



Small Businesses, Big Opportunities - Recent SBA Expansion of the Mentor-Protégé Program

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Effective August 24, 2016, the Small Business Administration (“SBA”) will fulfill the mandates of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013 (“NDAA 2013”), which collectively authorized the establishment of mentor-protégé programs for small business concerns (“SBCs”) modeled after the SBA’s 8(a) Business Development (“BD”) Mentor-Protégé Program. Specifically, SBA’s Final Rule on Small Business Mentor Protégé Programs (“Final Rule”) will establish “a Government-wide mentor-protégé program” for all SBCs, including Service-Disabled Veteran-Owned Small Business Concerns (“SDVO SBCs”), Historically Underutilized Business Zone (“HUBZones”), and Women-Owned Small Businesses (“WOSBs”). In doing so, the SBA will retain its 8(a) BD Mentor-Protégé Program and establish a second Mentor-Protégé Program for all other SBCs, with the intent of making the requirements for these programs consistent with each other.

Two principal benefits of the SBA’s mentor-protégé program are that it: (1) enhances business development opportunities for small businesses to grow and gain meaningful expertise through the technical, management, financial, educational, and contract performance assistance provided by a mentor firm; and (2) expands contracting opportunities for both small businesses that may not otherwise have the capacity or ability to perform certain contracts and non-small businesses that may not otherwise qualify for certain set-aside contracts. As a result of the recent expansion, more businesses, small and large, will be able to take advantage of these and other benefits offered by the SBA’s Mentor-Protégé Programs. Below is a brief background on the original SBA 8(a) Mentor-Protégé Program and some key highlights from the new, expanded Small Business Mentor-Protégé Program implemented by the Final Rule.

BACKGROUND

The SBA currently offers the 8(a) BD Mentor-Protégé Program. Under this program, protégés are limited to 8(a) concerns, which are small businesses that are at least 51% owned, controlled, and managed by a socially and economically disadvantaged American citizen. These 8(a)s are eligible for certain sole-source and set-aside contracts and can form joint ventures and teams to bid on 8(a) set-aside contracts, small business set-aside contracts, or unrestricted procurements. In order to qualify as

a protégé under the current regulations, the 8(a) participant must have a size that is less than half the size standard corresponding to its primary NAICS code, or be in the developmental stage of its 8(a) program, or not have received an 8(a) contract previously. A significant benefit of the program is that a joint venture between an 8(a) SBC and a non-small concern will be deemed small so long as the 8(a) is small, thereby allowing the joint venture to bid on the same types of contracts as the 8(a) would be qualified to bid on its own.

EXPANDED MENTOR-PROTÉGÉ OPPORTUNITIES

Increased Pool of Protégés

When two businesses decide they are ready to enter into a mentor-protégé relationship as part of the SBA's program, the firms must execute a written mentor-protégé agreement ("MPA") setting forth an assessment of the protégé's needs and a timeline for the delivery of the assistance the mentor commits to provide to address those needs. The Final Rule greatly expands the pool of potential protégés who may enter into such agreements by establishing the following:

- The pool of available protégés has been expanded from 8(a)s only to any concern that qualifies as small, including SDVO SBCs, HUBZones and WOSBs.
- A concern is no longer required to be less than half the size standard to be a protégé, but instead need only qualify as small in its primary or even secondary NAICS code to qualify as a protégé, including 8(a) concerns.
- Even if a firm does not qualify as small for its primary NAICS code, that firm can still serve as a protégé in a secondary NAICS code for which it does qualify as small (unless the firm has never performed any work in that secondary NAICS code or the protégé would bring nothing of value to a potential joint venture).
- Graduating from the 8(a) program no longer means that the concern cannot participate in the Mentor-Protégé Program as the 8(a) can now transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship if it continues to qualify as a small business and otherwise meets the regulatory requirements.

Comments to the Final Rule expressed concern regarding the SBA's ability to manage the volume of anticipated MPAs under the newly expanded program. In response, the SBA is creating a separate unit within the Office of Business Development with the sole function of processing and reviewing MPAs and providing assistance. Although the SBA is not moving forward with the option yet, it has left open the possibility of creating open and closed enrollment periods for the submission of MPAs to the extent that the number of MPAs overwhelms the new SBA unit.

Joint Venture Contracting Opportunities

Outside of the SBA's Mentor-Protégé Programs, a joint venture partnership between an SBC and a non-small business could threaten the size status of the SBC because it could lead to a finding of control and, therefore, affiliation between the SBC and its large business joint venture partner. This is significant because when calculating the size of a business to determine whether that business is small,

the SBA includes the annual receipts and employees of all affiliates. Thus, if affiliation is found, the concern may no longer be deemed small, in which case neither the SBC nor the joint venture would qualify for certain procurements, such as set-asides.

