone. Discussions about the possibility of a future merger or buy-out, by themselves, are not sufficient to find affiliation.

3. When may SBA find affiliation based on common management (13 C.F.R. § 121.103(e))?

If one or more officers, directors, managing members, or general partners of a business concern control the Board of Directors and/or the management of another business concern, the concerns are affiliates.

Example 1: Controlling members of Company A's Board of Directors occupy three out of five positions in Company B's Board of Directors. The two concerns

are affiliated because the controlling members of the Board of Directors of Company A also control the Board of Directors of Company B. In addition, all concerns controlled by Company A will be considered affiliates of Company B and vice versa.

Example 2: A controlling member of Company A's Board of Directors has veto rights over the majority decisions of Company B's Board of Directors. By possessing such negative control, Company A has control of the Board of Directors of Company B and the two concerns are affiliated. In addition, all companies controlled by Company A will be considered affiliates of Company B and vice versa.

4. When may SBA find affiliation based on an identity of interest between individuals or businesses, including family members (13 C.F.R. § 121.103(f))?

Individuals or firms that have identical (or substantially identical) business or economic interests may be treated as one party unless they can demonstrate otherwise. Family members, persons with common investments, or firms that are economically dependent through contractual (or other) relationships, are among those treated this way. However, individuals or firms may seek to demonstrate that no affiliation exists by providing evidence establishing that apparently identical interests are, in fact, separate. Patterns of subcontracting, commingling of staff and/or facilities, and other veiled attempts to disguise the true nature of the relationship may evidence an identity of interest.

Example 1: Several officers of Company A are also officers of Company B. The two companies are in the same line of work and extensively subcontract with each other. The interrelationship between the two companies results in them acting as one, and therefore since they have an identity of interest, the two are considered affiliates.

Example 2: Companies A and B share office space and equipment in the same location and also share key employees. In addition, Company A has sent a substantial amount of business to Company B for each of the last three years (which amounts to more than 70% of Company B's total revenues). All this, taken together, is an indication that the two companies have combined their resources to each other's benefit, and therefore, are likely to be affiliated.

Example 3: When three of four members of a concern's Board of Directors have multiple investments in common with each other outside the concern, they may be viewed as sharing an identity of interest. The three directors would be deemed to control the Board and to therefore also control the business. Each outside business that these three directors control would be an affiliate of the business concern in question.

Example 4: A husband and wife founded an accounting firm in 1974. In 2008, their daughter opened an office supply store using her own funds and a bank loan. Her parents purchase supplies from the daughter's store, and sales to her parents represent 10% of the daughter's revenues. There are no other business interactions between the daughter and her parents. If there are no other indicia of affiliation, SBA would find the business dealings to be minimal and the presumed affiliation due to family relationships to have been rebutted.

5. When may SBA find affiliation based on the newly organized concern rule (13 C.F.R § 121.103(g))?

A new concern that is affiliated with an existing concern if:

- (1) The former (or current) officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern;
- (2) Both concerns are in the same or related industries or fields of operation;
- (3) The individuals that organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and
- (4) The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification or bid or performance bonds, and/or other facilities, whether for a fee or otherwise.

The affiliation may be rebutted by showing that there is a clear fracture between the two businesses.

Example: The former chief executive officer of Company A organizes Company B and serves as Company B's managing member. Companies A and B are in the same or similar industries. Company B receives subcontracts from Company A. Company B is affiliated with Company A, unless it can establish that there is a clear fracture between the two companies.

6. When may SBA find affiliation based on contractual relationships or economic dependency (13 C.F.R § 121.103(a),(f) and (g))?

A concern that is economically dependent upon another person or concern may be found to be affiliated with that concern. It may also be found affiliated with other concerns controlled by the individual or concern to which it is dependent. It may be found affiliated on the basis of control or power to control, an identity of interest, the newly organized concern rule, or a combination of these.

Example 1: Company A performs subcontracts for Company B, and Company B accounts for 90% of Company A's revenues. Company A's existence depends on work from Company B and the two are deemed affiliates.

Example 2: Company A provides significant loans to Company B and guarantees other loans to Company B. Company B's over reliance of dependence on Company A's financial support (both direct and indirect) results in their affiliation.

Example 3: A loan between two businesses is not an arm's-length transaction and the terms and conditions of the loan demonstrate financial dependence by one business on the other. The two are deemed affiliates.

Example 4: Company A obtained a patent for a product it developed. It licenses the use of the product to Company B, and makes it available for other companies to obtain a license. No affiliation exists between Company A and Company B based solely on the licensing agreement.

