

APPENDIX A

SIZE ELIGIBILITY, CONTRACTING PARTICIPATION LEVELS, AND AFFILIATION DETERMINATION

A. General: Only small businesses that meet size limits as to average annual gross revenues for the last three years may be codified as CSBEs. Certified CSBEs will be further categorized by contracting participation levels in accordance with levels of bonding capacity determined during a prequalification process. Size determinations for certification eligibility and contracting participation levels shall take into account the combined gross revenues and bonding capacities of the applicant business concern and all of its domestic and foreign affiliates. All affiliates of the applicant firm, regardless of whether organized for profit, shall be included.

B. Affiliation: Business concerns are considered affiliates of each other when either directly or indirectly:

- i. One concern controls or has the power to control the other, or
- ii. A third party or parties controls or has the power to control both, or
- iii. An identity of interest between or among parties exists such that affiliation may be found.

1. In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships. Variations of these factors are examined more closely below: a. Nature of control in determining affiliation.

(1) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

(2) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors.

(3) Control can arise through management positions where a concern's vote stock is so widely distributed that no effective control can be established.

b. Identity of interest between and among persons as an affiliation determinant.

Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control a concern, persons with an identity of interest may be treated as though they were one person.

c. Affiliation through stock ownership.

(1) A person is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control fifty (50) percent or more of its voting stock.

(2) A person is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than fifty (50) percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(3) If two or more persons each owns, controls or has the power to control less than fifty (50) percent of

the voting stock of a concern; such minority holdings are equal or approximately equal in size; and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each such person individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

d. Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

e. Affiliation under voting trusts.

(1) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may qualify as a small business within the size regulations, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction. However, if a voting trust is primarily entered into for a legitimate purpose other than that described above, and it is recognized within the appropriate jurisdiction, it may be considered valid for the purpose of a size determination.

(2) Agreements to divest (including agreements in principle) are not considered to have a present effect on the power to control the concern.

f. Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another concern.

g. Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated.

h. Affiliation with a newly organized concern. Affiliation generally arises where former officers, directors, principal stockholders, and/or key employees of one concern organize a new concern in the same or a related industry or field of operation, and serve as its officers, directors, principal stockholders, and/or key employees, and the concern is furnishing or will furnish the other concern with subcontracts, financial or technical assistance, bid or performance bond indemnification, and/or other facilities, whether for a fee or otherwise.

i. Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that its economic viability would be in jeopardy without such contracts/business.

j. Affiliation under joint venture arrangements.

(1) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(2) For the purpose of financial assistance to a joint venture, the parties thereto are considered to be affiliated with each other. Where the financial assistance, however, is to a concern for its own use, outside the joint venture, an affiliation determination shall not automatically arise from the existence of the joint venture arrangement. In this latter situation, the existence of affiliation shall be determined under these regulations.

(3) Concerns bidding on a particular construction contract as joint ventures are affiliated with each other with regard to performance of the contract. This determination of affiliation does not extend to other contracts or business outside the joint venture arrangement.

(4) An ostensible subcontractor which performs or is to perform primary or vital requirements of a contract may have such a controlling role that it must be considered a joint venture affiliated on the contract with the prime contractor. In determining whether subcontracting arises to the level of affiliation as a joint venture, DBD considers whether the prime contractor has unusual reliance on the subcontractor.

(5) Even though a concern might not be an affiliate of its joint ventures for the purpose of operations apart from the joint venture, it nevertheless must include its proportionate share of the joint venture receipts or employees in determining its eligibility under the size standards.

k. Affiliation under franchise and license agreements. In determining whether the franchiser controls or has the power to control and, therefore, is affiliated with the franchisee, the restraints, relating to standardized quality, advertising, accounting format and other provisions, imposed on a franchisee by its franchise agreement shall generally not be considered, provided that the franchise has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee may not be controlled by the franchiser by virtue of such provisions in the franchise agreement, control and, thus, affiliation could arise through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

1. C. Gross Annual Revenues.

a. In size determinations, size eligibility requires that the concern may not exceed the three year average gross annual revenues in the applicable standard.

b. Definitions. For the purpose of determining annual gross revenues of a concern:

(1) Accrual basis means a method of accounting in which accounts and notes receivable are recorded in the regular books of account for the period in which the firm first has a claim of right to them

(2) Claim of right has the meaning attributed to it by the U.S. Internal Revenue Service (IRS).

(3) Gross Revenues is defined to include 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. However, the term revenues excludes proceeds from sales of capital assets and investments, proceeds from transactions between a concern and its domestic and foreign affiliates, amounts collected for another by a travel agent or real estate agent, and taxes collected for remittance to a taxing authority.

(4) Regular books of account means the general ledger or other book of final entry and, if used, the journals or other books of original entry.

(5) Completed fiscal year means a taxable year including any short period. Taxable year and short period have the meaning attributed to them by the IRS.

(6) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

c. Period of measurement.

(1) Annual gross revenues of a concern which has been in business for three (3) or more completed fiscal years means the arithmetic annual average revenue of the concern over its last three (3) completed fiscal years (total revenue compiled over the entire three (3) year period would be divided by three).

(2) Annual gross revenues of a concern which has been in business for less than three (3) fiscal years means the arithmetic annual average revenue over the time period the concern has been in business (total revenues compiled over the period the concern has been in business, divided by the number of weeks, including fractions of a week, the concern has been in business, multiplied by 52).

(3) Annual gross revenues of a concern which has been in business three or more years but has a short year in the last three years will be the arithmetic annual average revenue over the two full years and the short year. See paragraph 3.c.5. of this section. The short period may appear at the beginning, middle or end of the three year calculation period.

d. Method of determining annual gross revenues.

(1) Revenue may be taken from the regular books of account of the concern. If the concern so elects, or has not kept regular books of account, or the IRS has found such records to be inadequate and has reconstructed income of the concern, then revenues shown on the federal income tax return of the concern may be used in determining annual gross revenues. Subject to the exception in paragraph 3.c.4. of this section, revenue shown on the regular books of account or the Federal Income tax return on a basis other than accrual must be restated to show revenue on an accrual basis for all fiscal years.

(2) Where the Federal Income tax return of a concern, restated if necessary pursuant to paragraph (d)(1) of this section to reflect the percentage of completion method, shows its annual gross revenues to be less than seventy-five (75) percent of the applicable size standard, the concern need not restate its revenue to an accrual basis prior to determining annual revenues.

(3) Where a short period is included in the concern's most recent three (3) years, annual gross revenues are calculated by dividing the sum of the revenues of the short year and the receipts of the two (2) full fiscal years by the sum of the number of weeks in the short fiscal year and the number of weeks in the two full fiscal years, and multiplying that figure (the weekly average revenues) by fifty-two (52).

e. Annual gross revenues of affiliates.

(1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period or before certification, the annual gross revenues in determining size status include the revenues of both the applicant and the affiliate. Furthermore, this aggregation of the revenues of both the

applicant and its affiliates applies for the entire applicable averaging period used in computing size (usually the preceding three (3) complete fiscal years) rather than only for the period after the affiliation arose.

(2) The annual gross revenues of a concern which had been an affiliate of the applicant during part of the period used in determining size (usually the preceding three complete fiscal years), but was not an affiliate at the time of certification, are not included within the computation of annual gross revenues in making size determinations. This exclusion of annual gross revenues of a former affiliate applies during the entire period used in computing size, rather than only for the period after which the affiliation ceased.