Significantly, and consistent with the previous provisions of the SBA's 8(a) BD Mentor-Protégé Program, the Final Rule allows a protégé to "joint venture with its SBA-approved mentor and qualify as a small business for any Federal government contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement." In addition, given the obvious difficulties a new or young joint venture under the Mentor-Protégé Program would have in establishing a positive past performance, the Final Rule requires that a procurement agency must consider the past performance of the members of the joint venture when considering the past performance of the joint venture entity submitting a proposal or offer. Thus, these provisions increase competition for set-aside work by allowing a protégé to benefit from the experience of its mentor and by allowing a large business mentor to compete for work, via a joint venture with its protégé, for which the large business mentor would otherwise be ineligible.

Comments submitted in response to the Final Rule expressed concern regarding how these changes would affect and alter competition for federal government contracts within the small business program. Examples include those SBCs that are not able or willing to participate meaningfully in the Mentor-Protégé Program, but who will be facing competition for set-asides from joint ventures potentially out of their league in terms of resources and experience. Also, due to the "Rule of Two" the new program likely will lead to increased set-asides in the event that two or more mentor-protégé joint ventures indicate they are qualified to perform the proposed contract. The result could be fewer procurements available for non-small firms that are not able or willing to participate in the Mentor-Protégé Program.

Overall, however, the SBA concluded that increased set-asides are beneficial in that they will allow more SBCs to obtain larger contracts and a greater number of contracts. The SBA posits that this increase in set-asides and competition for set-asides could in turn lower prices to the Government for set-aside procurements.

Nonetheless, the Final Rule puts in place certain restrictions to ensure benefit to the protégé firm and to avoid abuse by large businesses mentoring these protégés and entering into joint ventures. Perhaps most notably, a mentor-protégé joint venture may not be populated for purposes of contract performance. This means that although the joint venture may have its own separate employees to perform administrative functions, the employees performing the contract work must be employees of either the protégé or the mentor. This requirement, in conjunction with the performance of work requirement for the protégé, is intended to ensure that the protégé performs work that will benefit the protégé "by developing new expertise, experience, and past performance." Similarly, the project manager for a contract must be an employee of the protégé. Although the SBA will allow the project manager to be a new hire for the protégé, the protégé may not hire the project manager from the mentor's employees.

Similarly, the Final Rule also imposes the following administrative requirements on any such joint ventures, to include:

- The joint venture agreement must be in writing, regardless of whether it exists as a formal or informal partnership or as a separate limited liability company or other separate legal entity.
- For set-aside contracts, the joint venture partners must certify that they will perform the contract in compliance with the joint venture regulations and their joint venture agreement.
- Likewise, the joint venture partners must annually report to the SBA and the Contracting Officer “how they are meeting or have met the applicable performance of work requirements”
- The joint venture must be separately identified in the System for Award Management (SAM) as its own entity and have a separate DUNS number and CAGE number specifically for the joint venture.

IMPLICATIONS FOR AGENCY MENTOR-PROTÉGÉ PROGRAMS

Section 1641 of the NDAA 2013 prohibits the continuation of other agency-specific mentor-protégé programs absent approval by the SBA. In this regard, there are several other mentor-protégé programs offered by various agencies that, among other things, offer contracting incentives to prime contractors serving as mentors. Examples include allowing a Contracting Officer to give favorable consideration to a bidder with a mentor-protégé relationship in place, providing credit for the costs of mentorship toward subcontracting plan goals, reimbursement of mentoring costs and an annual mentor award.

It is unclear what the SBA’s expanded Mentor-Protégé Program will mean for the other agency mentor-protégé programs in the future. As of now, the SBA is allowing these programs to continue for another year, after which the agencies (except the Department of Defense) must obtain SBA approval to continue to operate their programs. The SBA expressed that, in light of the recent changes to the regulations, “conceivably other agency-specific mentor-protégé programs for small business would not be needed.” Recognizing the benefits these other programs have offered, however, the Final Rule authorizes procuring agencies to provide incentives in the contract evaluation process to a mentor who will provide significant subcontracting work to its SBA-approved protégé firm.

CONCLUSION

For better or worse, the expansion of the SBA’s Mentor-Protégé Program to all SBCs is a significant change in government contracts. Although the Final Rule addresses numerous changes to the SBA’s regulations, the full extent of which are beyond the scope of this alert, it is clear that the changes likely will spur new mentor-protégé relationships and increased competition in government contracts for set-aside work. Whether the impact will be a benefit or a hindrance to competition and whether the SBA will be able to manage the sudden growth to come, only time will tell.

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