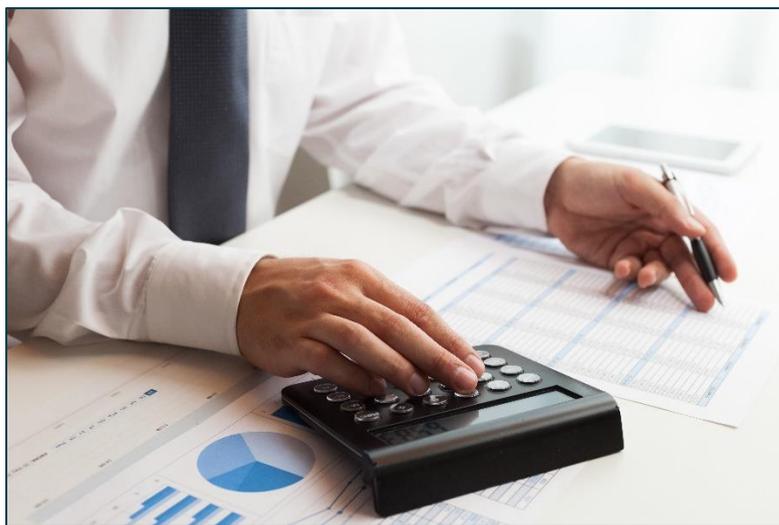


SMALL BUSINESS RUNWAY EXTENSION ACT OF 2018

By Derek Shaw



BACKGROUND

On December 17, 2018, President Trump signed the Small Business Runway Extension Act (H.R. 6330) into law. The Small Business Runway Extension Act amends the Small Business Act by modifying the method for prescribing size standards for business concerns. Specifically, the Act extends the measurement period of the Small Business Administration's (SBA) calculation of average annual receipts from three years to five. It is also anticipated that the Act will provide some small businesses with the opportunity to gain additional years under small business status by including

(oftentimes lower) revenues from four and five years ago in the average annual revenue computation.

In the Small Business Act of July 30, 1953, Congress created the SBA to “aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns.” The charter also stipulated that the SBA would ensure small businesses a “fair proportion” of government contracts and sales of surplus property. Generally, the SBA has used annual receipts as the measure of size standards for nonmanufacturing industries, using a three-year average to determine small business status. As contract awards have grown larger in recent years, the increased annual revenues from those contracts have driven average revenues up for many small businesses and caused them to graduate from set-aside programs before they are truly prepared to compete with large businesses. Revenue spikes in a given year can also have the same effect in skewing average revenues. Extending the revenue measurement window from three years to five years should allow small businesses more time to mature, develop adequate systems and processes, and build the critical mass required to compete as a large business.

IMPACT TO GOVERNMENT CONTRACTORS: GOOD NEWS AND BAD NEWS

As noted above, the purpose of the Act is to provide small businesses with the opportunity to extend their small business status. In fact, the Act may provide some recent graduates from small business status with an opportunity to “re-qualify.” For example, a company with revenues that are growing in the current three-year window, but who had lesser revenue amounts in earlier years, may be able to keep their small status for a longer period of time when those lesser year one and two revenues are averaged in. Therefore, the Act is largely seen as a positive to many contractors.

This may not always be the case, however, as some contractors may actually lose their small business status under the revised methodology. For example, a company that had higher revenues in years one and two of the five-year period, and declining revenues in years three, four and five, may find themselves classified as a large

business when the five years are averaged. In those cases, a contractor might have qualified as a small business under the original methodology but would lose that status under the revised Act.

IMPLEMENTATION CHALLENGES

The Small Business Runway Extension Act of 2018 is a seemingly straightforward amendment to the Small Business Act; however, full implementation has been anything but straightforward. While the Act technically went into effect when it was signed by the President, the SBA has yet to revise their regulations for calculation of average annual gross receipts. For example, regulations found at 13 C.F.R. § 121.104 (“How does SBA calculate annual receipts?”) continue to reference the three-year measurement period. Additionally, the federal System for Award Management website ([SAM.gov](https://sam.gov)) still displays size status using a three-year average. The SBA attempted to provide some clarity on implementation of the Act in its Information Notice 6000-180022, dated December 21, 2018, which states in part:

“The change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process. The Office of Government Contracting and Business Development (GCBD) is drafting revisions to SBA’s regulations and SBA’s forms to implement the Runway Extension Act. Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.”

The SBA bases its position on the fact that the Runway Extension Act does not expressly include an effective date. As such, the SBA will continue to enforce the three-year measurement period until they issue new interim or final regulations implementing the Act, which could take some time. In the meantime, contractors should use caution when submitting any proposals for set-aside work, using the five-year measurement methodology prior to the SBA updating the applicable regulations. If a contractor chooses to propose using the five-year measurement, they should clearly disclose their approach and assumptions to the contracting agency in their proposal submission. Contractors would also be advised to check with the SBA before using the new five-year period as the basis for any certification as a small business.

For more information about how the Small Business Runway Extension Act of 2018 effects your current business status, please contact our [Government Contracting Group](#) at 833-CPA-BMSS.