7. When may SBA find affiliation with parties to a joint venture (13 C.F.R. § 121.103(h)(1) and (2))?

A joint venture is an association of individuals and/or concerns that consorts to carry out a business venture for joint profit.

- The parties to a joint venture are affiliates of each other if any one partner seeks SBA financial assistance for use in connection with the joint venture.
- The parties to a joint venture that submit an offer for a particular procurement or property sale are affiliated with each other for performance of that particular contract, unless an exception to affiliation applies.
- The parties to a joint venture are considered affiliates for all purposes, unless an exception exists or the joint venture receives no more than three contract awards over a two-year period.

Even if an exception to affiliation exists, a party to a joint venture must include in its receipts its proportionate share of receipts generated by the joint venture, and in its total number of employees its proportionate share of joint venture employees when determining its own size.

Exceptions to Affiliation for Joint Venture Partners. (13 C.F.R. § 121.103(h)(3)(i)-(iii)):

- (1) Each Partner is Small for a Bundled or Consolidated Procurement. A joint venture of two or more businesses will not be affiliated as long as each partner is small under the size standard assigned to the procurement if it is a bundled or consolidated procurement as defined in 13 C.F.R. § 125.2(d).
- (2) Each Partner is Small for a Procurement that is not Bundled or Consolidated. If the procurement is not a bundled or consolidated procurement, a joint venture of two or more businesses will not be affiliated as long as each partner is small under the size standard assigned to the procurement and if a receipts-based size standard applies, the dollar value of the procurement exceeds half the size standard or if an employee-based size standard applies, the dollar value of the procurement exceeds \$10 million.

Example 1: Company A and Company B form joint venture AB and submit an offer for a non-bundled procurement with a NAICS code and corresponding size standard of \$14 million. The estimated dollar value of the procurement (including options) is \$8 million. Companies A and B are both small for the size standard assigned to the procurement and therefore are not affiliated because the procurement value exceeds half the size standard. The joint venture is therefore considered small for this procurement.

Example 2: Company A and Company B form joint venture AB and submit an offer for a non-bundled procurement with a size standard of 500 employees. The estimated dollar value of the procurement is \$11 million. Companies A and B are both small for the size standard assigned to the procurement and therefore are not affiliated because the procurement value exceeds \$10 million. The joint venture is considered small for the procurement.

- (3) 8(a) BD Joint Venture. A joint venture with at least one 8(a) BD participant partner will not be affiliated with its other partners when it submits an offer for an 8(a) BD competitive procurement, so long as the following conditions are met:
- (a) All Partners are Small (13 C.F.R. § 124.513(b)(1)). All of the joint venture partners are small for the size standard assigned to the procurement, and:
 - (b) The size of at least one 8(a) BD participant firm is less than half the size standard; and
 - (c) If a revenue-based size standard applies, the procurement exceeds half the size standard or if an employee-based size standard applies that the procurement exceeds \$10 million.

Example 1: Company A is an 8(a) BD certified firm that creates joint venture AB with Company B, which is not an 8(a) BD certified firm. Joint venture AB submits an offer for an 8(a) BD set-aside contract with a size standard of \$14 million and an estimated value of \$7.5 million. Companies A and B are both small for the size standard. The average three-year annual receipts for Company A's three most recently completed fiscal years is \$6.5 million so Company A's size is less than half that of the size standard. Companies A and B are not affiliated because: (1) both firms are small for the size standard; (2) the 8(a) BD participant firm's size is less than half the size standard; and (3) the procurement exceeds half the size standard.

Example 2: Company C is an 8(a) BD certified firm and Company D, which is a non-8(a) BD certified firm, form joint venture CD. Joint venture CD submits an offer for an 8(a) BD set-aside contract with a size standard of 500 employees and an estimated value of \$11 million. Companies C and D are small for the size standard. On average, Company C employed 200 individuals in each pay period for the completed 12-month period prior to the firm's initial offer including price. Companies C and D are not affiliated because: (1) both firms are small for the size standard; (2) the 8(a) BD participant firm's size is less than half the size standard; and (3) the procurement exceeds \$10 million.

