

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Advanced Technology Systems Company,

Appellant,

Appealed From
Size Determination No. . 02-2019-093

SBA No. SIZ-6034

Decided: October 25, 2019

APPEARANCES

Kevin P. Connelly, Esq., Jeffrey M. Lowry, Esq., Vedder Price, P.C., Washington, D.C.,
for Appellant Advanced Technology Systems Company

Liana Gonzalez, Esq., Office of General Counsel, U. S. Small Business Administration,
Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On July 3, 2019, Resicum International, LLC (Resicum) protested the size status of Advanced Technology Systems Company (Appellant). On July 15, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination No. 02-2019-081, dismissing the protest as non-specific. On July 24, 2019 Resicum appealed the dismissal to SBA's Office of Hearings and Appeals (OHA). On August 28, 2019, OHA reversed and vacated the dismissal, and remanded the matter to the Area Office for a new size determination. *Size Appeal of Resicum International, LLC*, SBA No. SIZ-6024 (2019).

On September 17, 2019, the Area Office issued Size Determination No. 02-2019-093 (Size Determination), finding Appellant other than small. On October 2, 2019, Appellant filed the instant appeal from that size determination. Appellant argues that the dismissal is clearly erroneous, and requests that OHA reverse the size determination, and find that Appellant is an eligible small business. For the reasons discussed *infra*, I DENY the appeal, and AFFIRM the Size Determination.

¹ This decision was originally issued under a protective order. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On May 3, 2019, the Mission and Installation Contracting Command Fort Benning (Agency) issued Solicitation No. W911SF19R0011 (Solicitation) for Aviation Maintenance Services. The Contracting Officer (CO) set the procurement aside entirely for small business, designating North American Industry Classification System (NAICS) 488190, Other Support Activities for Air Transportation, with a corresponding \$32.5 million annual receipts size standard, as the appropriate code. On June 3, 2019, Appellant submitted its proposal. On July 2, 2019, the Agency informed Resicum that Appellant was the awardee. (Notice of Non-Award.)

B. Size Protest

On July 3, 2019, Resicum filed its Protest. Resicum alleged that data received from the CO shows that Appellant had average annual receipts of \$38,764,404 over the previous three years, exceeding the applicable size standard. On July 15, 2019, the Area Office issued Size Determination No. 02-2019-081, dismissing Resicum's Protest as non-specific under 13 C.F.R. §§ 121.1007(b) and (c). On July 24, 2019, Resicum appealed that size determination to OHA. On August 28, 2019, OHA granted the appeal, vacated the size determination and remanded the matter to the Area Office for a new size determination. *Size Appeal of Resicum International LLC*, SBA No. SIZ-6024 (2019).

C. Size Determination No. 02-2019-093

On September 17, 2019, the Area Office issued the Size Determination, finding Appellant other than small. The Area Office noted that Appellant had submitted a completed SBA Form 355, its Federal tax returns for 2014, 2015, 2016, and 2017, together with its financial statements for 2018, and other supporting documentation. (Size Determination, at 2.) The Area Office further noted that in its Response to the Protest, Appellant had maintained that at the time it submitted its proposal (June 3, 2019), the Runway Extension Act had been passed and was legally in effect for over five months. Appellant had argued that it made its self-certification based upon that law, and calculated its own annual receipts using a five-year term instead of a three-year term. Although SBA had issued a formal notice on December 23, 2018 stating the five-year term would not be used to calculate annual receipts until SBA has issued a final rule implementing the change, it did not state that any rule issued by SBA would not be retroactive. (*Id.* at 2.)

The Area Office found that the three-year term for determining a challenged concern's annual receipts was still in effect, because SBA had not issued final regulations implementing the change to a five-year term, relying on SBA Information Notice No. 6000-180022 and OHA's

decision in *Size Appeal of Cypher Analytics, Inc., d/b/a Crown Point Systems*, SBA No. SIZ-6022 (2019) (*Cypher Analytics*). (*Id.* at 3-4.) The Area Office reviewed the documentation Appellant submitted, calculated Appellant's annual receipts using a three-year term, and concluded Appellant's annual receipts were [REDACTED], well in excess of the applicable size standard, and therefore determined that Appellant was other than small. (*Id.* at 5.)

