United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: BTAS, Inc, Appellant, Appealed From Size Determination No. 04-2020-027	SBA No. SIZ-6063 Decided: August 11, 2020

APPEARANCES

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Samuel S. Finnerty, Esq., Patrick T. Rothwell, Esq., PilieroMazza PLLC, Washington, DC, for the Appellant

DECISION[1]

I. Introduction and Jurisdiction

On June 18, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area IV (Area Office) issued Size Determination No. 04-2020-027 concluding that BTAS, Inc. (Appellant) is not a small business. Appellant maintains that the Area Office improperly calculated Appellant's receipts over a three-year period rather than over a five-year period, in contravention of the "Small Business Runway Extension Act of 2018," Pub. L. 115-324, 132 Stat. 4444 (Dec. 17, 2018). (Runway Extension Act). For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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 instant 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.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation

On April 29, 2019, the General Services Administration (GSA) issued Request for Proposals (RFP) No. GS00Q13DR0002P1P3P4, a Multiple Award, Indefinite Delivery, Indefinite Quantity (MA-IDIQ) task order contract for Government-wide professional service based requirements, available for use by all Federal agencies and other entities, also known as "One Acquisition Solution for Integrated Services - SB" (OASIS). The RFP contemplated three awards for Pool 1, 3, and 4, respectively.[2] For Pool 3, the Contracting Officer (CO) set aside the procurement entirely for participants in the 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 541330, Exception A, Engineering Services, with a corresponding $38.5 million annual receipts size standard. Proposals were due June 28, 2019.

On June 25, 2019, Appellant submitted its proposal, including price. On May 26, 2020, the CO announced that Appellant had been awarded the contract.

B. Protest

On June 20, 2020, LCGI SSAI Joint Venture LLC (LCGI), an unsuccessful offeror, filed a timely size protest challenging Appellant's size. The CO forwarded the protest to the Area Office for review.

In its protest, LCGI alleged that Appellant does not meet the size standard required for award under Pool 3 because its average revenues over the three years preceding the Solicitation closing date exceed $38.5 million. (Protest, at 5.) LCGI relied on the Runway Extension Act and SBA Information Notice No. 6000-180022 (December 28, 2018) to support using the most recent three years of a concern's receipts when determining size status. LCGI also pointed to the Solicitation, which included a slide deck and Questions and Answers (Q & A), noting that "[u]ntil the SBA issues further direction, agencies will continue to use the previous standard of 3 years when determining size status." (*Id.*, at 4-6, 143, citing Ex. C, Slide 6 of the OASIS SB Pools Industry Day Deck at 143 (May 7, 2019); Ex. D, Q & A No. 438 at 182 (June 6, 2019)).

On June 6, 2019, GSA addressed questions from prospective offerors, including whether the Small Business Runway Extension Act applies to this solicitation.

> [Answer] The SBA has released their response on this matter, which states that until the SBA issues further direction, agencies will continue to use the previous standard of 3 years when determining size status. The [Small Business] Runway Extension Act amended 15 USC 632 where it describes an alternate path where other Federal agencies can prescribe a size standard for categorizing a business

[2] The CO informed OHA that Appellant was the apparent awardee for Pool 3. Accordingly, this decision pertains only to Solicitation No. GS00Q13DR0002P1P3P4, Pool 3, and no further discussion of the remaining Pools are required.

> concern as a small business but that also requires public notice and SBA Administrator coordination. GSA lacks the authority to deviate from the SBA's current regulations, which specify a 3 year size standard, absent coordination and concurrence from the SBA.

(*Id.*, at 5, citing Ex. D, Q & A No. 27, at 146; *see also*, Q & A Nos. 28, 33, 64, 200, 1044, 1094, and 1096, at 146-240.)

LCGI noted that on June 24, 2019, SBA issued a notice of proposed rulemaking to implement the Runway Extension Act. (Protest at 5, citing 84 Fed. Reg. 29399, 29400 (June 24, 2019)). The instant Solicitation closed on June 6, 2019. On December 5, 2019, SBA issued the final rule with an effective date of January 6, 2020. (*Id.*, citing 84 Fed. Reg. 66561-02, 66561 (Dec. 5, 2019).)