- (4) 8(a) BD Mentor-Protégé Joint Ventures. A joint venture between an 8(a) protégé and its SBA-approved mentor is considered small if the protégé is small for the size standard, and if:
- (i) For 8(a) BD Program Procurements. The joint venture agreement has been approved prior to contract award in accordance with 13 C.F.R. § 124.513 and if for an 8(a) BD sole source award, the joint venture has not reached the dollar limit set forth in 13 C.F.R. § 124.519;
 - (ii) For non-8(a) BD Program Procurements. SBA does not need to approve the joint venture prior to award; however, if size is protested, the provisions of 13 C.F.R. § 124.513(c) and (d) will apply.

For more information about the 8(a) BD Mentor-Protégé Program, click [here](#).

General Affiliation of Parties to a Joint Venture

Three Awards in Two Years. Generally, the parties to a joint venture will be affiliated with each other for all purposes if that specific joint venture receives more than three contract awards over a two-year period. The two-year period begins on the date of award of the first contract received by the joint venture. The same parties may create different, specific joint ventures that can again qualify to receive three contract awards over a two-year period; however, eventually such a long-standing relationship may lead to a finding of general affiliation between the parties where one of the joint venture partners is generally reliant on the other for a significant portion of its contracts.

Example 1: Joint venture AB receives its first contract award on August 17, 2010. AB receives its second award on June 1, 2011. AB then submits offers on April 4, 2012, June 14, 2012, and July 5, 2012. On August 31, 2012, AB learns that it is the apparent successful offeror for all three offers that it submitted in April, June, and July 2012. AB may perform all five contract awards without a finding of affiliation for purposes of those contracts or in general based solely on the number of awards received over a two-year period because AB submitted its offers within the two-year period from August 17, 2010, through August 17, 2012, and it had received two or fewer awards during the two-year period preceding the date of its initial offers including price for all three offers made in April, June, and July 2012. The number of offers submitted during the two-year period does not count against the three awards that may be received.

Example 2: Joint venture AB received three contract awards during the two-year period from August 17, 2010 through August 17, 2012. The same joint venture partners of AB then create joint venture CD on August 31, 2012. Joint venture CD may receive up to three contract awards during the two-year period from August 31, 2012, through August 31, 2014; however, the continued relationship between the same joint venture partners may eventually lead to a finding of general affiliation for all purposes (e.g., one company to a joint venture partner submits an offer for a solicitation itself, it may be deemed affiliated with the other companies in the joint venture for purposes of that solicitation/contract).

8. When may SBA find affiliation between a prime contractor and its subcontractor (13 C.F.R. § 121.103(h)(4))?

A prime contractor and its subcontractor may be found affiliated if the subcontractor is determined to be an “ostensible subcontractor”. In that case, SBA will treat the prime and subcontractor as joint venturers, which requires that the entities be affiliated.

SBA will find that a subcontractor is an “ostensible subcontractor” when:

- (1) The subcontractor performs the primary and vital requirements of a contract, or of an order under a multiple award schedule contract; or
- (2) The prime contractor is unusually reliant on the subcontractor.

All aspects of the relationship between the prime and subcontractor are considered, including the terms of the proposal, agreements between the prime and subcontractor, and

whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

Example 1: Company A and Company B form Team AB, which submits an offer for a small business set-aside contract. Company A is the prime contractor and Company B is the subcontractor. The teaming agreement does not provide a detailed description of the tasks and the percentage of work to be performed by Company A or Company B but states that Company A will perform the majority of the work. Company A is located at the same address as Company B. Company A employs 10 individuals who will perform administrative duties and some of the primary requirements associated with the contract. Company B employs 50 individuals who will manage the contract and also perform the primary requirements associated with the contract. Company B wrote the Team's proposal and is supporting Company A financially for this contract so that Company A may qualify to receive bonding to perform this contract. Company B is Company A's ostensible subcontractor based on the totality of the circumstances and thus Company A and Company B are affiliated.

Example 2: Company C and Company D form Team CD, which submits an offer for an 8(a) BD competitive set-aside contract to provide building maintenance services. The primary and vital tasks of the procurement are electrical maintenance and mechanical maintenance services. Other, non-primary tasks associated with the contract include elevator maintenance. Company C is the prime contractor and Company D is the subcontractor. The teaming agreement states that Company C will perform at least 51% of the work associated with this contract. Team CD's proposal states that 100% of the labor expenses associated with elevator maintenance and management services, and 30% of the labor expenses associated with mechanical and electrical engineering services will be spent on Company C's personnel. The proposal states that the remaining 70% of the labor expenses associated with the primary and vital requirements of mechanical and electrical maintenance will be spent on Company D's personnel. Although Company C is spending at least 51% of the overall labor expenses on its own employees, it is spending 70% of the labor expenses associated with the primary and vital requirements on Company D's employees. As a result, Company D is Company C's ostensible subcontractor because it is performing the majority of the primary and vital requirements, and therefore Company C and Company D are affiliated.