D. The Appeal

On October 2, 2019, Appellant filed the instant appeal. Appellant points to Congress' passage of the Small Business Runway Extension Act on December 17, 2018. (Appeal at 1-2, citing Pub. L. 115-324, 132 Stat. 4444, Dec. 17, 2018.) Previous to the passage of the Runway Extension Act, the Small Business Act prohibited any Federal department or agency from setting a size standard unless the standard determined size on the basis of annual gross receipts over a period of not less than three years. (*Id.* at 1-3, citing 15 U.S.C. § 632(a)(2)(C)(ii)(II).) The Runway Extension Act amended this section by striking “3 years” and inserting “5 years.” (*Id.*)

Appellant maintains that it submitted its proposal for the instant procurement in the knowledge that its annual receipts for the three-year period exceeded the size standard, but with the expectation that the Runway Extension Act's change to a five-year period for determining a concern's annual receipts was in effect. (*Id.* at 3.)

Appellant maintains that Congress, through the Runway Extension Act, makes it clear that small business size must be calculated on at least a 5-year, not a 3-year, average of annual receipts. No Federal agency is permitted to use a 3-year average, and the Act was effective immediately. Therefore, the Area Office erred in finding Appellant other than small. (*Id.* at 4.)

Appellant notes that the Small Business Act gives SBA the authority to establish “detailed definitions or standards by which a business concern may be determined to be a small business concern.” (*Id.*, citing 15 U.S.C. § 632(a)(2)(A).) Congress amended section 3(a)(2)(C)(ii)(II) of the Small Business Act with the Runway Extension Act to replace the prohibitions on size standards that considered no less than three years of annual receipts to one that changed the applicable period of time to five years. (*Id.* at 5, citing Pub. L. 115-324, 132 Stat. 4444, Dec. 17, 2018.)

Appellant maintains SBA no longer has the authority to utilize a 3-year period for calculating a concern's annual receipts for services businesses such as Appellant but must now use a five-year period. The Act was effective immediately, because Congress did not assign a future effective date. (*Id.*, citing *Johnson v. U.S.*, 529 U.S. 694, 702 (2000).) This is true whether or not SBA's existing regulations still required the use of a three-year calculation period, because a regulation which contravenes a statute is invalid. Further, a regulation that is valid when promulgated becomes invalid upon enactment of a statute in conflict with the regulation. (*Id.* at 5, citing *R&W Flammann GmbH v. U.S.*, 339 F.3d 1320, 1324 (Fed. Cir. 2003); *Scofield v. Lewis*, 251 F.2d 128, 132 (5th Cir. 1958).)

Appellant asserts the Area Office erred in determining SBA was not required to use a 5-year period to average its annual receipts. While the Area Office referred to SBA's Information

Notice No. 6000-180022 to find that the Act was not effective immediately, Appellant asserts that Congress conducted hearings subsequent to the Notice's issuance to clarify that the Act took effect immediately and advanced a clarifying amendment to that effect, stating that the Runway Extension Act has been effective since the date it was signed into law. (*Id.* at 6, citing 165 Cong. Rec. H5810-01 - Clarifying the Small Business Runway Extension Act (June 15, 2019).)

Further, Appellant disputes the reasoning of *Cypher Analytics*, because it did not consider the impact of the Runway Extension Act on SBA's existing regulations, the legislative history of the Act, or Congress' rejection of SBA's position and efforts to affirm its original intent. In *Cypher Analytics*, OHA reasoned that because 15 U.S.C. § 632(a) related to the promulgation of a size standard, rather than a specific method, the Runway Extension Act could not become effective until SBA issued a new size standard rule after notice and comment. (*Id.* at 6, citing *Cypher Analytics* at 7.) Appellant maintains OHA's was a narrow reading of the Runway Extension Act which failed to acknowledge that in light of the amendment, SBA no longer had any authority to issue any regulations which imposed a size standard for services businesses which used an average annual gross receipts calculation of less than 5 years. Therefore, SBA's existing regulations providing for a three-year term to determine annual receipts were without legal authority. (*Id.* at 7.)