LCGI maintained that under the SBA's Information Notice and the terms of the Solicitation, including the associated slide deck and Q & A's, the proper method for calculating annual receipts for the purposes of the Pool 3 threshold is to average a concern's revenue for the prior three years. (*Id.*, at 6.) LCGI relied on OHA's precedent holding that the Runway Extension Act's five-year period for determining a concern's annual receipts was not effective until the SBA issued a final rule implementing the change. (*Id.*, citing *Size Appeal of Diversified Protection Corp.*, SBA No. SIZ-6042 (2019); *Size Appeal of Advanced Technology Systems Co.*, SBA No. SIZ-6034 (2019); *Size Appeal of Cypher Analytics*, SBA No. SIZ-6022 (2019).)

LCGI further relied on a Government Accountability Office (GAO) decision in a pre-award protest regarding another pool of the same Solicitation in August 2019, which upheld the use of three-year average methodology in calculating annual receipts. (*Id.*) There, the protesters argued that the Runway Extension Act required GSA to calculate annual receipts using the five-year average method rather the three-year average method directed by GSA and SBA in considering Pool 1 awards under the OASIS contract. (*Id.*) GAO considered the same facts set out above and denied the protest, holding that there was "no basis to conclude that SBA and GSA's actions violate the Runway Extension Act." (*Id.*, at 6-7, citing *TechAnax LLC*; *Rigil Corp.*, B-408685.22, B-408685.25, Aug. 16, 2019, 2019 CPD ¶ 294.)

On June 4, 2020, the Area Office initiated a formal size determination of Appellant.

C. Response to Protest

In response to the protest, Appellant argued that under the Runway Extension Act, it does not exceed the size standard using a five-year average and qualifies as a small business for this procurement. (Protest Response, at 2.) Appellant maintained the Runway Extension Act immediately changed the period for calculation of annual receipts for services contracts, including the instant procurement, from three years to five years.

Appellant further argued that while SBA would likely take the position that Appellant's size must be calculated using its annual receipts over a three-year period, this would be a mistake, because despite SBA's delay in amending its regulations to reflect the changes made by the

Runway Extension Act, the five-year period of measurement for annual receipts has been in effect since December 17, 2018—well before the Solicitation was issued. Thus, any finding by SBA that Appellant is not a small business for the Solicitation based on a three-year average of its receipts would be misguided at best, and contrary to law. (*Id.*)

Appellant argued the Small Business Act provides that "no Federal agency or department" can issue a receipts-based size standard unless that standard calculates the small business's size over a five-year period. (*Id.*, at 6, citing 15 U.S.C. § 632(a)(2)(C).) Thus, SBA, as a federal agency, is precluded from issuing, or, enforcing, a receipts-based size standard that uses anything less than a five-year period of measurement. (*Id.*)

Appellant claimed that it was the intent of Congress which should control in interpreting the Runway Extension Act. Congress's intent was "to lengthen[] the time in which [SBA] measures size through revenue, from the average of the past [three] years to the average of the past [five] years." (*Id.*, at 7, citing H.R. Rep. No. 115-939, pt. 1, at 2.) Appellant argued that it does not matter how SBA "interprets" Section 3(a)(2)(C) of the Small Business Act, or that "SBA has repeated this interpretation . . . in the Federal Register 52 times[.]" 84 Fed. Reg. 29339-01, 29400 (June 24, 2019). (*Id.*, at 8.) In Appellant's view, "just because SBA has a long-standing view on an issue, that does not make its view correct." (*Id.*) While SBA has convinced tribunals confronted with this same issue to defer to its interpretation of the Small Business Act, such deference is not warranted and should not be given by the Area Office. (*Id.*)

Appellant further reasoned that even though the Runway Extension Act does not specify an effective date, it was effective as soon as it was signed into law. (*Id.*, at 9, citing Pub. L. No. 115-324, 132 Stat. 4444 (Dec. 17, 2018).) Appellant maintained that a long-standing principle of statutory interpretation holds that a statute is presumed to be effective immediately unless it specifies a different effective date. (*Id.*, citing *Matthews v. Zane*, 20 U.S. 164, 179 (1822); *see also Gozlon-Peretz v. United States*, 498 U.S. 935, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). Thus, because the Runway Extension Act did not specify a different effective date, it was effective immediately. In Appellant's view, this is true regardless of whether SBA regulations, as of the date of Appellant's proposal, required the use of a three-year calculation period, because a regulation which contravenes a statute is invalid. (*Id.*, citing *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1324 (Fed. Cir. 2003) (explaining that a regulation that is valid when promulgated becomes invalid upon enactment of a statute in conflict with the regulation); *see also GHS Health Maintenance Org., Inc. v. United States*, 536 F.3d 1293 (Fed. Cir. 2008) ("an agency's rules may not conflict with a statute; if they do, the statute governs."). Thus, as soon as the Runway Extension Act was enacted, the portion of SBA regulations providing for a three-year period of measurement for receipts-based size standards was rendered invalid. (*Id.*)

Appellant alleged that OHA cases holding the Runway Extension Act's five-year period for determining a concern's annual receipts was not effective until the SBA issued a final rule implementing the change were erroneously decided, and the Area Office should not follow them. (*Id.*, at 10-12.)