Example 3: Company E submits an offer for a small business set-aside contract to provide software development services. Company F is Company E's subcontractor. The estimated value of the procurement is \$10 million. The solicitation requires that all offerors demonstrate that the prime or one of its subcontractors has experience performing at least 3 contracts of similar size and scope in the past 5 years. Company E has no experience in the computer software industry but can demonstrate management and consulting experience for contracts with values below \$1 million. Company E's proposal highlights Company F's experience as a prime contractor on at least 3 contracts of similar size and scope during the past 3 years. This past performance submission does not violate the

requirements of the solicitation but it demonstrates that Company E is unusually reliant on Company F and would not qualify to receive this contract without Company F's past performance. As a result, Company F is Company E's ostensible subcontractor and the firms are affiliated.

9. When may SBA find affiliation as a result of a franchise or license agreement (13 C.F.R. § 121.103(i))?

SBA will not consider the restrictions imposed by a license or franchise agreement as they relate to standardized quality, advertising, accounting format or similar provisions, when determining whether the franchisor or licensor is affiliated with the franchisee or licensee, if the franchisee or licensee has the right to profit and bears the risk of loss associated with ownership. Even if SBA does not find affiliation as a result of the franchise or license agreement, it may find affiliation through other means such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

10. When will SBA find affiliation based on the totality of circumstances?

In determining whether affiliation exists, SBA may consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation. 13 C.F.R. § 121.103(a)(5).

Totality of the circumstances is not an independent basis of affiliation. The specific independent bases of affiliation, *i.e.*, those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h) are the nucleus of a finding of affiliation through the totality of the circumstances. Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. § 121.103(c), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates. 13 C.F.R. § 121.103(a)(5); *Size Appeal of A.M. Kinney Associates*, SBA No. SIZ-4401, at 5-8 (2000); *Size Appeal of Inland Dredging Company, LLC*, SBA No. SIZ-4350, at 6 (1999); *Size Appeal of Field Support Services, Inc.*, SBA No. SIZ-4176, at 10 (1996).

11. Are there any exceptions to these rules on affiliation (13 C.F.R. § 121.103(b))?

Yes, SBA has set forth the following exceptions to the general rules on affiliation. These mean that SBA will not find affiliation if any of the following apply:

- (1) A business that is wholly owned or substantially owned by investment companies or development companies that are licensed or qualified under the Small Business Investment Act of 1958 (SBIA), are not considered affiliates of those investment companies or development companies.

Example: Company A is 51% owned by Company B, a Small Business Investment Company (SBIC) that is licensed under the SBIA. Company A is not affiliated with Company B.

- (2) An applicant for financial, management, or technical assistance under the SBIA is not affiliated with the following investors:
- (a) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 2 C.F.R. § 2510.3-101(d)
 - (b) Employee benefit or pension plans established and maintained by the Federal government or any state, or their political subdivisions, or any agency or instrumentality thereof, for the benefit of employees;
 - (c) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974, as amended;
 - (d) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under section 501(c) of the Internal Revenue Code of 1986, as amended;
 - (e) Investment companies registered under the Investment Company Act of 1940 (Act of 1940), as amended; and
 - (f) Investment companies as defined under the Act of 1940, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than the operation of commercial enterprises.
- (3) A business that is owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs), or which is owned and controlled by an entity that is wholly owned by an Indian Tribe, ANC, NHO or CDC, are not considered affiliates of such business concerns or entities.

Example 1: Company A is 51% owned and controlled by an ANC. Company A is not affiliated with its 51% ANC owner.

Example 2: Company A is 51% owned by Company B. Company B is 100% owned by an Indian Tribe. Company A is not affiliated with Company B based upon ownership.

- (4) A business that is owned and controlled by Indian Tribes, ANCs, NHOs, and CDCs, or which is owned and controlled by an entity that is wholly owned by an Indian Tribe, ANC, NHO or CDC, is also excluded from affiliation based on common ownership and common management with other concerns owned by these Indian Tribes, ANCs, NHOs, and CDCs. In addition, SBA will not find affiliation based upon the performance of common administrative services (e.g., bookkeeping and payroll) if there is adequate payment for those services.

