

THE INS AND OUTS OF FILING SIZE PROTESTS WITH THE SMALL BUSINESS ADMINISTRATION

BY STEVEN J. KOPRINCE



It's a situation familiar to any procurement attorney: An angry client is on the telephone, convinced that his or her company unfairly lost a government contract to a competitor. You are about to begin discussing protest options at the Government Accountability Office (GAO) and the Court of Federal Claims, when the client throws you a bit of a curveball. Rather than complaining about the agency's technical or price evaluations, the client tells you that the procurement was a set-aside for small businesses, and the client is convinced that the successful awardee is not a small business.

For contractors and procurement lawyers alike, the GAO is often the preferred forum for resolving procurement disputes. But in this case, there is a not-so-insignificant problem—the GAO lacks jurisdiction to hear challenges to the size status of a contract awardee. The same is true of the Court of Federal Claims. Instead, the U.S. Small Business Administration (SBA) has exclusive jurisdiction to determine whether the awardee of a small business set-aside contract is, in fact, small. You tell your client that he or she should file a “size protest,” asking the SBA to evaluate the awardee's eligibility.

Now what?

The amount of government contracts set aside for small businesses annually totals nearly \$100 million, and anecdotal evidence suggests that size protests are on the rise, as small businesses fight as hard as they can for every federal dollar in a difficult economic climate. If your client list includes small businesses that compete for government contracts, you owe it to yourself to understand how the SBA's size protest process works. Consider this article your “cheat sheet.”

Standing to File a Size Protest

Not just anyone can file a size protest; the protester must be an “interested party.” Unlike the setting in a bid protest with the GAO, a size protest with the SBA does not require the protester to be “next in line” for an award in order to be considered an interested party. Rather, a protest may be filed by “any offeror whom the contracting officer has not

eliminated for reasons unrelated to size.”¹ Thus, if an offeror finishes in sixth place, it may not have standing to file a protest with the GAO (depending on the nature of the protest), but it may file a size protest with the SBA.

However, an offeror is not an “interested party” if it has been eliminated from the competition for reasons that are not related to the size of the business. For instance, in *Size Appeal of Fitnet Purchasing Alliance*,² an offeror attempted to file a size protest, even though its proposal had been deemed technically unacceptable. The SBA's Office of Hearings and Appeals (OHA) held that the offeror was not an interested party and therefore was not eligible to pursue the protest.

In addition to disappointed offerors, the government agency's contracting officer, the SBA itself, and “other interested parties” may also file size protests.³ Of particular note, contracting officers and the SBA are not bound by the strict timeliness requirements that govern protests by other parties. For this reason, if a losing offeror fails to submit its own size protest in time, it may attempt to convince the contracting officer or SBA to “adopt” the putative protester's grounds of protest.

The OHA has held that an employee of a small business was an “other interested party,” even though he filed a size protest in his individual capacity, instead of on behalf of his company.⁴ In contrast, the OHA has consistently ruled that a subcontractor lacks standing to file a size protest, even though subcontractors are arguably very “interested,” since their subcontract awards depend on the prime contractor's award.⁵ A subcontractor must work with its prime contractor if it wishes to file a size protest.

Contents of a Size Protest

A size protest does not need to be in any particular form. However, in order to avoid dismissal, a size protest must be both “particular” and “specific.”

Particularity means that a size protest must relate to the party that has been awarded or proposed to be awarded a particular contract.⁶ Put another way, a protester cannot simply allege, in a vacuum, that one of its competitors is

not a small business. Instead, the protest must identify a particular solicitation under which the protested business is the awardee or proposed awardee; otherwise, the SBA will dismiss the protest.

In addition, a size protest must be “sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern’s size is questioned.”⁷ The protester is required to provide “[s]ome basis for the belief or allegation stated in the protest.”⁸ It is not enough to baldly state that Business A is not small—rather, the protester must say *why* it believes that the business does not fall within the applicable size standard. In most cases, to back up its allegations, the protester must submit some third-party evidence, such as Dun & Bradstreet reports, website printouts, and so on.

