



October 7, 2024

Ms. Laura Maas
HUBZone Program
U.S. Small Business Administration (SBA)
409 Third Street, SW
Washington, DC 20416

RE: Comments to Proposed Rule: RIN 3245-AH68:
**SBA Proposed Rule Significantly Changes Effect of Size/Status Recertifications
and Alters M&A for Government Contractors**

Dear Ms. Maas:

The following comments are submitted on behalf of the American Council of Engineering Companies (ACEC) – the business voice of the U.S. engineering industry. Founded in 1906, ACEC is a national federation of fifty-one state and regional organizations representing nearly 5,500 engineering firms and nearly 600,000 engineers, surveyors, architects, and other specialists nationwide. 85% of our member companies have 100 employees or less and 74% of our member companies have 50 employees or less. ACEC member firms drive the design of America’s infrastructure and built environment.

ACEC is pleased to provide input and seek clarifications on the proposed HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs by the Small Business Administration (SBA) as published in the *Federal Register* Volume 89, Number 164 (Friday, August 23, 2024). The proposed rule would delete the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and move them to a new section that would cover all size and status recertification requirements. This should ensure that the size and status requirements will be uniformly applied. ACEC applauds this effort toward clarity and simplicity. However, other material changes to these programs potentially reverse years of case law and seriously impact eligibility of small businesses as federal government contractors.

Recertification Requirements

While this proposed rule should avoid confusion going forward, we are concerned that many of our member firms, both small and other than small, have made business decisions on pursuing contracts, selling, acquiring, merging, or forming joint ventures based on understandings that future options, order, or agreements would be based on existing status at the time of initial offer.

Based on ACEC’s interpretation of this proposed rule, for firms that have already self-certified as a small business under NAICS Code 541330, or a specific small business subcategory:

1. Their size status for an order or agreement under a multiple award contract that itself was set aside or reserved for small business is determined as of the date of initial offer (submission of qualifications for architect/engineer (A/E) services) unless size recertification is requested by the contracting officer in connection with a specific order or agreement. Where a contracting officer requests size recertification with respect to a specific order or agreement, size is determined as of the date of initial offer (or other formal response to a solicitation) for that specific order or agreement only.
2. If size recertification is triggered by a merger, sale, or acquisition; or because it is a long-term contract in the fifth year of performance, size will be determined as of the date of the merger, sale, or acquisition occurred, or the date of the size recertification in the case of a recertification in the fifth year of a long-term contract.
3. Where an initially small contract holder has organically grown to be other than small and could not recertify as small for a specific order or agreement for which a contracting officer requested recertification, it may continue to qualify as small for other orders or agreements where a contracting officer does not request recertification.

SBA is proposing material changes to reverse recent decisions from the Government Accountability Office (GAO) and the SBA’s Office of Hearing Appeals (OHA). Historically, contracting officers requesting recertification has been rare. Contracting officers arbitrarily and inconsistently requesting recertification introduces a significant amount of uncertainty among graduating small businesses. **Efforts to guide contracting officers in their discretion could be helpful; however, such guidance from SBA should focus on recertification for extraordinary circumstances rather than become the routine.**

The proposed changes significantly disrupt company strategic planning and are an existential threat for many companies as significant financial losses are possible. **If these qualifying and disqualifying recertification provisions remain, we request that only new contract solicitations be subject to the changes. Existing contracts including IDIQ contracts with potential option years should be grandfathered in and remain as previously understood or negotiated.**

For A/E firms, the “date of offer” has been a subject of confusion. This date can be interpreted as the date that the SF330 qualifications form is submitted or the date that the firm responds to the Request for Proposal (RFP), after short listing. **ACEC advocates for the “date of offer” to be when the SF330 is submitted as some solicitations can take 12-18 months to issue an RFP after receiving SF330s from interested firms.**

Merger and Acquisition Impacts for Government Contractors

The Small Business Runway Extension Act of 2018 (P.L. 115-324) extending the look back period from three to five years as well as Mentor-Protégé Program Joint Ventures have been key mechanisms for graduating small businesses to have a path to “mid-size.” The proposed changes

would result in the acquisition value of small business contractors diminishing drastically as the future potential contract revenue for successful performance as a combined entity is not possible. The rule will not only discourage large companies from buying small companies, but also two or more small businesses merging. Additionally, the proposed changes to ownership and control requirements could limit the potential investor pool for small businesses as minority shareholders may want more investment protections.

Off-ramping provisions require a contract to be terminated for convenience if the contractor is acquired and makes a disqualifying recertification. Notably, protests would likely increase as any contract holder on a multiple award contract can request a formal size determination regarding a recertifying concern's status as a small business. The proposed rule would be greatly disruptive to the government customers who depend on a company to achieve their mission. Thus, it would result in more negative acquisition outcomes. **SBA should revisit application of recertification requirements on existing contracts and contracts in the procurement process to avoid unintended negative impacts to the government, contract holders or offerors, and the public.**

Thank you for your consideration of our industry's concerns and recommendations. We are committed to working with the SBA to find solutions without significant business disruption and ensure a vibrant marketplace for all small businesses.

Respectfully,

A handwritten signature in blue ink that reads "Bradley J. Saull". The signature is written in a cursive, flowing style.

Bradley J. Saull (*he/him*)
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American Council of Engineering Companies (ACEC)
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