GT GreenbergTraurig

Alert | Government Contracts

February 2019

Pros and Cons of the Small Business Runway Extension Act of 2018

On Dec. 17, 2018, President Trump signed into law a bill amending the Small Business Act's requirement that federal contractors' revenues be measured by the average of three years, replacing it with a five-year average for the purpose of determining small business program eligibility.

The interestingly named Small Business Runway Extension Act of 2018, Public Law 115-324, consists of only two sentences – the first names the statute, and the second, which contains the effective language, amends the Small Business Act (15 U.S.C. § 632(a)(2)(C)(ii)(II)) by "striking '3 years' and inserting '5 years'" in Section 3(a)(2)(C)(ii)(II). This revised methodology extends the time period used to calculate the average revenues of a business for size purposes from three to five years. This extension is of significant consequence to many businesses, as the SBA size standards establish eligibility for many small business assistance programs, including a variety of government contracting set-asides designed to aid small businesses in obtaining federal government contracts.

The intent of the legislation is to deal with "the 'Other-Than-Small' Conundrum." *See* H.R. REP. NO. 115-939 at 3 (2018). The "Other-Than-Small Conundrum" arises from the fact that the federal government recognizes only two categories of businesses – those that are "small" and those that are "other-than-small." As a result of this limited view of business size, firms that are newly "other-than-small" because of significant business growth no longer qualify for those small business set-aside procurements upon which their business model was originally based and which may have been principally responsible for that business's growth. Having graduated from the small category too soon, and no longer eligible for SBA assistance and set-asides, they may remain unable to effectively compete in the open market.

The House Committee on Small Business reported on the potential advantages of extending the period for calculating whether a business is small and thus qualifies for small business set-aside procurements. The advantages included improving the health of the industrial base, increasing competition, preserving jobs, and allowing businesses to remain under the small-size revenue threshold, enabling them to develop their business plans and infrastructure to transition to mid-size more successfully because of increased lead time. *Id.* at 6-7. All of these reported advantages assume that the business in question has a steady increase in revenues over the five-year measurement period. However, the committee did not address what happens if the converse occurs – a business that is faced with decreasing revenues over the five-year measurement period.

While the changes unquestionably help businesses that have experienced growth over a five-year period by including earlier years that exhibited lower revenues, the legislation may negatively impact those businesses that have experienced decreasing revenues over the same time frame. The reason is that those businesses would now be required to include the higher revenues of their earlier and more successful years in the calculation of the average annual receipts, causing them to exceed the applicable small business size standard. Ironically, this might serve to significantly delay or even preclude their ability to compete for and win set-aside contracts that could potentially reverse their declining fortunes. The Congressional Budget Office even tacitly acknowledged that the new legislation may have a negative impact on business, stating that it "has no basis for estimating the number of entities that either would newly qualify or would no longer qualify as small businesses."

The SBA has advised that 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. SBA Information Notice, *Small Business Runway Extension Act of 2018*, Control No. 6000-180022 (Dec. 21, 2018). 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 the three-year methodology.

Authors

Richard L. Moorhouse and **Józef S. Przygrodzki**. Questions about this information can be directed to:

- Richard L. Moorhouse | Northern Virginia | +1 703.749.1304 | moorhouser@gtlaw.com
- Józef S. Przygrodzki | Northern Virginia | +1 703.903.7591 | przygrodzkij@gtlaw.com
- Or your Greenberg Traurig attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

GT GreenbergTraurig