The SBA will dismiss a protest if the protester asks the SBA to do the initial research itself. For instance, simply stating that the awardee’s size is questionable and “should be researched” is not enough to meet the specificity requirement.⁹ Nor is it enough to tell the SBA *where* to do the research. In one case, a protester asked the SBA to review the website of the business whose award was being protested, stating that the website contained evidence that the business was not small. The OHA held that the protest was not specific, writing “[i]f a protester is going to reference a website in its protests, the protester must identify information from that website and explain why that information demonstrates why the protested concern is other than small.”¹⁰

Timeliness of a Size Protest

Size protests must be filed with the SBA very quickly. The regulations require size protests to be *received* by the contracting officer (not *filed* with the officer) within five days (excluding Saturdays, Sundays, and legal holidays) after a specific event occurs. The date the five-day period begins depends on the type of contract:

- *Non-negotiated procurement or sale*: A size protest for a non-negotiated procurement must be received before the close of business on the fifth day after the opening of the bid or proposal.¹¹
- *Negotiated procurement*: A size protest for a negotiated procurement must be received before the close of business on the fifth day after the contracting officer has notified the protester of the identity of the prospective awardee.¹²
- *Long-term contracts*: For contracts with durations longer than five years (including option periods)—such as Multiple Award Schedule Contracts, Multiple Agency Contracts, and Government-Wide Acquisition Contracts—the following rules apply:
 - *Contracts*: Size protests of the contract award itself must be received before the close of business on the fifth day after receipt of notice of the identity of the prospective awardee or award.
 - *Option periods*: Size protests of the exercise of an option period must be received by the contracting officer prior to the close of business on the fifth day

after receipt of notice of the size certification made by the business whose award is being protested.

- *Individual orders*: Protests based on a size certification made in response to a contracting officer’s request for size certifications on an individual order must be received by the close of business on the fifth day after receipt of notice of the identity of the prospective awardee or award.¹³
- *Architectural/Engineering Services*: The OHA has held that, under Federal Acquisition Regulation (FAR) 36.6, the protest period for contracts for architectural/engineering services is triggered when the government informs offerors that one of their bids has been chosen for negotiation.¹⁴

In contrast to the SBA’s regulation, FAR 19.302 provides that a size protest under a Multiple Award Schedule is timely “if received by SBA at any time prior to the expiration of the contract period, including renewals.”¹⁵ Contractors should assume that the SBA will enforce its own regulation rather than the conflicting FAR provision.

Contractors anticipating a possible size protest must be vigilant, because the clock may start ticking even if the contractor has not been sent a formal, written notification of the agency’s proposed award to a competitor. Under the regulations, the five-day period begins when notification of award is received electronically. Prospective contractors should monitor FedBizOpps (fbo.gov), any agency-specific procurement website, and their e-mail accounts to ensure that they do not miss an announcement of a proposed award.

Sometimes, a government agency’s contracting officer may fail to give written notification of award, even if the solicitation and FAR require it. In such cases, the five-day protest clock begins upon the “oral notification of the contracting officer or authorized representative. . . .”¹⁶ Moreover, even if the contracting officer doesn’t directly provide a disappointed offeror with notice of any kind, the clock starts to run when the agency makes a public announcement or otherwise communicates the identity of the apparently successful offeror.¹⁷ Again, contractors contemplating a potential size protest must carefully monitor the agency’s public announcements.

Unlike in the GAO’s bid protest setting, the time to file a size protest with the SBA cannot be extended by requesting a post-award debriefing from the procuring agency. Even if an offeror requests a debriefing, the five-day clock keeps ticking.

A protest filed by any party (including the contracting officer) *before* the bid opening or notification to offerors of the selection of an apparently successful offeror will be dismissed as premature. The rule is designed to “prevent unnecessarily burdening businesses with size investigations and to focus SBA’s resources on businesses where it is clear they are the potential awardees.”¹⁸ The dismissal of a premature protest is typically “without prejudice”—that is, the protest may be filed again at the appropriate time.