Appellant further takes issue with *Cypher Analytics*' reasoning that SBA's interpretation of the Runway Extension Act was reasonable because any size standard could be implemented only through notice-and-comment rulemaking and with the approval of SBA's Administrator. This analysis failed to acknowledge that SBA's 3-year rule violated the Act's mandate to use a 5-year period to calculate a concern's annual receipts. (*Id.*)

Appellant further criticizes *Cypher Analytics* for failing to take into account the legislative history of the Runway Extension Act or the steps taken by Congress after passage to affirm its intent and to correct SBA's interpretation of the law. Appellant quotes from the legislative history to say that the increase in time period was intended to help small contractors successfully navigate the middle market as they reach the upper limits of their size standard. The House Report said the Act would lengthen the time in which SBA measures size through revenue by modifying SBA's size formula from an average of the past three years to an average of the past five years. (*Id.*, citing H. Rpt. 115-939 at 1-2.) While *Cypher Analytics* held that the Runway Extension Act only changed the method for promulgating a new size standard at some undetermined future date and did not alter existing size formula, the legislative history is clear that Congress intended to immediately modify SBA's method of determining size. (*Id.* at 7-8.)

Appellant asserts that on March 26, 2019, Congress held a hearing to examine SBA's conclusion that the Runway Extension Act was not effective until SBA completed its rulemaking. Witnesses testified that SBA's failure to immediately implement the Act was creating confusion in the small business federal contracting community. In response to the hearing, the House of Representatives passed H.R. 2345, the Clarifying the Small Business Runway Extension Act. The bill stated that "the Small Business Runway Extension Act of 2018 has been effective since the date it was signed into law, on December 17, 2018." (*Id.* at 8, citing 165 Cong. Rec. H5810-01 - Clarifying the Small Business Runway Extension Act (June 15,

2019).) Appellant maintains this establishes Congress' expressed intent, and therefore OHA should reconsider *Cypher Analytics*. (*Id.*)

Appellant also maintains that the plain language of the statute is clear that the five-year period applies to all federal agencies, including SBA. The first step in statutory construction is the plain language of the statute. If the language is unambiguous and the statutory scheme is coherent and consistent, the inquiry ceases. (*Id.* at 8-9, citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)) Courts may consider “the structure of the statute” when determining the meaning of an unambiguous statute, and give effect, if possible, to every clause and word of the statute. (*Id.* at 9, citing *Eaglehawk Carbon, Inc. v. U.S.*, 122 Fed. Cl. 209, 212 (2015); *Duncan v. Walker*, 533 U.S. 167, 1174 (2001).)

Appellant finally argues that the Small Business Act, as amended by the Runway Extension Act, states that the 5-year period for calculating receipts applies to every “Federal department or agency.” (*Id.* citing 15 U.S.C. § 632(a)(2)(C)(ii)(II).) The Small Business Act defines “agency” as “each authority” of the U.S. Government. (*Id.* citing 15 U.S.C. § 632(b).) The legislative history is clear that Congress intended for the Runway Extension Act to apply to SBA, and there is no reasonable basis to conclude that SBA is exempt. (*Id.* citing H. Rpt. 115-939 at 1, stating the Act lengthens the time SBA uses to measure size, from a three-year period to a five-year period.)

E. The Response of SBA's Office of General Counsel

On October 21, 2019, SBA's Office of General Counsel responded to the appeal. SBA first noted that on June 24, 2019, it had published a proposed rule implementing the Runway Extension Act, and that it would soon publish a final rule. (Office of General Counsel Response at 1, citing 84 Fed. Reg. 29399 (June 24, 2019).) SBA further noted that OHA has already addressed this issue in *Cypher Analytics* and held the Runway Extension Act does not directly contradict SBA's existing regulations. (*Id.* at 1-2.)

SBA maintains that using the notice-and-comment process for this rule change is required by the Administrative Procedure Act and sections 3(a)(2)(C)(i) and 3(a)(6) of the Small Business Act. The process also protects the interests of firms which might be hurt by a five-year average by giving them time to adjust. The rulemaking process allows SBA to consider the costs and benefits of the rule and ascertain if detrimental effects could result which might need to be ameliorated. (*Id.* at 2, citing 15 U.S.C. § 632(a)(2)(C)(i), (a)(6).)