D. Size Determination

On June 18, 2020, the Area Office issued Size Determination No. 04-2020-027, concluding that Appellant is not small under a $38.5 million size standard. The Area Office reviewed Appellant's ownership and management structure, and found that Appellant is affiliated with [XX].[3] (Size Determination, at 2.)

Turning to the calculation of Appellant's size, the Area Office noted that Appellant had argued to the Area Office that concerns about its size were based on the erroneous interpretation that size should be calculated over a three-year period. (*Id.*, at 2-3.) Appellant urged that the Runway Extension Act instead required the Area Office to utilize a five-year calculation period, and suggested that "the Area Office may choose to defer to SBA guidance and case law from [OHA], which provide a number of alleged justifications for continuing to apply a [three]-year period of measurement to proposals submitted under the Solicitation." (*Id.*)

The Area Office rejected Appellant's argument, explaining that the Area Office may not, in fact, choose to ignore OHA precedent and the law, when SBA's comments accompanying publication of the Final Rule stated explicitly, "[t]hus, even if SBA receives a request for a size determination or size appeal after the effective date of the final rule, SBA will still use a [three]-year calculation period *if the determination or appeal relates to a certification submitted prior to the final rule's effective date*." (*Id.*, at 3, quoting 84 Fed. Reg. 66561, 66568 (Dec. 5, 2019), emphasis Area Office.)

The Area Office concluded that it is bound to accept OHA's interpretation of the law, where 13 C.F.R. § 134.316(d) clearly states that an OHA decision is the "final decision of the SBA." Because none of OHA's multiple decisions on this subject have been appealed and no court of competent jurisdiction has overruled its analysis of this issue, the Area Office determined that it would apply the period of measurement provided for by the law.

The Area Office therefore found that Appellant's average annual receipts over its last three completed fiscal years exceed the $38.5 million size standard, and as a result, Appellant is not a small business. (*Id.*)

E. Appeal

On July 3, 2020, Appellant filed the instant appeal. Appellant argues that the Area Office erred as a matter of law in finding that Appellant is not small based on a three-year period of measurement for its annual receipts, even though the Runway Extension Act, which requires a five-year period of measurement for a concern's annual receipts, has been in effect since it was signed into law on December 17, 2018. (Appeal, at 1.) Had the Area Office used a five-year

[3] On appeal, Appellant challenges only the portion of the Area Office's analysis relating to the Runway Extension Act, so further discussion of the Area Office's findings pertaining to [XX] and other unrelated matters are unnecessary. *E.g., Size Appeal of Envt'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination "remains the final decision of the SBA.").

period to calculate Appellant's annual receipts, the Area Office would have found Appellant to be small. (*Id.*)

Appellant contends that because the Runway Extension Act was enacted prior to the submission of Appellant's proposal, it requires that the calculation of Appellant's annual receipts be based on a five-year period of measurement. (*Id.*, at 4.)

Appellant argues that although the Area Office did not fully explain its decision, stating that "[t]here is no need to rehearse the arguments on both sides of the issue[,]" Appellant finds it to be clear "the Size Determination was based on inconsistent and irrelevant SBA policy, prior OHA decisions, and language contained in the preamble of a December 2019 SBA final rule—a rule which was enacted more than a year after Appellant submitted its proposal." (*Id.*)

Appellant asserts that to the extent the Area Office's decision was based upon SBA's position that section 3(a)(2)(C)(ii)(II) of the Small Business Act does not apply to SBA, it is in error. Appellant emphasizes the Runway Extension Act amended the Small Business Act § 3(a)(2)(C)(ii)(II) by striking "3 years" and inserting "5 years." (*Id.*, at 5-6, citing 15 U.S.C. (a)(2)(C)(ii)(II).) As a result, since December 17, 2018, the Small Business Act, as revised by the Runway Extension Act, "has prohibited any 'Federal department or agency' from utilizing a receipts-based size standard that determines the size of a business over a period of less than five years." Thus, SBA, as a federal agency, is precluded from issuing or applying a receipts-based size standard in which size is calculated using any period of measurement less than five years. (*Id.*)