Size Protest Filing Requirements

A disappointed offeror should *not* file its size protest

directly with the Small Business Administration. Rather, a size protest must be filed with the government's contracting officer responsible for the procurement.¹⁹ The contracting officer is required to forward the protest to the SBA. If the protester attempts to circumvent this process (even inadvertently) by filing its protest directly with the SBA, the SBA will dismiss the size protest.

A size protest must be delivered to the contracting officer by hand, by U.S. mail, by fax, by e-mail, or by any overnight delivery service, such as FedEx or UPS.²⁰ A protester can also "file" a size protest orally with the contracting officer by telephone. However, if the protester files a protest orally, the contracting officer must receive a confirming letter, postmarked no later than one day after the date of the telephone call, or within the initial five-day protest period discussed below. The letter must be either received by the contracting officer within the initial five-day period or postmarked no later than one day after the date of the telephone call.

As a practical matter, it is highly advisable for protesters to file using a method, such as an overnight delivery service, that guarantees delivery at a certain date and provides a third-party verification of receipt. Protesters should also consider e-mailing or faxing a copy of the protest to the contracting officer in case there are delivery problems. There are no penalties for filing a protest in multiple ways to ensure timely delivery.

The contracting officer must "promptly" forward the protest, together with certain additional information about the procurement and the offeror, to the SBA Government Contracting Office serving the area in which the offeror's headquarters (commonly known as the "area office") is located.²¹ The contracting officer must forward the protest to the SBA, even if he or she believes that the protest is untimely; the SBA, not the contracting officer, makes the decision about the timeliness of the protest.

Effect of Ongoing Size Protest on Procurement

Under the FAR's provisions regulating negotiated procurements, when a government agency sets aside a contract for small businesses, the contracting officer is supposed to give unsuccessful offerors a pre-award notice of the "apparently successful offeror" and the opportunity to contest the awardee's size prior to the contract being awarded. When the agency gives a pre-award notice and a disappointed offeror subsequently files a size protest, the contracting officer must temporarily stay the award, unless he or she determines in writing that the award must be made to in order to protect the public interest.²²

Unlike an override of the automatic stay in a GAO bid protest, the contracting officer does not need to go "up the chain of command" to override the stay of the size protest. If the SBA does not make its determination within 15 business days and the contracting officer does not grant the SBA an extension, the contracting officer may award the contract if he or she determines in writing that there is an immediate need to make award and that waiting for the SBA's size determination will be disadvantageous to the government.²³

It should be noted that this provision, which was added to the SBA's regulations by way of a Final Rule issued in February 2011 (and effective in March 2011), conflicts with the current FAR provision, which calls for a 10-day period and does not require written notice thereafter to make award.²⁴ The GAO has previously held that, in the event of a conflict regarding size provisions, the SBA's regulations are controlling. However, protesters should not assume that the contracting officer is aware of the revised SBA regulation or deems it controlling. Thus, protesters may wish to consider specifically informing contracting officers of the 15-day period and written notice requirements in conjunction with their protests.

Contracting officers are not always required to provide disappointed offers with pre-award notices, and even when pre-award notices are required, contracting officers sometimes neglect to provide them. If the agency awards the contract before a size protest is filed, the agency does not have to suspend performance of work under the contract because of the size protest (unlike the "automatic stay" that kicks in at the onset of many GAO protests). However, a protester is certainly entitled to ask the agency to voluntarily suspend performance pending the SBA's review.

