

Government Contracts



SBA Proposes New Small Business Mentor-Protégé Program: Significant Opportunities For Large And Small Businesses

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The Small Business Administration (SBA) recently published a long-awaited proposed rule that would open up the benefits of the 8(a) mentor-protégé program to all categories of small businesses.¹ The rule, which implements authorities granted in the National Defense Authorization Act for Fiscal Year 2013 (FY 2013 NDAA), will provide significant new opportunities to businesses both large and small. As we noted at that time, Congress authorized the SBA to create additional mentor-protégé programs modeled on the current 8(a) mentor-protégé program, but it was unclear to what extent the SBA would exercise that authority.² The new rule makes clear that SBA proposes to exercise its authority broadly to the significant benefit of small business contractors.

Under the current regime, the SBA's mentor-protégé program is limited to small, socioeconomically disadvantaged businesses participating in the SBA's 8(a) business development program. This is a narrow universe that includes only a small fraction of small government contractors. The benefits of this program to the 8(a) protégé and non-8(a) mentor are manifold: It gives 8(a) protégé businesses an exception to the general rule that joint venture partners are deemed to be affiliated so that they can team with large businesses; it allows mentors to own up to 40 percent of the protégé, thus providing much-needed capital to the protégé; it allows large businesses to team with protégés to compete for set-aside contracts; and, in certain circumstances, it allows large businesses to perform up to 60 percent of the work and receive up to 60 percent of the profit of contracts performed by a mentor-protégé joint venture. Although other agencies have established their own mentor-protégé programs over the years, only the SBA program provides these wide-ranging benefits along with protection from being deemed large through affiliation with a mentor (based on the mentor-protégé relationship).³ Because 8(a) participants are only a small fraction of all small businesses, very few small businesses have been able to take advantage of the SBA mentor-protégé program, and many large businesses have found the pool of potential protégés too limited.

The new rule, while maintaining the existing 8(a) mentor-protégé program (in a slightly altered form), proposes to establish a single new program, nearly identical to the successful 8(a) program, to include all small business categories – HUBZone small businesses, service-disabled veteran-owned small businesses, woman-owned small businesses, and small businesses that do not belong to any particular socioeconomic category. Although the rule is not final and the SBA likely will modify aspects of it as a result of comments, the following are the most noteworthy aspects of the proposed rule:

- The new rule all but does away with populated mentor-protégé joint ventures – *i.e.*, joint ventures existing as separate legal entities and populated with the individuals intended to perform the awarded contract. This form of joint venture was not particularly popular, and the SBA expressed concern that this form of joint venture made it too difficult to track the protégé's work share. Going forward, SBA proposes that both mentor and protégé perform work as subcontractors to an unpopulated joint venture.
- Both mentors and protégés will be subject to the same numerical limitations that exist under the 8(a) program: Each mentor ordinarily may have a single protégé, and vice versa. Under certain circumstances, however, the SBA may grant permission for a mentor to have up to three protégés and for a protégé to have two mentors. These limits – which now would apply across all SBA mentor-protégé relationships – mean that mentors and protégés must choose each other carefully.
- Currently, to be a protégé, an 8(a) participant must have a size less than half the size standard corresponding to its primary NAICS code (unless it is in the developmental stages of the program or never has received an 8(a) contract). SBA proposes to eliminate that size restriction, both for the new mentor-protégé program and for the existing 8(a) program. This resolves a significant question surrounding the FY 2013 NDAA legislation and will allow small businesses, even those of significant size, to participate in the program if they meet its other requirements.
- The rule proposes to create a new size-verification mechanism for protégé applicants – either during review of the protégé application or as part of a size protest determination prior to application. The rule does not specify what information will be required during this review.
- Under the current program, the mentor-protégé agreement is necessarily limited by the period in which the 8(a) firm is in that program. For non-8(a) firms, the SBA proposes to limit each mentor-protégé agreement to three years. A mentor-protégé joint venture generally may continue performing contracts after the agreement expires, but any recertification must take into consideration the fact that protection from affiliation exists only as long as the mentor-protégé agreement.
- A firm that graduates from the 8(a) program but remains small may transfer its existing mentor-protégé agreement to the new small business program.
- The rule establishes a process by which a firm may administratively appeal the initial rejection of a proposed mentor-protégé agreement. Following an appeal that is denied on the same grounds as the initial application, a prospective protégé must wait 60 days before submitting a new agreement with the same proposed mentor.

- The SBA proposes a number of remedies it may pursue if mentors stop providing the required business development assistance to their protégés, including recommending that contracting agencies issue a stop work order on any contract that the mentor-protégé joint venture is performing.
- The proposed rule seeks comments on the continued existence of other agencies' mentor-protégé programs, which depend on SBA approval. Those programs offer different benefits from the SBA program (for example, some offer subcontracting credit for assistance given to the protégé) and may very well survive or even be incorporated into the SBA program.⁴ Without an exception to affiliation for joint venturers, however, or the ability for mentors to perform up to 60% of a joint venture's contract, those other agency programs will become significantly less attractive to large and small businesses alike.

The proposed rule offers significant opportunities to both small and large businesses. A far larger pool of small businesses will be able to participate in mentor-protégé programs with all of the attractive features of the current SBA 8(a) mentor-protégé program, and thus may benefit from the experience, capabilities, and capital of large business mentors. Large businesses will gain access to new markets and begin potentially long-term relationships with promising small concerns. Comments on the proposed rule are due by April 6, 2015. We plan to issue another update when the SBA publishes the final rule.

¹ 80 Fed. Reg. 6618 (Feb. 5, 2015).

² See L. Lepow and D. Specht, "Small Business Opportunities and Risks Contained in the 2013 Defense Authorization Act" (Jan. 7, 2013); see also D. Chudd and D. Specht, "Small Business Issues in Government Contracts Mergers & Acquisitions," Briefing Papers (Aug. 2014).

³ The mentor and protégé can still be affiliated for reasons outside of their SBA-approved relationship. See *Size Appeal of Patriot Constr., Inc.*, SBA No. SIZ-5439 (2013).

⁴ See Testimony of D. Specht Before the U.S. House of Representatives Committee on Small Business, Subcommittee on Contracting and Workforce (July 15, 2014).

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