June 26, 2018

Via email to sizes_standards@sba.gov.

U.S. Small Business Administration
Khem R. Sharma, Chief, Office of Size Standards
409 Third Street SW, Mail Code 6530
Washington, DC 200416


Dear Mr. Sharma:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), Small Business Committee, I am submitting comments on the revised Size Standards Methodology and related questions announced by your office on April 27, 2018.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Small Business and Socioeconomic Issues.”
I. INTRODUCTION

On April 27, 2018, the Small Business Administration (“SBA”) announced a revised Size Standards Methodology white paper that provides new methods for establishing, reviewing, and adjusting small-business size standards. Before the revision, size standards were determined using “anchor” size groups: $7 million in receipts or 500 employees. SBA now proposes a new approach and has asked questions of industry. To assist in the further development of this methodology, the Section would like to address aspects of SBA’s methodology and provide its views on some of the questions asked.

II. COMMENTS ON SBA’S PROPOSED POSITIONS

A. Five Year Receipts Are Reasonable in Light of Increasing Contract Values.

SBA has indicated that it believes that the current method of calculating the size of a firm’s receipts by using a three-year average adequately accounts for fluctuations in receipts due to variations in economic conditions. SBA also noted it fears that “extending the averaging period to five years would allow businesses to greatly exceed the size standards for some years and still be eligible for Federal assistance.”

It is the Section’s experience that the average size of small-business set-aside contracts has increased in recent years. Our members have seen single small-business set-aside awards of hundreds of millions of dollars that cause entities to exceed their size standards almost immediately. Although these businesses may have increased revenue, they often lack the infrastructure to compete for awards outside of small-business programs. Extending the measurement period to five years is more likely to even out revenue spikes and will provide small businesses with a better chance of success upon graduating to other-than-small status.

B. Receipts Are the Best Method for Determining Size, Not Gross Profits.

The Section agrees with SBA’s decision not to establish size standards based on gross profits. To do so would require that SBA review the idiosyncrasies of a concern’s balance sheet instead of a uniform tax filing. The balance sheet might receive broad distribution as well: competitors pursuing size protests may receive access to detailed accounting and financial records not available in a protest based solely on receipts. The Section is concerned that this broader access to a small-business concern’s records will increase the risks of disclosure and costs of protesting (identifying and debating about the appropriate record documents) without corresponding enhancements to small-business programs or the Government’s overall purchasing outcomes.
III. SBA’S PROPOSED QUESTIONS

A. Size Standards Should Not Vary from Program to Program or Geographically.

SBA asked for comments as to whether size standards should vary from SBA program to program and whether size standards should vary geographically. Such a structure would introduce significant confusion for businesses. The Section believes that small-business rules should be straightforward enough for entrepreneurs to understand, and this approach would move in the opposite direction.

The Section also notes that determining the geographic region to which a company belongs may be extremely difficult. A small business may be headquartered in one region, have contracts awarded by a customer agency in a different region, and have principal place of performance for its biggest contract in a third region altogether. National size standards across all programs remain the best option. If SBA believes that certain geographical areas (e.g., the Washington D.C. metro area) are penalized by smaller size standards, then SBA should increase size standards overall and not introduce difficult-to-administer geographic standards.

B. Employee Based Standards Should Not Be Adjusted for the Possibility of Automation.

SBA requested comments on whether it should “consider adjusting employee based size standards for labor productivity growth or increased automation.” The Section believes that the effects of automation will be reflected in SBA’s existing industry analysis. When it analyzes industry data to determine size standards, SBA is already looking at the number of employees across industries. If the new percentile approach shows that size standards should be lower, this approach would account for any employee reductions due to automation.

C. SBA Should Keep Bands of Size Standards.

SBA asked whether size standards should be specific to the precise dollar calculated or clustered in bands. The Section commends SBA for its efforts to make size standards more accurate, but cautions against abandoning bands completely. Although a more individualized approach to size standards makes sense, SBA must balance accuracy and simplicity. Having a different size standard for every NAICS code will result in more confusion for small businesses. Instead, the Section encourages SBA to introduce additional bands as necessary to address the data it has gathered, but to avoid the use of hundreds of size standards that will sow confusion.

The Section also notes that an increase in the variety of size standards may also encourage more NAICS protests as small businesses jockey for more nuanced size standards that will allow them to compete, or will prevent higher-size-standard concerns from competing. Under the current band system, there is often little incentive to protest the NAICS code chosen for a solicitation because having bands generally ensures that the size standard will not drastically change when the NAICS code does. However, with different size standards for every NAICS code, protests may well increase.
IV. CONCLUSION

The Section appreciates the opportunity to comment on SBA’s proposed size-standard methodology and applauds the efforts of SBA to improve the system.

Sincerely,

Aaron Silberman
Chair, Section of Public Contract Law

cc:
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