Example 1: Company A is 51% owned and controlled by an ANC. Company B is also 51% owned and controlled by the same ANC. Company A and Company B

share the same ownership and management team however these firms are excluded from affiliated.

Example 2: Company A is 51% owned by Company B. Company B is 100% owned by an Indian Tribe. Company B also owns Company C. Company A and Company C are not affiliated despite the fact they share the same ownership and management.

- (5) A business that is part of an SBA approved pool of concerns for a joint program of research and development, or for defense production as authorized by the Small Business Act are not affiliates of one another because of the pool.
- (6) A business that leases employees from a business primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a Professional Employer Organization (PEO) is not affiliated with the leasing company or PEO solely because it leases or co-employs employees.

Example: Company A leases 80% of its employees from a company that primarily leases individuals to other companies. Company A is not affiliated with the leasing company solely because of the leasing relationship.

- (7) A business that participates in the 8(a) Business Development (BD) program and has an SBA-approved mentor-protégé agreement is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Affiliation may be found for other reasons
- (8) The member shareholders of a small agricultural cooperative, as defined in the Agricultural Marketing Act (12 U.S.C. 1141j), are not considered affiliated with the cooperative by virtue of their membership in the cooperative.
- (9) For a bundled contract with a small business reserve, a prime and its subcontractors that form a Small Business Teaming Arrangement are not considered affiliated if each team member is small under the size standard assigned to the contract and there is a written and signed agreement amongst all the small businesses.

SUMMARY OF AFFILIATION

<i>Category</i>	<i>Affiliation may be found if...</i>
Ownership	<ul style="list-style-type: none"> ▶ An individual, concern, or entity owns or has the power to control more than 50% of voting equity ▶ An individual, concern, or entity owns or has the power to control a block of stock that is large compared to others ▶ Two or more persons owns, controls or has the power to control less than 50% of voting equity and such holdings are equal or about equal in size and are large compared to other holdings, SBA presumes that each controls or has the power to control. ▶ If voting equity is widely held and no block is large as compared to all others, then Board and CEO/President will be deemed to control.
Options, convertible securities, agreements to merge (given <i>present effect</i>)	<ul style="list-style-type: none"> ▶ If an individual or entity has control with the exercise of options and/or convertible securities and agreements to merge; however, agreements that are open or merely continue negotiations about a possible merger are not given present effect
Common management	<ul style="list-style-type: none"> ▶ Officers, managing members, partners who control the management of the concern also control the management of another concern ▶ Individuals or entities that control the board of directors of the concern also control the board or management of another concern
Identity of interest	<ul style="list-style-type: none"> ▶ SBA may <i>presume</i> identity of interest among two or more persons/entities, and therefore affiliation, such as: <ul style="list-style-type: none"> (a) Between family members or individuals/firms with common investments and with identical or substantially identical business or economic interests. (b) If a firm economically relies on another firm (e.g., for a certain percentage such as 70% or more of its receipts).
Newly organized concern	<ul style="list-style-type: none"> ▶ The firm's officers, directors, principal stockholders, managing members, general partners, or key employees <i>organize another concern</i> in the same or related industry or field, and serve in such capacity for the new concern and the one furnishes the other with contracts, or other assistance. The firm can rebut the presumption of affiliation by showing there is a clear line of fracture between the two.
Joint ventures	<ul style="list-style-type: none"> ▶ Parties to a joint venture that submit an offer for a particular procurement or property sale are affiliated with each other for performance of that particular contract, unless one of the exceptions to affiliation listed apply. ▶ Generally, the parties to a joint venture will be affiliated with each other for all purposes if that specific joint venture receives more than three contract awards over a two-year period. The two-year period begins on the date of award of the first contract received by the joint venture. ▶ The same parties may create different, specific joint ventures that can again qualify to receive three contract awards over a two-year period; however eventually such a long-standing relationship may lead to a finding of general affiliation between the parties. ▶ See exceptions to affiliation.
Ostensible subcontractor	<ul style="list-style-type: none"> ▶ The firm is a subcontractor <ul style="list-style-type: none"> (a) that performs or will perform primary and vital requirements of a contract or (b) upon which the concern is unusually reliant.
License agreements	<ul style="list-style-type: none"> ▶ There is a license agreement and the licensee has no right to profit from its efforts with regard to the agreement and does not bear the risk of loss
Totality of the circumstances	<ul style="list-style-type: none"> ▶ Based upon the totality of circumstances, SBA determines that affiliation exists.

CALCULATING SIZE - RECEIPTS

How do I know if I am small for a receipts-based size standard?

