



What Congress Giveth to Small Business, the SBA Says Not So Fast

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In our **December 26, 2018 blog post**, we addressed the Small Business Recovery Extension Act of 2018, by which Congress extended to five years the lookback period for averaging receipts in determining small business size under revenue based NAICS codes. We urged caution, however, because the SBA had not yet opined on the issue.

The SBA has now spoken in an internal Information Notice, espousing a view that runs counter to principles of statutory interpretation and does no favors for the small business community it is supposed to support. The SBA acknowledges the clear statutory directive: "Under prior law, firms in industries with receipts-based size standards calculated size based on annual average gross receipts over three years. The Runway Extension Act provides that, unless specifically authorized by statute, receipts-based size standards be based on annual average gross receipts over five years." The SBA then boldly advises that, in its view, the law is not yet effective and shall not become effective for SBA purposes until the SBA issues new regulations. It prescribes as follows: "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."

Besides the curious implication that perhaps its position supersedes that of Congress, the SBA misconstrues the rules of statutory construction that are to the effect that a statute becomes law upon signature by the President, if the statute itself does not specify a different effective date. That said, even though a bold contractor might desire to contest the point, prudence suggests that all await what we hope will be the expeditiously issued regulatory pronouncement about this straightforward statute. Indeed, logic and fair play suggest that the SBA, in issuing the updated regulation, ought to make its provisions retroactive to the effective date of the statute so that businesses might take full advantage of Congress's directive.

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