

July 16, 2012

BY ELECTRONIC SUBMISSION

The Honorable Karen Mills
Administrator
United States Small Business Administration
409 3rd Street SW
Washington, DC 20416

RE: Comments on Proposed Small Business Innovation Size Regulations. May 15, 2012
77 Fed. Reg. pp. 28,510-28,530.¹

Dear Administrator Mills:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits these comments to the Offices of Technology and Size Standards of the Small Business Administration (SBA) regarding its proposed Small Business Innovation Size Standard rule that will implement parts of the Small Business Innovation (SBIR) Re-Authorization Act as passed in the 2012 National Defense Authorization Act. The proposed rule will among other things address ownership, control and affiliation issues of SBIR companies. The proposed rule also permits, as authorized by statute, small business concerns that are majority-owned by multiple venture capital operating companies to participate in the SBIR program.

The SBIR program is considered to be a vital part of this nation's innovative and technology community. SBIR was created by Congress in 1983 and SBA was given the statutory authority to manage the program. Since its inception, SBIR has made over 50,000 awards totaling more than \$12 billion dollars. SBA has done a tremendous job managing the program.

About the Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement

¹ Small Business Size Regulations, Small Business Innovation Research Program, 77 FedReg. pp 28,520-28,530, May 15, 2012

Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.³

Comments

Through a series of regional roundtables, Advocacy has worked closely with SBA to conduct extensive outreach with small businesses in Washington, DC, Austin, Texas, Boston, Massachusetts, and New Orleans, Louisiana. In addition, Advocacy has received a number of other communications from interested small business stakeholders. There are three particular concerns that Advocacy would like to highlight for SBA that emerged from these discussions: eligibility/time of award, size protest, and domestic business concerns.

1. Eligibility

Under the existing SBIR regulation, an awardee is not required to certify its small business status until it is notified that it will be awarded the grant/contract. The proposed rule will change the time for a potential SBIR awardee to declare its small business status. Under the proposed rule the small business stakeholder will be required to declare its status as a small business at the time of the submission of the proposal. It is believed that this change, which is not statutorily mandated, is designed to bring the SBIR program in line with the other SBA programs. It is further believed that this proposed change is consistent with the government's overall effort to control waste, fraud, and abuse in Federal programs.

However, small business stakeholders in the various roundtables have voiced concern with this change. The stakeholders believe that because of the nature of the SBIR program, this change will result in a decrease in the number of SBIR applicants. While this program may have similar characteristics of some of SBA's other procurement programs, it is unlike the other SBA procurement programs in that the SBIR product is research and pre-production development and not an actual service or product.

A number of the SBIR projects, like most R&D products, never make it to the commercialization phase. Also, a large segment of the initial research and pre-product developments occur from individual scientists and engineers associated with universities. Because changes in status could occur after the proposal submission, some believe that requiring a declaration of small business status would in fact be premature. Some stakeholders expressed concern that the proposed rule may create potential violations of their conflicts of interest clauses at their respective institutions of higher learning.

² Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (SBREFA).

³ Id.

Recommendation: SBA give full consideration to reviewing the comments of the stakeholders regarding the elimination of the time of submission eligibility requirement and adoption of the current SBA time of award standard.

2. Size Protest

Currently, Section 121.1001(a) (4) of the SBA regulations sets forth who may initiate a size protest or request a formal size determination. This regulation states that a prospective offeror among others, may file a protest. The proposed regulation would change this to allow a current offeror to file a protest. The proposed regulation is silent on the definition of a current offeror.

Recommendation: Provide greater clarity in the final rule as to the process for the size protest. Eliminate the requirement to establish size at the time of proposal submission, adopt the current SBA standard, and allow only the prospective offeror among others to file a size protest.

3. Domestic Business Concern:

SBA is proposing to change the definition of a “domestic business concern” that is currently used for SBA programs. Currently, Section 121.702 Ownership and Control states that, “an SBIR awardee must be a business concern that is at least 51% owned and controlled by U.S. citizens or permanent resident aliens or at least 51% owned and controlled by another business that is at least 51 % owned and controlled by U.S. citizens or permanent resident aliens.” SBA is proposing additional criteria for an SBIR firm that it must be a domestic business concern created or organized in the United States, or under the laws of the United States or of any State.

Small business stakeholders are concerned that the proposed language “created or organized” has not been clearly defined. There is also concern as to whether this proposed definition of “domestic business concern” is statutorily required for all SBIR companies or only for VCOCs. Section 5107 (c)(3)(A) of the SBIR Reauthorization Act states that, “the SBA’s regulations addressing the participation of applicants majority-owned by multiple Venture Capital Operating Companies (VCOCs), hedge funds, or private equity firms in the SBIR program should address whether the applicant is owned by domestic business concerns.”

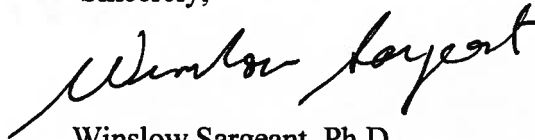
Recommendation: SBA give full consideration to the comments of the stakeholders regarding this new definition of domestic business concern and its potential impact on the SBIR program.

Conclusion

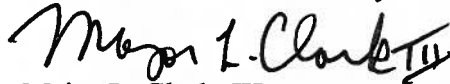
In light of the significant economic impact the proposed rule may have on small businesses in the innovation and research industries, Advocacy appreciates this opportunity to forward the concerns of small businesses to SBA.

Please contact me or Major L. Clark, III of my staff at 202/205-7150 or major.clark@sba.gov if you have any questions or require additional information.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy



Major L. Clark, III
Assistant Chief Counsel for Advocacy

cc. The Honorable Cass Sunstein