SBA reports it has received over 200 comments on the proposed rule, with 140 fully in support and 37 opposing a change to a five-year rule. (*Id.*) SBA further notes that it issued a Public Information Notice soon after the Runway Extension Act was enacted. The Notice stated that the Small Business Act required rulemaking before any changes to the size standard were implemented. Thus, for over nine months small contractors have been aware that a change in the period used to calculate a firm's receipts must await a rule change. The Federal Acquisition Regulation, SAM.gov and SBA's regulations all still use a three-year average. It is therefore unfair for Appellant or any other firm to obtain an exception to the three-year average. After SBA published the Information Notice, every firm knew the change in the averaging period

would be subject to rulemaking, and Appellant could not have had an expectation it would receive immediate regulatory relief. (*Id.* at 3, citing SBA Information Notice No. 6000-180022 (Dec. 21, 2018).)

SBA disputes Appellant's contention that *Cypher Analytics* failed to take account of the Runway Extension Act's legislative history, because that history states that "Congress has granted the Administrator substantial discretion in calculating the size of a small business, provided that the business is independently owned and operated and not dominant in its field." (*Id.* at 4, citing H. Rpt. 115-939, at 2.) Further, prior legislative history states that § 632(a)(2)(C) only applies to agencies other than SBA. (*Id.* citing S. Rpt. 103-332.) SBA notes the legislative history does not speak directly to an effective date for instituting a five-year averaging period. Conversely, the Small Business Act itself includes the requirement that size standard changes go through notice and comment rulemaking at two points. (*Id.* citing 15 U.S.C. § 632(a)(2)(C) and (a)(6).) Congress did impose an interim rule in the Small Business Jobs Act of 2010, making it clear Congress knows how craft an immediately effective change to SBA's size standards when it wishes to do so. (*Id.* citing Pub. L. No. 111-240, § 1116, codified at 15 U.S.C. § 632(a)(5).)

Finally, SBA argues Appellant's reliance upon H.R. 2345, the Clarifying the Small Business Runway Extension Act, is misplaced, because that proposed legislation calls for the Administrator to issue a rule implementing the Act, thus supporting SBA's interpretation of the Act as not immediately imposing a five-year averaging period. Finally, SBA notes the rulemaking is crucial because while the Runway Extension Act addressed the averaging period for service-industry firms, it left the statutory language for non-service industry firms at three years. To simply declare the new averaging period effective immediately would create an inequitable inconsistency between service firms and agricultural and construction firms, which also use annual receipts size standards. The proposed rule resolves this inconsistency. (*Id.* at 4-5.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. (*Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).)

B. The Runway Extension Act

The Runway Extension Act was signed into law on December 17, 2018. Section 2 of the Runway Extension Act, entitled "Modification to Method for Prescribing Size Standards for Business Concerns," stated that "Section 3(a)(2)(C)(ii)(II) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(ii)(II)) is amended by striking '3 years' and inserting '5 years'." *See* Runway

Extension Act, Pub. L. No. 115-324, § 2. The Runway Extension Act did not specify an effective date.

As a result of the Runway Extension Act, the Small Business Act now reads, in pertinent part:

SEC. 3. DEFINITIONS.

(a) SMALL BUSINESS CONCERNS.—

(1) * * *

(2) ESTABLISHMENT OF SIZE STANDARDS.—

(A) IN GENERAL.--In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act.

(B) ADDITIONAL CRITERIA.--The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) REQUIREMENTS.--Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 5 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

(iii) is approved by the Administrator.

15 U.S.C. § 632(a)(2).

....

(6) PROPOSED RULEMAKING.—In conducting rulemaking to revise, modify or establish size standards pursuant to this section, the Administrator shall consider, and address, and make publicly available as part of the notice of proposed rulemaking and notice of final rule each of the following:

(A) a detailed description of the industry for which the new size standard is proposed;

(B) an analysis of the competitive environment for that industry;

(C) the approach the Administrator used to develop the proposed standard including the source of all data used to develop the proposed rule making; and

(D) the anticipated effect of the proposed rulemaking on the industry, including the number of concerns not currently considered small that would be considered small under the proposed rule making and the number of concerns currently considered small that would be deemed other than small under the proposed rulemaking.