Appellant maintains its position is supported by established principles of statutory construction, which provide that if the language of a statute is unambiguous and the statutory scheme is coherent and consistent, the language controls. (*Id.*, at 6-7, citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).) Here, the Small Business Act as amended by the Runway Extension Act applies to Federal agencies, and SBA is a Federal agency, therefore by the statute's unambiguous language the Act applies to SBA, and SBA's assertion to the contrary is of no moment. (*Id.*) Appellant further argues that Congress' intent that SBA be covered by the Act and thus be required to extend the time period for calculating receipts be extended by to five years is clear, and thus under the *Chevron* test, that intent is controlling. (*Id.*, at 6-8, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).)

Given that SBA is subject to the Small Business Act § 3 (a)(2)(C), it would have been clear error for the Area Office to base its Size Determination on the notion that the Runway Extension Act does not apply to SBA. (*Id.*, at 8.) Appellant argues it does not matter how SBA "interprets" Section 3(a)(2)(C) of the Small Business Act, or that "SBA has repeated this interpretation . . . in the Federal Register 52 times[.]" Rather, the Runway Extension Act clearly applies to SBA and SBA's view to the contrary should have been rejected by the Area Office and should be rejected by OHA. (*Id.*)

Further, Appellant argues that while the Runway Extension Act did not specify an effective date, it has been in effect since December 17, 2018, when it was signed into law. (*Id.* at 9.) Appellant relies on principles of statutory interpretation holding that a statute is presumed to

be effective immediately unless it specifies a different effective date. (*Id.*, citing *Matthews v. Zane*, 20 U.S. 164, 179 (1822); *see* also *Gozlon-Peretz v. United States*, 498 U.S. 935, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). Thus, because the Runway Extension Act did not specify a different effective date, it was effective immediately and did not require formal rulemaking.

Further, the Runway Extension Act takes precedence over any contrary regulations. (*Id.*, citing *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1324 (Fed. Cir. 2003) ("A regulation that contravenes a statute is invalid.").) Even if there was some ambiguity regarding the effective date of the Runway Extension Act, the Area Office should have summarily resolved such ambiguity by deferring to Congress' stated intent, emphasized by the passage of H.R. 2345, the "Clarifying the Small Business Runway Extension Act" for SBA to lengthen the time by which concerns' annual receipts are calculated from three years to five years. (*Id.*, at 10.)

Appellant insists that SBA's policy statement in the Information Notice and OHA precedents are not dispositive, because the Information Notice is not the type of agency statement that is afforded the *Chevron* deference. The Area Office erred in relying upon the effective date in the Final Rule SBA published dealing with the period of measurement used to calculate annual receipts. (*Id.* at 12, citing 84 Fed. Reg. 66561, 66568 (Dec. 5, 2019)). Only agency interpretations of ambiguous statutes reached through formal proceedings with the force of law, such as adjudications or notice-and-comment rulemaking, qualify for *Chevron* deference, and the Runway Extension Act was not ambiguous. (*Id.*, at 11-12, citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).)

Appellant argues the Runway Extension Act did not need to be implemented through rulemaking to be effective. Appellant argues OHA's decisions in *Diversified Protection Corp.*, and *Cypher Analytics* are erroneous. Appellant further argues the Runway Extension Act does not "revise, modify or establish size standards[,] which require notice-and-comment rulemaking, as outlined in Section 3(a)(6) of the Small Business Act, but rather, modifies the method by which size for receipts-based size standards is calculated." (*Id.*, at 13.) Conversely, the actual establishment of a size standard, which by statute was delegated to SBA, requires notice-and-comment rulemaking. However, since Congress did not establish a size standard in issuing the Runway Extension Act, the Area Office should have calculated Appellant's size using the applicable five-year period of measurement. (*Id.*, at 13.)