Defending a Size Protest

After the protester submits the size protest, its work is essentially done, and the burden of defending the size status shifts to the business whose award has been protested. Upon receipt of the protest, the area office will notify the contracting officer, the business whose award has been protested, and the protester that the protest has been received. Together with notice of the protest, the SBA will require the protested business to:

- complete an SBA Standard Form 355;
- provide a written response to the protest allegations; and
- furnish other relevant documentation, such as tax returns, financial statements, and contracts, demonstrating its small business size status.²⁵

Importantly, once a size protest has passed the particularity and specificity hurdles, the burden shifts to the protested business to demonstrate that it is a small business.²⁶ Moreover, the protested business does not have much time to meet its burden—only *three business days* after receiving the protest, unless the SBA grants an extension. A protested business should immediately contact counsel upon receiving a size protest and begin the process of filling out Form 355 and gathering the requested documents. If the protested business fails to provide any of the requested information within the time allotted, the SBA may draw an "adverse inference" and assume that the information would be harmful to the protested business.

In crafting its response and deciding what other evidence to submit, the protested business should understand the differing weights the SBA assigns to certain forms of evidence. The SBA gives more weight to documents such as affidavits, which are signed under penalty of perjury, than to unsworn

documents. Because SBA Form 355 requires a protested business to sign under penalty of perjury, SBA will assign it greater weight than most other types of evidence.

However, the SBA also gives more weight to contemporaneous documents—that is, documents created before the protest was filed—than to information created after the protest. Even an affidavit created after a protest has been filed may be deemed less probative than contemporaneous records. Thus, companies engaged in set-aside contracting should be sure to put their best foot forward when it comes to creating subcontracts, teaming agreements, operating agreements, and the like, because a contradictory post hoc affidavit is unlikely to sway the SBA.

The SBA's Decision

After receiving a size protest, the SBA will issue a formal size determination within 15 business days—“if possible.”²⁷ In practice, the various area offices do not always meet the 15-day benchmark. Although the SBA attempts to process size protests as quickly as possible, in rare cases, protests have taken several months to resolve.

The formal determination of the size of a business will conclude either that the protested business is “small” or “other than small” under the size standard corresponding to the solicitation’s North American Industry Classification System (NAICS) code. The SBA must provide its size determination in writing and give the basis for its conclusions. The SBA will provide a copy of the size determination to the contracting officer, the protester, the protested business, and any affiliate or alleged affiliate.

Effect of the SBA's Decision on the Procurement

If the SBA determines that the protested business is small or dismisses the size protest, the agency’s contracting officer may proceed with awarding the contract if the award has been withheld until that time.²⁸ The protester may challenge the size determination by way of an appeal to the SBA’s Office of Hearings and Appeals or may ask the area office to reopen the issue in order to correct an error.

If the SBA finds that the protested business is “other than small,” the contracting officer may not award the contract if the award has previously been withheld.²⁹ In addition, under the SBA’s newly adopted regulations, the contracting officer *must* terminate an ongoing contract if the SBA concludes that the awardee is “other than small,” unless a timely OHA appeal is filed.³⁰

The SBA’s amended regulations go a step further than the GAO’s recent case law, which has required termination unless there are “countervailing reasons for allowing the award to remain in place,” such as the absence of another eligible offeror who can step in and perform the work that is under contract.³¹ Successful protesters would be wise to ensure that the government’s contracting officers are aware of the termination requirement and that the officers understand that the regulations no longer allow continued performance on the basis of “countervailing reasons.”

The SBA’s regulations strongly encourage a business whose award has been protested to appeal a negative outcome. If the protested business appeals an adverse

determination of size in time, the contracting officer does not need to terminate the award. Instead, the contracting officer only needs to “consider whether performance can be suspended” pending the OHA’s decision.³² The contracting officer is not required to suspend the contractor or even make a written determination that suspension would be impractical. In addition, if the OHA upholds the area office’s decision, the contracting officer may terminate the contract, but is not required to do so.

In other words, as long as the protested business appeals the area office’s decision to the OHA, the contracting officer has the discretion to allow the business to complete the entire base period of its contract as well as any option periods beginning prior to the contracting officer’s receipt of the OHA’s decision. However, if the OHA affirms the area office’s determination that the business is “other than small,” the contracting officer may not exercise any subsequent options.

Effect of Adverse Determination of Size on the Protested Business

If the area office determines that a business is “other than small” under a particular size standard, the business becomes ineligible to self-certify as small under the same size standard or one that is lower.³³ The SBA will add the business to its list of “other than small” companies, which is available on the SBA’s website (www.sba.gov/content/businesses-determined-other-small). However, the fact that the business is ineligible for the set-aside kicks in immediately upon the business’s receipt of the size determination, not when the business is added to the list. If the business subsequently self-certifies as a small business, it may face suspension, debarment, or criminal penalties.

In addition to being immediately unable to self-certify as small, the business must “immediately inform” the officials responsible for any pending procurement upon which the business self-certified as small prior to receiving the size determination.³⁴ The business is not required to withdraw pending proposals, but informing a contracting officer of an adverse size determination will certainly not improve a bidder’s chances of a future award. If the business decides to continue pursuing a pending procurement, it should consider telling procuring officials of any perceived errors in the size determination and let the officials know that the business plans to file an appeal with the OHA.

A business on the wrong end of a size determination has three options to reverse its fortunes (and regain its ability to self-certify as a small business). First, the business can ask the area office to reopen the decision in order to correct a mistake.³⁵ In practice, however, area offices seldom reconsider their decisions. Unless the area office makes a glaring error, the protested business would be wise to pursue a different path.

The protested business may also file an appeal with the OHA. If OHA reverses the adverse determination of size, the business regains its status as a small business. In addition, as discussed above, a timely appeal with the OHA may prevent termination of the ongoing contract. Thus, for many—and perhaps most—businesses whose award

has been protested, an appeal will be the best option, provided there is a good-faith basis to challenge the determination of size that has been made.

In some cases, however, an appeal is not a viable option. The SBA's regulations regarding the determination of the size of a business are complex, and sometimes even a well-intentioned business mistakenly believes it is a small business, when that is not actually the case. If an adverse determination of size is clearly correct, the protested business should not waste the OHA's time (or the company's own time) with a frivolous appeal. Instead, the business may attempt to "fix" the problems identified in the size determination and apply to the SBA for recertification as a small business.

As a very basic example, consider a case in which the SBA finds Company A large as a result of its affiliation with Company B, because the same individual—let's call him Bob—owns a majority stake in both companies. After receiving the size determination, Bob sells all of his interest in Company B. Now, Company A has a strong argument that the affiliation no longer exists, and consequently, it should be recertified as a small business.

To apply for recertification, a business should file an application for recertification with the area office in which the company's headquarters is located.³⁶ The business must include a current SBA Form 355 and an explanation of the changes it made in order to regain its size status—such as Bob's sale of his interest in Company B.

The SBA's evaluation of a company's request for recertification is considered a formal determination of size, meaning that the SBA should make its best efforts to resolve the matter within 15 business days. In practice, however, the time frame for requesting and receiving a recertification may vary considerably, depending on which area office hears the request and the SBA's current workload and staffing. Some contractors suspect that requests for reconsideration occasionally sink to the bottom of the area offices' "to-do" lists because no pending procurement hangs in the balance. A business that files a request for recertification should (politely) follow up with the area office on a regular basis to help keep the matter on the front burner.

The Contract-Specific Exception

There is one important exception to the rule that an adverse determination of size affects subsequent procurements: If the SBA based its decision *solely* on a contract-specific affiliation (the so-called "ostensible subcontractor" rule) or a violation of the "non-manufacturer rule," the business does not need to forgo future certifications or obtain recertification in order to bid on future procurements.³⁷ In these cases, the SBA considers the size problem to be limited to a specific contract, rather than an ongoing determination. The protested business should review its size determination carefully and contact the responsible SBA official if it is unsure as to whether this exception applies.

Some Final Thoughts

If you represent clients who bid on government contracts that are set aside for small businesses, it is important to make sure that the clients understand that they have

the right to protest awards to competitors they consider to be businesses that are "other than small." Often owners of small businesses can gain information about their competitors through the grapevine that, coupled with a little independent research, may amount to a successful size protest.

And, of course, your clients should understand that size protests work both ways. If a client is awarded a government contract that has been set aside for a small business, the company should be on the lookout for a size protest and call counsel immediately if one is filed. Given that an adverse determination of a company's size could put a client out of business as a "small" government contractor, defending a size protest is no time for a client to try to represent itself. **TFL**

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Endnotes

¹13 C.F.R. § 121.1001(a)(1)(i).

²*Size Appeal of Fitnet Purchasing Alliance*, SBA No. SIZ-5089 (2009).

³See 13 C.F.R. § 121.1001(a)(1); see also FAR 19.302(a).

⁴See *Size Appeal of Reiner, Reiner & Bendett P.C.*, SBA No. SIZ-4587 (2003) (concluding that an employee would suffer economic harm if the contract was not awarded to his employer and thus had standing to file a size protest).

⁵See, e.g., *Size Appeal of Omnisec Int'l & Securiguard, Inc.*, SBA No. 3761 (1993), quoting *Size Appeals of Mela Assocs., Inc. & Encore Computer Corp.*, SBA No. 3632 (1992). It is debatable whether the rule prohibiting subcontractors from filing size protests is consistent with a case like *Reiner*, in which OHA broadly interpreted the "other interested parties" rule to confer standing upon an individual employee of a small business prime contractor. Nevertheless, OHA has long prohibited subcontractors from filing size protests and is unlikely to change course unless a regulatory change occurs.

⁶See 13 C.F.R. § 121.1007(a).

⁷13 C.F.R. § 121.1007(b); see also FAR 19.302(c)(2) (size protest must contain "specific, detailed evidence to support the allegation that the offeror is not small").

⁸*Id.*

⁹*Size Appeal of Val-Coast Inc.*, SBA No. SIZ-5031 (2009).

¹⁰*Id.*

¹¹See 13 C.F.R. § 121.1004(a)(1); see also FAR 19.302(d)(1).

¹²See 13 C.F.R. § 121.1004(a)(2); see also FAR 19.302(d)(1).

¹³See 13 C.F.R. § 121.1004(a)(3).

¹⁴See *Size Appeal of EA Eng'g, Sci. & Tech. Inc.*, SBA No. SIZ-4973 (2008).

¹⁵FAR 19.302(d)(3).

¹⁶13 C.F.R. § 121.1004(a)(5).

¹⁷See *id.*

¹⁸*Size Appeal of Taylor Consultants Inc.*, SBA No. SIZ-5050 (2009).

¹⁹See 13 C.F.R. § 121.1003; *see also* FAR 19.302(d)(1).

²⁰See 13 C.F.R. § 121.1005; *see also* FAR 19.302(d)(1)(ii). The FAR calls for submission “by hand, telegram, or letter.” FAR 19.302(d)(1)(ii). Although the SBA will likely enforce its own regulation permitting emailed or faxed size protests, protesters would be wise to provide hard copies to contracting officers, who are often more familiar with the FAR than the SBA’s regulations, to avoid unnecessary disputes.

²¹See 13 C.F.R. § 121.1006(a).

²²See 13 C.F.R. § 121.1009(a)(2); *see also* FAR 19.302(h)(1).

²³See 13 C.F.R. § 121.1009(a)(3).

²⁴See 76 Fed. Reg. 5680-01 (Feb. 2, 2011) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, & 134).

²⁵See 13 C.F.R. § 121.1008(a); *see also* FAR 19.302(f).

²⁶See 13 C.F.R. 121.1009; *see also* *Size Appeal of TPMC-Energy Solutions Envtl. Servs. 2009, LLC*, SBA No. SIZ-5109 (2010) (Area office erred by requiring protester to prove that protested business was large, rather than requiring protested business to prove that it was small).

²⁷See 13 C.F.R. § 121.1009(a)(1).

²⁸See 13 C.F.R. § 121.1009(g).

²⁹See 13 C.F.R. § 121.1009(g)(2).