15 U.S.C. § 632(a)(6).

After the Runway Extension Act became law, SBA issued SBA Information Notice No. 6000-180022 (Dec. 21, 2018), signed by the Associate Administrator of the Office Government Contracting and Business Development (AA/OGC&BD). The Notice stated that the Act required that, unless specifically authorized by law, receipts-based size standards will be based on average annual gross receipts over five years. The Notice went on to state that while SBA was receiving inquiries about whether business could immediately start reporting their size standards on the basis of five years of annual receipts instead of three, the Small Business Act still required that new size standards must be approved by the Administrator through the rulemaking process. The AA/OGC&BD stated that the Runway Extension Act did not have an effective date, and it was not effective immediately. Therefore, the change from a three-year to a five-year period for calculating a concern's receipts was not applicable to any present contracts, offers or bids. SBA Information Notice No. 6000-180022 (Dec. 21, 2018).²

On June 24, 2019, SBA issued a proposed rule to modify its method for calculating a concern's average annual receipts to comply with the Runway Extension Act changes. 84 Fed. Reg. 29399 (June 24, 2019). The proposed rule would amend 13 C.F.R. § 121.104(c) to change

² Found at https://www.sba.gov/sites/default/files/resource_files/6000-180022SBRunwayExtensionAct.pdf

the period used to calculate a concern's annual receipts from three years to five years. 84 Fed. Reg. 29399, 29413. In the preamble to the proposed rule, SBA maintained that 15 U.S.C. § 632(a)(2)(C) does not apply to SBA, and that SBA has independent statutory authority to issue size standards under 15 U.S.C. § 632(a)(2)(A). SBA further asserted in the preamble it has consistently maintained this interpretation of the Small Business Act over the years, including some 52 times in the Federal Register since 2002. 84 Fed. Reg. 29399, 29400. SBA asserts in the preamble that this proposed rule carries out the intent of the Runway Extension Act as expressed in the Report of the House Committee on Small Business, H. Rpt. 115-939. (*Id.*)

C. Analysis

As in *Cypher Analytics*, the sole issue presented in this case is whether the Area Office erred in calculating Appellant's average annual receipts over a three-year period rather than over a five-year period. Appellant does not dispute that the Area Office correctly determined Appellant's size as of June 3, 2019 (*i.e.*, the date Appellant submitted its proposal), and does not dispute that applicable regulations in effect on that date required that receipts be averaged over a three-year period. *See* 13 C.F.R. § 121.104(c)(1). Appellant maintains, however, that the Area Office nevertheless erred because the Runway Extension Act superseded those regulations and imposed a five-year period of measurement.

In *Cypher Analytics*, where that appellant raised the same issue, OHA held:

I find Appellant's arguments unpersuasive, for two principal reasons. First, the Runway Extension Act amended only a single sentence of the Small Business Act, and the provision amended pertains specifically to the promulgation of size standards, not to the methodology used to calculate the size of a particular business. Thus, the language introduced by the Runway Extension Act appears within the portion of the Small Business Act entitled "Establishment of Size Standards," outlining requirements that are to be addressed by any "proposed size standard." Section II.A, *supra*. Likewise, the pertinent section of the Runway Extension Act itself was entitled "Modification to Method for Prescribing Size Standards for Business Concerns." *Id.* Although it may well be true, as Appellant asserts, that in addition to revising the law governing establishment of size standards, Congress also intended to lengthen the period of measurement used to compute the size of a particular business concern, the fact remains that the actual text of the Runway Extension Act was narrow in scope and revised only the specific portion of the Small Business Act relating to the establishment of size standards. As a result, Appellant has not shown that the Runway Extension Act directly contradicts and overrules the regulations at 13 C.F.R. § 121.104(c)(1) and FAR 19.101, which address the period of measurement used to determine size.

Second, as SBA emphasizes in its response to the appeal, an additional problem for Appellant is that, even as amended by the Runway Extension Act, section 3(a)(2)(C) of the Small Business Act continues to state that a size standard may be established only after notice-and-comment rulemaking and with approval of the SBA Administrator. Section II.A, *supra*. Accordingly, insofar as the

Runway Extension Act can be understood as lengthening the time period used to calculate the size of individual businesses, such a change would have occurred in the context of a revision to the size standard methodology, and therefore could be implemented only through notice-and-comment rulemaking and with approval of the SBA Administrator. Notably, section 3(a)(2)(C) of the Small Business Act - the exact provision revised by the Runway Extension Act - not only requires notice-and-comment rulemaking and approval of the SBA Administrator, but also contemplates an exception to these requirements if, and only if, “specifically authorized by statute.” *Id.* The Runway Extension Act, though, was silent as to any such exception being granted here. *Id.* Consequently, SBA could reasonably conclude, as stated in SBA Information Notice No. 6000-180022, that the Runway Extension Act is not immediately effective and instead must, based on the entirety of section 3(a)(2)(C) of the Small Business Act, be implemented via notice-and-comment rulemaking.

