Dean Koppel  
U.S. Small Business Administration  
Office of Government Contracting  
409 Third Street, S.W., 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-referenced matter. 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. The Section is submitting these comments under an approved Request for Blanket Authority.2

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1 The Honorable Thomas C. Wheeler, a member 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 under the topic “Small Business and Socioeconomic Programs” at: http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html.
I. **INTRODUCTION**


II. **COMMENTS**

The Section believes that portions of the Proposed Rule should be clarified and that, as it stands, the rule may have an unintended negative impact on small business contractors. The Section recognizes nevertheless that the majority of the provisions in the Proposed Rule are specifically mandated by the Jobs Act (indeed, much of the language in the Proposed Rule is identical to the corresponding provisions of the Jobs Act). We therefore intend to limit our comments on the Proposed Rule to those sections that we believe would benefit from additional clarity, which we believe SBA is able to provide. Specifically, the Section respectfully suggests that the limitation of liability provisions of the Proposed Rule be revised to address situations in which contractors make good faith – but ultimately incorrect – representations of size or status.

The Jobs Act provides that SBA’s implementing regulations must “provide adequate protections to individuals and business concerns from liability . . . in cases of unintentional errors, technical malfunctions, and other similar situations.” 15 U.S.C. § 632(w)(4) (emphasis added).

The Proposed Rule, however, limits the “safe harbor” provision to unintentional errors and technical malfunctions only:

Paragraphs (a) – (c) shall not apply in the case of unintentional errors or technical malfunctions that demonstrate that a
misrepresentation of size was not affirmative, intentional or willful. Consideration shall be given to the firm’s internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. In no case shall an individual or firm be liable for erroneous representations or certifications made by Government personnel.


The Section is concerned that the Proposed Rule’s limitation of liability may be construed too narrowly and, on its face, is not clear with regard to small business concerns that certify that they are small for the purposes of a particular set-aside procurement but are later determined to be other than small following a size or status protest.

In the discussion of the Proposed Rule, SBA explains as follows:

The proposed regulations concerning presumption of loss will only impact small business concerns that misrepresent their size or status…in such a way that criminal prosecution or other action is taken by the Government.

76 Fed. Reg. 62,316 (emphasis added). As the Proposed Rule is currently written, an adverse determination of size or status by either the SBA Area Office (“Area Office”) or the Office of Hearings and Appeals (“OHA”) may be found to constitute an “other action” taken by the Government such that the protested concern would be subject to penalties for willful misrepresentation. Initial analysis might indicate that such an outcome is appropriate or, indeed, ideal. Not all adverse size or status determinations, however, involve cases of fraud or attempts by large corporations to “game the system.” In many cases, an adverse determination is simply indicative of a misunderstanding or misapplication of SBA’s size and status regulations. Although SBA admirably attempts to provide regulations that are “user-friendly,” there are nevertheless complex issues that are difficult for small businesses, and even their government customers, to navigate – particularly because small businesses often do not have the same level of access to legal counsel that large corporations have.
For example, small businesses often rely on advice received from government officials in making representations of size or status. The Section is aware of at least one example in which a small business was advised by a government employee that revenue-based size standard calculations are based on work performed by a concern under a specific North American Industry Classification System code, rather than on the concern’s overall revenue. This flawed interpretation of SBA’s regulations could result in a concern making a false certification under the Proposed Rule. The Section is also aware of other instances in which small businesses mistakenly relied on “word of mouth,” an SBA Help Desk representative, or superseded regulations in calculating their size status for a particular procurement.

Although the Proposed Rule’s limitation of liability would protect contractors that misrepresent their size status as a result of “unintentional errors or technical malfunctions,” 76 Fed. Reg. 62,317, it is not clear that the safe harbor provision would also protect contractors that mistakenly misrepresent their size or status as a result of some other issue while attempting in good faith to comply with the regulations. The limitation of liability does state that concerns will not be liable for “erroneous representations or certifications made by Government personnel,” but it is not clear whether this language would cover, for example, a small business concern that relied on the procuring agency’s, or the SBA Help Desk’s, interpretation of SBA’s regulations when determining its size or status prior to certification.

Further, OHA case law interpreting the regulations is often nuanced and unpredictable. For example, in the size determination appeal Social Impact, Inc., SBA No. SIZ-5090 (Nov. 18, 2009), OHA determined that the protested concern was other than small for the procurement at issue. This decision, however, was the culmination of three size determination appeals in which OHA examined the Area Office’s application of SBA’s size regulation that permits conference management service providers to exclude from the calculation of annual receipts amounts collected for another entity. Although OHA ultimately found that the amounts in question should not have been excluded, and after the inclusion of those amounts the protested concern exceeded the size standard for the procurement, OHA’s analysis revealed ambiguity in the application of the regulations that could only be resolved by reviewing OHA precedent and SBA’s regulatory history.

Similarly, OHA case law regarding the ostensible subcontractor rule is voluminous and fact-specific. To determine whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, “all

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3 The ostensible subcontractor rule provides that when a subcontractor is performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are deemed to be affiliated for purposes of the procurement at issue. 13 C.F.R. 121.103(h)(4).
aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.” 13 C.F.R. 121.103(h)(4). Thus, although some cases are clearer than others, there is no bright line test for determining when a small business concern and its subcontractor will be deemed to be affiliated.

The Section believes that the following revision of the Proposed Rule’s limitation of liability provision will provide needed clarity, and may also reassure potential small business contractors that they will not be unduly penalized for erroneous, but good faith, efforts to interpret SBA’s regulations and represent their size or status:

Paragraphs (a) – (c) shall not apply in the case of unintentional errors, or technical malfunctions, or other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional or willful. Consideration shall be given to the firm’s internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner, and efforts made to comply in good faith with SBA’s regulations. In no case shall an individual or firm be liable for erroneous representations or certifications made by Government personnel.

III. CONCLUSION

The Section supports the intent of the size and status integrity provisions of the Jobs Act and the implementation of those provisions by SBA. Without the revisions discussed above, however, the practical effect of these provisions might be to deter qualified small businesses from doing business with the Government. We believe the above-suggested clarification of the Proposed Rule’s limitation of liability provisions will reassure potential contractors and ameliorate some of the potentially negative effects of the Jobs Act.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.
cc:
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