

GAO AND SBA CONFIRM THAT RUNWAY ACT REQUIRES RULEMAKING

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In a recent decision, the Government Accountability Office (“GAO”) confirmed the position of the Small Business Administration (“SBA”) that the Small Business Runway Extension Act of 2018, Pub. L. No. 115-324 (“Act”) requires rulemaking by the SBA before the size standards changes can become effective. *TechAnax, LLC, Rigil Corp.*, B-408685, August 16, 2019. This blog explained that the Act changed the period for measuring small business revenue-based size standards from an average of the past three years to an average of the past five years. (See “New Law Extends Period to 5 Years for Calculating Small Business Revenue in Size Standards, Feb. 5, 2019.) Also, as noted below, the SBA Office of Hearings and Appeal reached a similar conclusion.

Although the Act was signed by the President on December 17, 2018, the earlier blog noted that the SBA maintained that the new standard would not take effective until implemented by a formal rulemaking process. SBA issued a proposed Rule on June 24, 2019 at 84 Fed. Reg. 29399, with comments due by August 23, 2019. No final rule has been issued.

In *TechAnax*, the GAO supported the SBA position, noting that the GAO gives deference to SBA in the interpretation of SBA regulations. *TechAnax* sought to require the General Services Administration (“GSA”) to modify a solicitation for information technology services so that the Act, which had already become law, would be used to determine the period for measuring (i.e., the five years should apply, not the three years). The GSA refused to modify the solicitation, which these protesters challenged.

GAO followed its normal procedure, and asked for SBA comments on the protest. The SBA stated that the Small Business Act requires either that SBA conduct rulemaking to revise, modify or establish size standards. SBA stated that until a final rule was issued, SBA would continue to apply the 3-year averaging period in 13 CFR § 121.104 for calculating average annual receipts. The GAO granted deference to SBA’s interpretation of the Small Business Act, concurred that rulemaking was required to implement the 3-year to 5-year average, and denied the protest.

Subsequently, SBA’s Office of Hearings and Appeals (“OHA”) issued *Cyper Analytics, d/b/a/ Crown Point Sys.*, SBA No. SIZ-6022, Aug. 27, 2019 that was fully consistent with the GAO *TechAnax* decision. OHA concluded that the Runway Extension Act revised only the portion of the Small Business Act relating to the establishment of size standards, and did not make an immediate change to the existing standards, which remained at 3 years until implemented by SBA in regulations.

Takeaway. SBA’s size standards will not be changed automatically by new laws (unless the laws amend specific provisions of the Small Business Act, and state that the new amendments are effective immediately).

The three to five year extension in the Small Business Runway Extension Act will not be effective until SBA promulgates its final rules on that Act.

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