Meeting the Small Business Classification

Issue:
This brief explains the verification requirement that an applicant provide documentation that it meets the classification of a small business as defined by the Small Business Administration (SBA).

(For purposes of this brief, the regulations when referring to Service-Disabled Veterans applies equally to Veterans; applicant refers to the business entity applying for verification; and participant refers to a business entity that has already been verified.)

The Regulations:

**13 C.F.R. § 125.11** provides:

> Veteran owned small business concern means a small business concern:

(1) Not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans. All of the provisions of subpart B of this part apply for purposes of determining ownership and control.

**38 C.F.R. § 74.1** provides “[s]mall business concern (SBC) has the same meaning given to such term in 13 CFR part 125.”

**13 C.F.R. § 125.11** provides “[s]mall business concern means a concern that, with its affiliates, meets the size standard corresponding to the NAICS code for its primary industry, pursuant to part 121 of this chapter.”

**13 C.F.R. § 121.101(a)** provides “SBA’s size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for “small business” concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS).”

**13 C.F.R. § 121.104(a)** provides “[r]eceipts means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered “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...”

**13 C.F.R. § 121.104(c)** provides

...(1) Except for the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5. For certifications submitted on or before January 6, 2022, rather than using the definitions in this paragraph (c), a concern submitting a certification may elect to calculate annual receipts and the receipts of affiliates using either the total receipts of the concern or affiliate over its most recently completed 5 fiscal years divided by 5, or the total receipts of the concern or affiliate over its most recently completed 3 fiscal years divided by 3.

(2) Except for the Business Loan and Disaster Loan Programs, annual receipts of a concern
which has been in business for less than 5 complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Except for the Business Loan and Disaster Loan Programs, where a concern has been in business 5 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 4 full fiscal years divided by the total number of weeks in the short year and the 4 full fiscal years, multiplied by 52.

4) For the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three. Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52. Where a 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...

13 C.F.R. §§ 121.106(a) and (b) provide
“(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee 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. Volunteers (i.e., individuals who receive no compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern’s size includes the following principles:

1. The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

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

3. If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

4. The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the 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.

13 C.F.R. § 121.1002 provides “[t]he responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination...”

13 C.F.R. § 125.8(a) provides “[a] joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of
the exceptions to affiliation set forth in § 121.103(h)(3) of this chapter.”

13 C.F.R. § 121.103(h)(1)(i) provides “[a] joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.”

13 C.F.R. § 121.103(h)(1)(ii) provides “[t]wo firms approved by SBA to be a mentor and protégé under §125.9 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of § 124.513 (c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.”

38 C.F.R. § 74.2(e) states “[a]ny firm verified in the VIP database that is found to be ineligible by a SDVOSB/VOSB status protest decision will be immediately removed from the VIP database, notwithstanding the provisions of §74.22. Any firm verified in the VIP database that is found to be ineligible due to a U.S. Small Business Administration (SBA) protest decision or other negative finding may be immediately removed from the VIP database, notwithstanding the provisions of §74.22. Until such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination, that the decision is overturned on appeal, or the firm applies for and receives verified status from CVE, the firm will not be eligible to participate in the 38 U.S.C. 8127 program.”

What This Means:

- Subpart B as referred to in 13 C.F.R. § 125.11 is saying that anywhere in the regulations where the term Service-Disabled Veteran is used, it is equally applicable to Veterans for purposes of determining eligibility.
- NAICS Code(s) listed on an applicant’s VIP profile must not exceed the size standards represented by those NAICS Codes.
- An applicant should only list NAICS Codes on its VIP profile in which it qualifies as small.
- During the verification process, CVE will review the documentation submitted to confirm whether the applicant qualifies as a small business concern.
- Depending on the NAICS Code(s) selected, size is determined by either gross receipts or number of employees.
- Effective January 6, 2022, an applicant’s average 5-year annual gross receipts must not exceed the SBA size standards established under each selected NAICS Code.
- If the size standard is based on the number of employees, CVE may review the firm’s IRS Form 941(s) or payroll records to determine the average number of employees, employed by the firm over the most recent 12-month period.
- If an applicant is denied because it does not qualify as a small business, it will have to provide evidence that it is in fact a small business concern in its selected NAICS Codes as defined by the SBA.
- For firms applying as joint ventures, each partner to the joint venture must individually qualify as a small business under the NAICS Codes listed on the joint venture’s VIP profile unless the joint venture has an approved mentor protégé
agreement. In such case, only the protégé is required to qualify as a small business.

- If your firm has received a size determination from the SBA that it does not qualify under a particular size standard and it is in the process of applying for verification, CVE may request information demonstrating that it meets the size standards established for the NAICS Codes listed on its VIP profile, which may include official documentation demonstrating that it has either overcome the grounds for the determination or the SBA decision has been overturned on appeal.

- If a participant receives a size determination of other than small from the SBA and it is currently registered in the VIP database, CVE shall remove the firm from the database until CVE receives official documentation demonstrating that the business has either overcome the grounds for the determination or the SBA decision has been overturned on appeal. Alternatively, CVE may issue a Notice of Proposed Cancellation on the basis that the participant no longer qualifies as a small business.

- If the applicant has never received a size determination from the SBA, then it is up to the firm to self-represent on its VIP profile the appropriate NAICS Code(s).

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