Cypher Analytics, at 7-8.

Appellant takes issue with *Cypher Analytics*, and requests that I overturn it. I disagree, and here reaffirm the holding. Appellant argues the Act was effective immediately and rendered the existing SBA regulations invalid because Congress did not assign a future effective date. However, as noted in *Cypher Analytics*, the Runway Extension Act did not alter the provisions of the Small Business Act which specifically state that “the Administrator may specify detailed definitions of size standards” and provides that the Administrator will do so through rulemaking. 15 U.S.C. § 632(a)(2)(A), (a)(6). In other words, the definitions of the size standards must come as part of notice and comment rulemaking from the Administrator. Further, the provision of the Small Business Act revised by the Runway Extension Act, § 3(a)(2)(C), requires that size standards be promulgated only through notice and comment rulemaking, and with the approval of SBA's Administrator, and this requirement was not altered by the Runway Extension Act. Appellant's arguments as to Congress' intent and the effective date of the statute do not change the fact that the Runway Extension Act was in fact a narrow statute and failed to alter any of the requirements for notice and comment rulemaking in setting size standards. The change in the statute altered the number of years of a concern's annual receipts to be used in setting size standards under § 3(a)(2)(C), but it does not short-circuit the process for promulgating regulations. Indeed, it leaves undisturbed the requirement for a size standard to be set only after notice and comment. Therefore, the statute does not conflict with the existing regulation.

Appellant argues that *Cypher Analytics* failed to consider the impact of the Runway Extension Act on SBA's existing regulations. However, that impact is to be determined by the Administrator in the rulemaking process, which has yet to be finalized. Accordingly, the Area Office was correct in applying the current regulations in making its size determination of Appellant. To do otherwise would require speculation as to how the Runway Extension Act would alter the regulation, which would be an impermissible manner of making a size determination.

Appellant's reliance upon the legislative history of the Runway Extension Act is misplaced. While the report Appellant relies upon says Congress intended to change the formula

by which SBA determines size it does not say, and the Act does not explicitly require, the immediate imposition of the five-year term upon SBA's existing regulations, or the circumvention of the notice and comment rulemaking under the authority of the Administrator to make any necessary modification to SBA's regulations. Indeed, the legislative history explicitly recognizes Congress' grant of broad discretion to the Administrator in setting size standards. H. Rpt. 115-939, at 2. Had Congress wished to immediately impose an interim rule, it could have done so in the legislation itself, as it did in the Small Business Jobs Act of 2010. Pub. L. 111-240, § 1116, codified at 15 U.S.C. § 632(a)(5). That Congress chose not to impose such an interim rule, when it had the power to do so, supports the conclusion it did not intend an immediate change in the regulation outside of the notice and comment process.

Similarly, while the proposed bill Appellant submits as its Exhibit 5 (H.R. 2345, passed by the House, no action by the Senate) sets a timetable for the Administrator to issue new regulations on the Runway Extension Act, it does not state that the existing regulations are invalid. Indeed, rather than short-circuiting the regulatory process, this legislation recognizes it, and sets a timetable for the goal of amending the regulations to extend the three-year period for determining a firm's receipts to a five-year period at a point in the future. In other words, the proposed legislation Appellant relies upon acknowledges that a five-year term for determining annual receipts in SBA size determinations is not yet in effect and recognizes that the rulemaking process is required to fully implement it. Further, SBA is already undertaking the process contemplated in the proposed legislation, as evidenced by the proposed rule. 84 Fed. Reg. 29399 (June 24, 2019). Therefore, the proposed legislation upon which Appellant relies does not support its argument.

I therefore conclude that the Runway Extension Act does not impose an immediate amendment to SBA's regulations, but rather that SBA must implement any change in its size standards through notice and comment rulemaking by the Administrator. Therefore, at the time the Area Office conducted the size determination, the existing regulation computing a concern's annual receipts based upon a three-year average was still in effect, and the Area Office did not err in applying it. Appellant acknowledges that its receipts exceed the applicable size standard when calculated over three years. Therefore, Appellant has failed to establish clear error in the size determination.

IV. Conclusion

Appellant has failed to establish clear error in the size determination. I therefore DENY the instant appeal and AFFIRM Size Determination No. 02-2019-093. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge