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**VIA FEDERAL RULEMAKING PORTAL**

Khem R. Sharma
Chief, Office of Size Standards
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Re: RIN 3245-AH16, Proposed Rule
Small Business Size Standards: Calculation of Annual Average Receipts

Dear Mr. Sharma:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule on amendments to its regulations to implement several provisions of the Small Business Runway Extension Act of 2018, Pub. L. No. 115-324 ("Runway Act"). See 84 Fed. Reg. 29399 (June 24, 2019). Our firm represents small businesses operating across the government contracting spectrum. Although many of SBA's proposed changes are welcome to the small business contracting community, we believe that the proposed rule as it currently stands may create confusion and compliance challenges for some small business contractors. Our comments to key proposed changes are below.

- **SBA Should Use a Standard Five-Year Average For All Industries**

Under the proposed rule, average annual receipts are calculated over a five-year period for all industries which use a receipts-based size standard. SBA has asked for comments on whether SBA should use a five-year annual receipts average for all such industries or only for businesses in service industries. With receipts-based businesses remaining under the three-year calculation. We agree with SBA's observation that there is a strong risk of confusion to businesses which are engaged in both service and non-service industries to switch between a five-year average for a service industry and a three-year average for a non-service industry. Moreover, in our experience, businesses that operate in service industries as well as non-service industries are both potentially vulnerable to difficulties in effectively competing against larger firms once they are other than small and are at the "mid-tier" level. A five-year average will give businesses in the non-service industries "breathing space" to make the transition from small to mid-tier status on the same basis as businesses in service industries. Finally, we note the difficulties that a business would be presented with when explaining, for example, that it is small

because its revenues are under $41.5 million for base maintenance work but not for construction work.

We furthermore agree that SBA is authorized under section 3(a)(2)(A)-(B) of the Small Business Act to enact a consistent five-year average across all industries. We strongly urge SBA to use the five year measure for all receipts-based size standards.

- **SBA's Proposed Changes Will Benefit Many Small Businesses Now and in the Future**

As SBA has noted, the proposed rule stands to benefit many small businesses, particularly small businesses that have experienced significant growth over the past three years. Table 4 of the proposed rule indicates that roughly 1.9% of impacted businesses will experience a positive impact. That is, these businesses will either be able to remain small longer, or will be able to switch their status from other than small to small. Many small businesses have expressed strong approval of this outcome, as it provides much-needed stability in the small business contracting world.

The proposed rule will benefit the procurement community as a whole for several reasons. First, it will allow rapidly-growing but smaller small businesses to remain small for a longer period of time. Second, it will allow more advanced small businesses to remain small longer, and will allow some newly-graduated small businesses to return to their small status for a time. Third and finally, because the proposed rule will deepen the well of small businesses and extend their eligibility, it will provide security for Government customers who have come to rely on successful and highly competent businesses to service them.

The proposed rule is also beneficial to those small businesses which may experience a year where revenues spike. For example, firms with Rapid Response Contracts may have several years of steady revenues, but when a natural disaster hits and their services are immediately required, their revenues spike. This artificial inflation of revenues will cause a business to exceed the size standard more quickly under a three-year versus five-year period of measure. That quick spike in revenues may not have resulted in increased infrastructure for the firm such that it will be ready to compete in the open market.

For more advanced small businesses that have slowly been approaching the upper limit of their size standard for several years, the proposed rule is attractive because it will allow them a little more time to adjust to the world of other than small businesses. Likewise, for some businesses that have recently graduated into other than small status, the proposed rule will allow more time to prepare to compete as an other than small business. One of our clients notes:

> We are currently facing the possibility of going other-than-small at the end of [the 2018] calendar year. With 90%+ of our

> government contracts being small business set-asides (and government contracts representing the majority of our business), going other-than-small could be quite detrimental to our business. If SBA calculated the small business threshold on a five-year average, we would definitely remain [a] small business at least for a couple more years or for even a longer period of time.

Furthermore, this proposed rule will increase stability in the Government marketplace overall. As noted above, the proposed rule will help smooth the peaks and valleys inherent in small business growth. Of course, this is beneficial for the small businesses themselves, but it is also beneficial for the Government customer. An increase in small business stability directly translates to an increase in procurement stability on all levels. The Government will be able to rely on trusted small business sources of supply for longer periods, and will not have to constantly search for new sources. Additionally, these trusted sources will continue to fulfill small business contracting requirements, helping the Government reach its small business goals. Since these small businesses will have more time to build up their experience and assets, they will also be able to compete more effectively once they do become other than small, and the Government will reap the many benefits that result from this more effective competition.

- **SBA Should Adopt a Two-Year Transition Period to Mitigate Harm and Confusion**

While we know of many small businesses that will benefit from the proposed rule, it will also have a negative effect on some, such as those firms that were small, then other than small and planning to be small again based upon a three-year average of annual receipts. We do not believe that SBA intends to hurt the few businesses that fall within this category. Therefore, we urge SBA to adopt a two-year transition period, effective on December 17, 2018 and lasting through December 17, 2020, during which period firms can opt to measure annual receipts under either the three-year or five-year measurement period. While we recognize that this proposal may create difficulties for the SAM system, we posit that firms submitting proposals during this time can submit certifications as to size and designate which period of measurement is being used. SAM does not need to be the authority on size during this period. Most RFPs request that offerors certify as to size and that certification should simply take precedence over SAM representations if SAM is not capable of verifying size on either a three- or five-year basis. SBA should not allow technology to take priority over fairness to the small businesses which it serves.

- **SBA Should Exclude Sold Divisions From the Calculation of Receipts**

Although not appearing in the proposed rule itself, SBA has nonetheless indicated in the preamble to the proposed rule that it intended to "clarify how it believes annual receipts should be calculated in connection with the acquisition or sale of a division." 84 Fed Reg. at 29401. More specifically, SBA proposed that the annual receipts of a business would not be adjusted where the business sells or acquires a segregable division of the business during the applicable

period of measurement or before the date on which it self-certified as small. Id. This is a departure from current SBA practice, which allows for such an adjustment to the calculation of total revenues for size purposes when such a segregable division is sold by a business. This adjustment is consonant with the "former affiliate" rule, which provides that "[t]he annual receipts of a former affiliate are not included if 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." 13 C.F.R. § 121.104(d)(4).

This proposed change in policy is unwarranted as it would elevate form over substance, as tacitly acknowledged by SBA in the preamble. If a small business wishes to avail itself of the former affiliate rule, it would be required to move the division's assets into a separate subsidiary and then sell that subsidiary. While there may be a technical distinction between a sale of a division and the sale of a separate legal entity, we submit that any such distinction is overshadowed by the burden the rule would create, not only for the small business, but also for the government administrative contracting officer ("ACO") and the individual contracting officers.

Specifically, if a business is required to establish a subsidiary and populate it with the assets in the former division, including its contracts, this action would trigger either the government's name change or novation requirements. The business would be required to establish a separate EIN, DUNS and CAGE code for the subsidiary and submit the necessary paperwork to support the name change or novation. Then, the business' ACO would be required to approve the package and each individual contracting officer would need to amend the business' contracts to reflect the newly-established subsidiary as the contract holder. Thereafter, once the subsidiary is sold, the same process would be repeated if the subsidiary is being merged into the purchaser. The complexity involved in such a series of transactions will create additional work for both the business and the government and possibly generate confusion.

Furthermore, this change in policy could have a negative impact on companies which, relying on current SBA policy, sold cognizable and segregable divisions to third parties and were small as a result of the sale. It would be unfair to require those companies to recalculate annual receipts to include revenues received prior to the sale and during the applicable period of measurement. For example, Business A had two divisions, an IT division and a program management division. Due to an organizational conflict of interest ("OCI"), Business A decided to sell its program management division in 2018. In addition to eliminating the OCI, the sale also allowed the business to retain small business status. Requiring the business to recalculate its revenues to include revenues of the program management division prior to the date of sale would amount to retroactive rulemaking and be extremely disruptive to its business plans. A change in policy which would include the receipts of the sold divisions in the calculation of total revenues for size purposes would make it more difficult for such businesses to remain small.

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We thank SBA for its efforts, and we appreciate the opportunity to submit these comments. Please do not hesitate to contact the undersigned at (202) 857-1000 if you have any questions about these comments.

Very truly yours,

Pamela J. Mazza
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