If the size standard is receipts-based, the small business will need to calculate its annual receipts for each of its three most recently completed fiscal years and divide the total by three. Therefore, if the concern's annual receipts were \$3M for 2010, \$10M for 2011 and \$2M for 2012, and it had no affiliates, its size would be \$5M.

If the concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

What if I have been in business for less than three years?

If you have been in business for less than three complete fiscal years, then you would take the total receipts for the period you have been in business, divide by the number of weeks in business, and then multiply by 52.

Do I include the receipts of my affiliates?

Yes. The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

What if I acquired my affiliate recently?

If you acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which you self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

What if the affiliate has been in business for less than three years?

If the affiliate has been in business for a period of less than three years, the receipts for the fiscal year with less than a 12 month period are annualized. In other words, you would take the total receipts for the period the concern has been in business, divide by the number of weeks in business, and then multiply by 52.

What if the business is no longer my affiliate?

You would not include the annual receipts of a former affiliate if the affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

What does SBA mean by the term “receipts”?

Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships).

Is there anything I can exclude from “receipts”?

You would not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker.

For size determination purposes, these are the only exclusions from receipts. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

What tax return would I use to determine my “receipts”?

You would use the Federal income tax return and any amendments filed with the IRS on or before the date of self-certification to determine your size status. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

What if I haven't filed my tax return yet for a fiscal year?

If you have not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

What do you mean by completed fiscal year?

A *completed fiscal year* means a taxable year including any short year. “Taxable year” and “short year” have the meanings attributed to them by the IRS.

Where can I find the regulations about annual receipts?

They are located at 13 C.F.R. § 121.104.

CALCULATING SIZE – EMPLOYEES

How do I know if I am small for an employee-based size standard?

You would take the average number of employees of your concern (including the employees of all domestic and foreign affiliates) based upon the number of employees for each of the pay periods for the preceding completed 12 calendar months.

Who is considered an employee?

SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employer organization, or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern.

Are volunteers considered employees?

Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

Do you count part-time and temporary employees the same as full-time employees?

Yes. Part-time and temporary employees are counted the same as full-time employees.

What if I have been in business for less than a year?

If you have been in business for less than 12 months, you would take the average number of employees each of the pay periods during which you have been in business.

How do I calculate the average number of employees, including affiliates?

You would add the average number of employees of your business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

Do I include the employees of a former affiliate?

You would not include the employees of a former affiliate if the affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

Where can I find the regulations about calculating number of employees?

They are located at 13 C.F.R. § 121.106.

FURTHER INFORMATION

The above is an overview of some basic principles of size and affiliation as set forth in SBA's regulations and decisions from SBA's Office of Hearings and Appeals (see <http://www.sba.gov/oha>). You should review all applicable regulations carefully before certifying a business's size status.

For further information or questions, please contact the SBA Size Specialist who is responsible for the area in which the company is located. See below or <http://www.sba.gov/content/government-contracting-field-staff-directory> for a directory. There are six area offices in SBA's Office of Government Contracting, listed below. Each has someone designated as a Size Specialist.

Area I

Office of Government Contracting
Boston Area Office
Small Business Administration
10 Causeway Street
Room 265
Boston, MA 02222-1093
Tel: (617) 565-5622 or (631) 454-0750

Area II

Office of Government Contracting
Philadelphia Area Office
Small Business Administration
Parkview Tower 1150 First Avenue
Suite 1001
King of Prussia, PA 19406
Tel: (610) 382-3190

Area III

Office of Government Contracting
Atlanta Area Office
Small Business Administration
233 Peachtree Street, NE
Suite 1805
Atlanta, GA 3030
Tel: (404) 331-7587, x 208

Area IV

Office of Government Contracting
Chicago Area Office
Small Business Administration
500 West Madison Street

Suite 1240
Chicago, IL 60661-2511
Tel: (312) 353-7674

Area V

Office Government Contracting
Dallas Area Office
Small Business Administration
4300 Amon Carter Boulevard
Suite 116
Fort Worth, TX 76155
Tel: (817) 684-5302

Area VI

Office of Government Contracting
San Francisco Area Office
Small Business Administration
455 Market Street
Suite 600
San Francisco, CA 94105
Tel: (415) 744-6844

IN WASHINGTON, DC, THERE ARE TWO OFFICES THAT YOU MAY CONTACT

Office of Size Standards

U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416
Tel: (202) 205-6618

Office of Contract Assistance

U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416
Tel: (202) 205-6460