Appellant then argues that any possible arguments that the Runway Extension Act did not apply because it required rulemaking from SBA would lead to illogical questions, such as "what would prevent SBA from not changing the size standard at all?". (*Id.*, at 14.) If the Area Office concluded that the Runway Extension Act required rulemaking, in Appellant's view, it implicitly concluded that SBA could have avoided amending its regulations to implement the Act altogether, which Congress would not condone. (*Id.*)

Appellant makes a final note, that the current SBA Form 355 expressly instructs applicants, such as Appellant, that "[f]or certifications made prior to January 6, 2022, select whether the applicant elects to use a [three]-year or a [five]-year averaging period for average annual receipts." Thus, SBA represented to applicants, like Appellant, whose certifications of

size took place prior to January 6, 2020, but after the date the Runway Extension Act was signed into law, that they could elect to apply the five-year average. (*Id.*, at 14-15.) The Area Office should have honored that representation by using the five-year average that Appellant elected when calculating its size.

Accordingly, the Area Office's failure to apply the five-year calculation period was clear error of law, so the size determination should be reversed.

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 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. Runway Extension Act

The Runway Extension Act was signed into law on December 17, 2018. "Small Business Runway Extension Act of 2018," Pub. L. 115-324, 132 Stat. 4444 (Dec. 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. Law 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).

After the Runway Extension Act was enacted, SBA issued SBA Information Notice No. 6000-180022 (December 21, 2018),[4] signed by the Associate Administrator of the Office Government Contracting and Business Development (AA/OGC&BD). The Information Notice stated SBA's view that "the Runway Extension Act modifies the method for prescribing size standards for small businesses," but "[t]he Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process." *See* Information Notice, at 1. Particularly, SBA stated, "[t]he 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." *Id.*

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 the period used to calculate a concern's annual receipts from three years to five years. 84 Fed.

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

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 nevertheless was "propos[ing] to change its own size standards to provide for a [five]-year averaging period for calculating annual average receipts for all receipts-based size standards" so as to "promote consistency government-wide on small business size standards." 84 Fed. Reg. at 29400. SBA asserted 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.*)

On December 5, 2019, SBA published the final rule to implement the Runway Extension Act by "lengthen[ing] the time in which the SBA measures size through revenue, from the average of the past [three] years to the average of the past [five] years." 84 Fed. Reg. 66561, 66562 (Dec. 5, 2019). SBA explained that, because some small businesses could be disadvantaged by utilizing a five-year average, SBA would adopt a two-year transition period during which "a firm may choose between calculating receipts using a [three]-year average or a [five]-year average." *Id.* at 66563. The new rule became effective January 6, 2020. *Id.* at 66561. SBA cautioned that:

> [U]ntil the effective date of a final rule, SBA will continue to apply the [three]-year averaging period in the present [13 C.F.R.] § 121.104 for calculating average annual receipts for all SBA's receipts-based size standards. Since size is determined as of the date when a firm certifies its size as part of its initial offer which includes price, the [three]-year calculation period will apply to any offer submitted prior to the effective date of the final rule. Thus, even if SBA receives a request for a size determination or size appeal after the effective date of the final rule, SBA will still use a [three]-year calculation period if the determination or appeal relates to a certification submitted prior to the final rule's effective date.

Id. at 66568.

C. Analysis

As noted above, SBA has published a final rule implementing a five-year period for calculating average annual receipts. Section III.B, *supra*. These new rules became effective January 6, 2020, and SBA's commentary in the Federal Register makes it clear that the three-year calculation period continues to apply to "any offer submitted prior to the effective date of the final rule." 84 Fed. Reg. 66561, 66568 (Dec. 5, 2019). Appellant submitted its offer for the instant procurement on June 25, 2019, and therefore the new rule is not applicable here. Appellant's size must be determined as of the date of its submission of its certification that it is small with its submission of its initial offer, including price. 13 C.F.R. § 121.404(a).

The sole issue in this case is whether the Area Office erred in calculating Appellant's average annual receipts over a three-year period instead of a five-year period. Appellant does not dispute that the Area Office correctly determined Appellant's size as of June 28, 2019, the date of

Appellant's submission of its initial offer including price. *See* 13 C.F.R. § 121.404(a). Appellant further does not dispute that the 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); FAR 19.101.

Appellant maintains, however, that the Area Office erred as a matter of law because the Runway Extension Act superseded those regulations and imposed a five-year period of measurement.

I here hold that OHA's decisions in *Size Appeal of Cypher Analytics, Inc. d/b/a Crown Point Systems*, SBA No. SIZ-6022 (2019), *Size Appeal of Advanced Technology Systems Company*, SBA No. SIZ-6034 (2019), and *Size Appeal of Diversified Protection Corporation*, SBA No. SIZ-6042 (2019) are apposite and dispositive of the instant appeal.