³⁰See 13 C.F.R. § 121.1009(g)(2)(i).

³¹*See, e.g., Greystones Consulting Group Inc.*, B-402835 (June 28, 2010).

³²13 C.F.R. § 121.1009(g)(ii).

³³See 13 C.F.R. § 121.1009(g)(5).

³⁴*See id.*

³⁵See 13 C.F.R. § 121.1009(h).

³⁶See 13 C.F.R. § 121.1010(a).

³⁷See 13 C.F.R. § 121.1010(b).

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(3) Uses or attempt to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

6 C.F.R. § 25.2; *see also* 6 U.S.C. § 444.

²⁸6 U.S.C. § 442(a)(2).

²⁹*Id.* § 443(c).

³⁰*Id.* § 442(b)(2). The DHS defines noneconomic damages to mean damages for losses resulting from physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses. 6 C.F.R. § 25.2.

³¹6 U.S.C. § 442(b)(1).

³²*Id.* § 442(c).

³³The SAFETY Act, 71 FED. REG. 33147, 33150 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25) (“such cause of action may be brought only against the Seller of the QATT and may not be brought against the buyers, the buyers’ contractors, downstream users of the QATT, the Seller’s supplier or contractor, or any other person or entity...”).

³⁴6 U.S.C. § 442(d)(2). The act also provides that the seller of the technology will “conduct safety and hazard analyses” and supply such information to the secretary. *Id.*

³⁵*Id.* § 442(d).

³⁶*Id.* § 442(a).

³⁷6 C.F.R. § 25.8(c) (2006).

³⁸6 U.S.C. § 442(d)(1).

³⁹*Id.*

⁴⁰The procedures for issuance of a designation and certification are set forth in 6 C.F.R. §§ 25.4(b), 25.6, and 25.9. QATTs that have been designated, but not certified, are not included on the Approved Products List.

⁴¹*See* U.S. Department of Homeland Security, Approved Product List for Homeland Security and Designations for Homeland Security, available at www.safetyact.gov (last visited Aug. 10, 2010).

⁴²*Id.*

⁴³On Aug. 31, 2010, the DHS issued a Block Designation for CCSFs, *see* www.safetyact.gov.

⁴⁴6 U.S.C. § 442 (2006).

⁴⁵*Id.* § 442(a)(1).

⁴⁶*Id.*

⁴⁷71 FED. REG. 33147, 33150 (June 8, 2006).

⁴⁸148 CONG. REC. S9200-02 (2002); 148 CONG. REC. S11012-02 (2002).

⁴⁹6 C.F.R. § 25.6(l)(2). The designation of a CCSF as QATT is described in the “Exhibit A,” a document provided to each CCSF when it is awarded SAFETY Act coverage. The description itself is confidential, but the DHS states that it is closely tied to the requirements for the CCSP, as contained in 49 C.F.R. Part 1549.

⁵⁰71 FED. REG. at 33153.

⁵¹6 C.F.R. § 25.6(l)(2).

⁵²*Id.* The DHS has stated that “[w]hile certain proposed significant modifications should require review, many routine or non-significant modifications will not.” 71 FED. REG. 33153 (June 8, 2006). The DHS elaborated: “When a Seller makes routine changes or modifications to a QATT such that the QATT remains *within the scope of the description* set forth in the applicable Designation or Certification, the Seller shall not be required to provide notice [to the DHS], and the changes or modifications *shall not adversely affect the force or effect of the Sellers QATT Designation or Certification.*” 6 C.F.R. § 25.6(l) (emphases added).

⁵³6 C.F.R. § 25.6(l)(2).

⁵⁴This outcome would be consistent with laws that regulate general liability insurance, for which coverage is provided for an “occurrence” defined as “an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” COUCH ON INSURANCE (3rd ed. 2010), § 126:29. Thus, a mistake or unintentional negligence would be considered an “occurrence” and covered by insurance. Public policy compels refusal of coverage for intentional actions. *Farm-land Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 721 (Miss. 2004).