VIA REGULATORY PORTAL AND ELECTRONIC MAIL

August 25, 2014

Dean R. Koppel, Assistant Director
Office of Policy and Research
Office of Government Contracting
U.S. Small Business Administration
409 3rd Street SW, 8th Floor
Washington, DC 20416


Dear Mr. Koppel:

On behalf of the Section of Public Contract Law of the American Bar Association (the “Section”), I am submitting comments on the above Small Business Administration (“SBA”) Proposed Rule: Advisory Small Business Size Decisions (hereafter “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have 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.¹

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore, should not be construed as representing the policy of the American Bar Association.²

In the Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1341 (2010), Congress established “a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement,

¹ Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, 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 under the topic “Small Business and Socioeconomic Issues” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation” of its size or status. In concert with the False Claims Act, 31 U.S.C. §§ 3729–3733, this “presumed loss” rule creates the potential for extremely large penalties for small businesses.

In response to concerns that this rule did not provide an exception for good-faith certifications, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2013 (“FY 2013 NDAA”), amending Section 645 of the Small Business Act (“Act”), 15 U.S.C. § 645(d), to create a safe harbor for “good faith reliance on a written advisory opinion from a Small Business Development Center . . . or an entity participating in the Procurement Technical Assistance Cooperative Agreement Program . . . .” The Act further states that “nothing in this Act shall obligate either entity to provide such a letter . . . .” On June 25, 2014, the SBA published the Proposed Rule to implement this provision of the FY 2013 NDAA.

The Section appreciates SBA’s efforts in implementing the safe-harbor provisions. The Section encourages SBA to provide additional clarification and guidance in the final rulemaking to ensure that the safe harbor is administered evenly and efficiently to provide effective relief for small businesses.

I. COMMENTS

The Section’s comments address three areas intended to improve the final rule: (1) addition of a requirement that all Small Business Development Centers (“SBDCs”) and Procurement Technical Assistance Centers (“PTACs”) offer advisory opinion services, even if they cannot issue an opinion on the facts of each case; (2) inclusion of timing guidelines for issuing advisory decisions; and (3) creation of an appeal process for negative determinations and refusals to issue determinations.

A. All SBDCs and PTACs Should Offer Advisory Opinion Services, Even if they Cannot Issue an Opinion on the Facts of Each Case.

The FY 2013 NDAA provides that a small business may rely “in good faith [] on a written advisory opinion from a Small Business Development Center (as defined in this Act), or an entity participating in the Procurement Technical Assistance Cooperative Agreement Program defined in chapter 142 of title 10, United States Code; however nothing in this Act shall obligate either entity to provide such a letter . . . .”

Although the language of the statute is not clear and Congress did not provide additional funding for this purpose, the most effective way to implement this safe harbor would be to allow individual SBDCs or PTACs to decline to issue
an advisory opinion in particular cases in which the facts do not support small business status for the requesting concern, but to require the issuance of opinions to those concerns that qualify. This would avoid creating a patchwork system in which some regions of the country have SBDCs or PTACs that offer opinions and others have SBDCs and PTACs that decline to offer these services in all cases.

Consequently, the Section requests that SBA clarify the Proposed Rule to state that all SBDCs and PTACs will offer advisory-opinion services, but that each SBDC and PTAC can decline to issue an advisory opinion in any case in which the facts do not support a finding that the requesting concern is a small business.

B. The Section Recommends That SBA Establish Timetables for the Issuance of Advisory Decisions.

The Section also believes that SBA should provide timing guidelines for the issuance of advisory decisions by PTACs and SBDCs. Although these guidelines should not be mandatory, PTACs, SBDCs, and small-business concerns would benefit from guidance on when applications for advisory opinions should be submitted and how quickly they should be processed. Timely processing of advisory-decision applications is critical for the safe-harbor rule to have meaningful impact.

The Section recommends that SBA adopt time guidelines similar to the 15 days provided for SBA Area Office Size Determinations. See 13 C.F.R. § 121.1009(a). A similar or slightly longer timeframe for PTACs and SBDCs would provide needed consistency and reliability for small businesses hoping to rely on the safe harbor.

C. The Section Recommends That SBA Establish a Review Mechanism for Negative Advisory Decisions.

The Section is also concerned with the implications that negative advisory decisions, or refusals to issue decisions, may have on small-business contractors. The Proposed Rule provides no avenue of review for a negative decision or refusal to issue a decision (by a PTAC or SDBC) or for a rejection by SBA’s Office of General Counsel. Under the Proposed Rule, a small business faced with this situation may feel that it can no longer certify its size in good faith, but it also has no way to initiate a review of the decision, as can be done following an SBA Area Office’s adverse size determination. Further, there is the possibility that a negative decision or non-decision may be used as evidence in a False Claims Act case.

The consequences of a negative determination or non-determination are similar, in effect, to those of a negative decision in a formal size determination by an SBA Area Office; SBA should consider providing contractors with an avenue to ensure such decisions or non-decisions are correct. The Section recommends that
SBA evaluate whether an additional review mechanism, whether it be at the Area Office, the Office of Hearings and Appeals, or another entity, is required to ensure that contractors are provided due process related to the issuance of advisory opinions.

II. CONCLUSION

The Section applauds SBA’s use of the notice-and-comment process and its efforts to implement the Act’s safe-harbor rule. These comments are meant to suggest improvements to SBA’s implementation effort and to encourage SBA to continue seeking assistance from other agencies and the public while refining its regulations. The Section respectfully requests that SBA consider the issues identified in these comments in developing any final rule to implement the Act’s safe-harbor rule. The Section is available and willing to provide any additional information and assistance as SBA may require.

Sincerely,

Stuart B. Nibley
Chair, Section Public Contract Law

cc:    David G. Ehrhart
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        Council Members, Section of Public Contract Law
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