In this case, Appellant's arguments are unpersuasive for two main 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 III.B, *supra*. Similarly, the pertinent section of the Runway Extension Act itself was entitled "Modification to Method for Prescribing Size Standards for Business Concerns." *Id.* While Appellant's assertion may be true, "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." *Cypher Analytics*, at 8. 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, even as amended by the Runway Extension Act, section 3(a)(2)(C) of the Small Business Act continues to require that a size standard may be established only after notice-and-comment rulemaking and with approval of the SBA Administrator. Section III.B, *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." *Cypher Analytics*, at 8. 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.

Appellant also takes issue with SBA's position, expressed in SBA's proposed rule addressing the Runway Extension Act, that section 3(a)(2)(C) of the Small Business Act does not apply to SBA, because SBA relies upon a different portion of the Small Business Act, section 3(a)(2)(A), when promulgating size standards. *See generally* 84 Fed. Reg. 29399, 29400 (June 24, 2019). I find it unnecessary to resolve this question. As discussed above, Appellant has not shown that the Runway Extension Act directly contradicts the then effective regulations concerning the period of measurement used to compute size, nor that Congress intended that the Runway Extension Act should be effective immediately without adhering to the statutorily-mandated notice-and-comment and SBA approval requirements, which are set forth in the same portion of the Small Business Act amended by the Runway Extension Act. If SBA is not subject to section 3(a)(2)(C), this would only further bolster SBA's rationale for implementing the Runway Extension Act through the regulatory process. *Cypher Analytics*, at 8.

Similar arguments raised by Appellant were previously advanced and rejected in *Cypher Analytics, Advanced Technology*, and *Diversified Protection Corporation*. While Appellant asserts that the Runway Extension Act took immediate effect and SBA is precluded from issuing or enforcing anything less than a five-year period of measurement, that argument is plainly contradicted by the text of the Runway Extension Act itself, as OHA has previously held.

Undeniably, the Runway Extension Act amended only one sentence of the Small Business Act pertaining specifically to the promulgation of size standards. Section III.B, *supra*. Since the Runway Extension Act did not alter the requirements for notice-and-comment rulemaking and approval by the SBA Administrator, the Runway Extension Act can only be implemented by adhering to these requirements. *Id.* Accordingly, as in *Cypher Analytics, Advanced Technology*, and *Diversified Protection Corporation*, 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 define the period of measurement used to compute size.

Appellant's contention that Information Notice No. 6000-180022 is not entitled to *Chevron* deference because it is not a formal adjudication, or the result of notice and comment rulemaking is irrelevant. OHA's previous decisions on the applicability of the Runway Extension Act were not based upon deference to the Information Notice, but upon a close reading of the Small Business Act as amended and the unaltered requirement for notice-and- comment rulemaking and approval by the Administrator.

Furthermore, Appellant's reliance upon the legislative history of the Runway Extension Act and Congress' intent is misplaced. While Appellant relies upon Congress' intent to change the formula by which SBA determines size, Appellant fails to show the Act explicitly requires 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. In fact, 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). Congress chose not to impose such an interim rule in this Act, when it had the power to do so, supporting the conclusion that it did not intend an

immediate change in the regulation outside of the notice and comment process. *Advanced Technology*, at 11.

Appellant's final point that the Area Office should have honored the representation that the current SBA Form 355 makes, which instructs applicants that "[f]or certifications made prior to January 6, 2022, select whether the applicant elects to use a [three]-year or a [five]-year averaging period for average annual receipts," borders on the frivolous. This argument disregards the Runway Extension Act, section 3(a)(2)(C) in its entirety, the Proposed and Final Rules and their Preambles. It further fails to take account of the terms of the Solicitation itself, including the slide deck and Q & A's, which consistently stated and gave notice that the averaging period for annual receipts for this procurement was three years.

Appellant's argument that the Area Office is implementing a regulation in contravention of a statute is meritless. As noted above, the Runway Extension Act changed one sentence in the section on the establishment of size standards. It did not alter the statute's requirement that size standards be established only after notice-and-comment rulemaking and approval by the Administrator. It is thus clear that the Area Office's actions are not in contravention of the statute, but in compliance with it. Appellant has failed to establish that the size determination is based upon any error of law or fact, and therefore I must deny this appeal.

IV. Conclusion

Appellant has not established clear error of fact or law in the size determination. Accordingly, I DENY the instant appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge