



SBA Proposed Rule Changes and How They Will Impact Government Contractors

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Attorney Bio – Megan Connor



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Megan Connor offers a holistic approach to solving clients’ problems. She counsels clients on a variety of government contracting and business matters, including regulatory compliance, security clearances, and intellectual property law. Ms. Connor is an ardent advocate for her clients, always keeping the clients’ business goals in mind. Whether it is assisting a contractor with resolution of a payment dispute with a federal agency or litigating a bid protest before the GAO or COFC, Ms. Connor guides clients based on what makes the best business sense for them. She also counsels and defends contractors in False Claims Act investigations as well as suspension and debarment matters.

When contractors look to grow or diversify, Ms. Connor advises on corporate formation, governance, restructuring and small business planning in the highly regulated government contracting environment. She routinely supports clients on the size and status recertification rules.

For small businesses, she counsels on affiliation issues, limitations on subcontracting, and how to maintain size and status. Ms. Connor also pursues and defends small business size and status protests and appeals before the SBA. She has effectively challenged SBA decisions in the COFC.

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Peter Ford heads the firm’s Boulder, Colorado office. Since joining PilieroMazza in 2011, Mr. Ford has become one of the firm’s most experienced attorneys for SDVOSB-related matters for both the VA and SBA. In this regard, he regularly assists clients with submitting applications to the VA’s VetBiz VIP program, filing reconsideration requests of VA VetBiz VIP program denials, and filing and defending SDVOSB status protests.

Mr. Ford advises clients on small business procurement matters, particularly issues related to eligibility for, and continued participation in, small business federal procurement programs, such as the SBA’s 8(a) BD, SDVOSB, WOSB and HUBZone programs and the VA’s VetBiz VIP program. He represents clients in actions before OHA, GAO and ODRA. He also counsels clients on maintaining compliance with the FAR and the small business regulations, which includes auditing clients for potential size and affiliation issues.

Additionally, Mr. Ford provides general corporate and business assistance, with a focus on company start-up and corporate restructuring matters and purchase and sale transactions.

Overview

- Changes in Receipts Calculation
- Limitations on Subcontracting
- HUBZone Program
- WOSB/EDWOSB Program
- 8(a) Program

Recent Changes in Size Calculations

- In April 2019, SBA issued its revised Size Standards Methodology White Paper, moving from an “anchor” approach to a “percentile” approach
- Moving away from the fixed number of size standard levels or “bands”
 - Instead, each industry will have its own size standard based on that industry’s data
- Also in April, SBA said that it “plans to issue proposed rules on all receipts based size standards, including those in NAICS Sector 54 and Subsector 236, in the near future.”
- In the meantime...

All Receipts-Based Size Standards Increased for Inflation

- Effective August 19, 2019, SBA increased all of the receipts-based size standards for inflation:

Prior size standard (\$ million)	Size standard adjusted for inflation (\$ million)
\$0.75	\$1.05
5.5	6.0
7.5	8.0
11.0	12.0
15.0	16.5
18.0	19.5
19.0	20.5
20.5	22.0
25.0	27.0
27.5	30.0
29.5	32.0
32.0	34.5
32.5	35.0
36.5	39.5
37.5	40.5
38.5	41.5

Small Business Runway Extension Act of 2018

- Small Business Runway Extension Act, which became law on December 17, 2018, amended the Small Business Act to change the three-year calculation to a five-year calculation
- It is SBA's position that Congress amended the wrong section of the Small Business Act, so SBA has been slow to implement the change
- SBA published its proposed rule changing the period of measurement for a receipts-based size calculation from three years to five years on June 24, 2019
- **Comments to this rule are due August 23rd**
- May become final by end of 2019 or may become the rule based on further congressional action

Legislation to Track

- H.R. 2500 - National Defense Authorization Act for Fiscal Year 2020
 - Section 872, Size Standard Calculations for Certain Small Business Concerns
 - SBA must issue a final rule by December 17, 2019 and also implement a transition plan
 - Passed House on July 12, 2019
- Nothing in Senate version (S. 1790)
- Section 705 of Senate SBC's version of SBA Reauthorization and Improvement Act of 2019 says the five-year calculation applies retroactively to December 17, 2018, and requires SBA to implement a transition plan
 - Current status: stalled

How Do I Submit Comments?

- www.regulations.gov
- Docket ID: SBA-2019-0006
- RIN: 3245-AH16
- <https://www.regulations.gov/comment?D=SBA-2019-0006-0001>
- You can insert your comments in the designated text box and/or upload a letter
- You do not have to identify yourself, but sometimes it helps SBA see the comments are coming from industry
- Once done inserting/uploading comments, click “Continue.” You’ll be able to preview before you formally submit.

You are commenting on:

The Small Business Administration (SBA) Proposed Rule: [Small Business Size Standards: Calculation of Annual Average Receipts](#)

For related information, [Open Docket Folder](#)

1 Your Information

1 Your Information **2 Your Preview** **3 Your Receipt**

Information entered will be viewable on Regulations.gov

[View Commenter's Checklist \(PDF\)](#) | [Alternate Ways to Comment](#)

Comment (Required)

My company supports immediate implementation of the five-year receipts calculation.

4917 characters remaining

Upload file(s) (Optional)

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I want to provide my contact information

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Please see the [Privacy Notice](#) and [User Notice](#) regarding comment submission.

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Limitations on Subcontracting

- SBA issued a proposed rule on December 4, 2018 that implemented provisions of the 2016 and 2017 NDAA's and the Recovery Improvements for Small Entities After Disaster Act of 2015, as well as other clarifying amendments
- Proposed revisions address key small business issues such as:
 - Limitations on subcontracting
 - Subcontracting plans
 - The non-manufacturer rule and Information Technology Value Added Reseller procurements
 - Recertification
 - Size determinations
 - Ostensible subcontractor affiliation
- Comments now closed; awaiting final rule

Compliance with Limitations on Subcontracting

- SBA does not think this is being enforced enough, so it is proposing to require contractors to submit information to aid COs in monitoring compliance
- Requested comments on whether all small primes performing set-aside or sole source contracts should be required to demonstrate compliance with the LOS, and if so, how?

Impact of Independent Contractors

- Proposes to clarify when an independent contractor can be counted as an employee for size and LOS purposes
- Where a contract is assigned a NAICS code with an employee-based size standard, an IC may be deemed an employee under the terms of SBA Size Policy Statement No. 1
- Where a contract is assigned a NAICS code with a receipts-based size standard, an IC cannot be considered an employee, and will always be deemed a subcontractor
- As a result, for a contract with an employee-based size standard, an individual that is considered an employee for size purposes will also be an employee for LOS purposes

Proposed Exclusions from LOS Calculation

- Illustrative list—non-exclusive
- Cloud computing
 - Subcontract cost would be excluded from LOS where SB prime performs other services that are the primary purpose of the contract
 - SBA asked for comment on an alternative that would treat cloud computing as a supply, which would make it subject to the NMR rule
- Media buys
- Transportation/disposal for environmental remediation firms where SBCs cannot provide the disposal or transportation services
- Travel

Other Proposed Rule Impacting Limitations on Subcontracting

- As of August 5, 2019, final FAR rule change drafted; waiting for it to be published/implemented
- Will conform the FAR's LOS clause, FAR 52.219-14, with how SBA performs the calculation, codified at 13 C.F.R. § 125.6
 - Both FAR and SBA regulations will then both provide a calculation based on total contract revenues
- December 3, 2018, DoD issued a class deviation, effective immediately, to implement SBA's formulation of the LOS for all DoD contracts
- Civilian agencies still follow the FAR

Big Changes for the HUBZone Program

- SBA proposed rules issued October 31, 2018; comments are now closed
- Freezes HUBZone maps until December 31, 2021
- No more certification of HUBZone status on bid and award date
 - Instead, SBA proposed certifying HUBZone firms annually and, once certified, you are eligible to bid on HUBZone contracts until your next annual certification

“Comprehensive Overhaul” of the HUBZone Program

- Definition of “employee” – propose changing from an individual working “a minimum of 40 hours per month” to “a minimum of 40 hours during the four-week period immediately prior to the relevant date of review,” which would be the date of initial application or recertification
- “Reside” for purposes of 35% requirement would mean living at a location full-time for at least 180 days immediately prior to the date of application or recertification
- SBA proposes to allow firms to continue counting HUBZone employees even if the employee moves out of a HUBZone

WOSB/EDWOSB Program...Certification is Coming

- SBA issued a proposed rule on May 14, 2019 eliminating self-certification for WOSB Program
- Comments closed on July 15, 2019
- Mandate from 2015 NDAA (in exchange for sole source)

WOSB/EDWOSB Program...Certification is Coming

- To compete for WOSB/EDWOSB set-asides, proposed rule would require company to be certified by either:
 - Third-party certifier
 - SBA
 - VA (but only if firm is VOSB or SDVOSB)
 - DOT (state DBE programs)
- [Certify.sba.gov](https://certify.sba.gov)
- 90-day goal for determination; no appeal rights

8(a) Economic Disadvantage Criteria

- May 14, 2019 WOSB rulemaking: SBA proposes increasing economic disadvantage criteria for initial eligibility in 8(a) Program
- Same levels for both
- AGI over 3 years may not exceed \$350,000
- Net worth may not exceed \$750,000
- Total assets may not exceed \$6 million

Latest with SBA's 8(a) and Mentor-Protégé Programs

- SBA is proposing to eliminate the separate 8(a) mentor-protégé program by consolidating it with the All Small Mentor-Protégé Program
- SBA may do away with the requirement for SBA approval of joint ventures for 8(a) contracts
- SBA is considering requiring 8(a) applicants to complete a tutorial to help determine if they are ready to be in the program
- SBA is seeking comment on whether to lift the restriction on mentors having more than three protégés at one time

About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

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- Government Contracts Law
- Intellectual Property & Technology Rights
- Labor & Employment Law
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Questions?



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