
SBA's Small Business Mentor Protégé Program Expands Opportunities for Small and Large Businesses

By Richard B. Oliver and Selena Brady

On July 25, 2016, the Small Business Administration (SBA) published the long-awaited final rule regarding “Small Business Mentor Protégé Programs,” establishing a government-wide mentor protégé program for all small businesses, including Historically Underutilized Business Zone (HUBZone) businesses, Women-Owned Small Businesses (WOSB), Service-Disabled Veteran-Owned small businesses (SDVOSB), and small businesses generally. 81 Fed. Reg. 48558. The SBA will separately operate the 8(a) Business Development Program’s mentor protégé program. The final rule, effective August 24, 2016, implements statutory provisions enacted in 2010 and 2013 which authorized the SBA’s creation of mentor protégé programs for all small businesses. This final rule, which includes numerous revisions from the SBA’s proposed rule published on February 5, 2015, enables virtually all federal contractors to quickly begin participating in the small business mentor protégé program.

The federal government has an annual goal that small businesses receive 23 percent of prime contracts dollars, resulting in federal agencies setting aside many procurements exclusively for small businesses or socio-economic categories of small businesses. The final rule’s expansion of the joint venture affiliation exception from the 8(a) mentor protégé program to the small business mentor protégé program is a significant benefit, enabling both small and large businesses to pursue previously unavailable acquisition opportunities. When joint venturing with their mentors, small businesses are able to pursue larger, more complex contracts, which allows small businesses to gain significant experience and past performance credentials. Large businesses also can reap significant benefits through the joint ventures, by gaining access to work that is restricted to small business concerns.

New Small Business Mentor Protégé Program

The small business mentor-protégé program, set forth in 13 C.F.R. § 125.9, establishes requirements that are generally consistent with the established 8(a) mentor protégé program. Indeed, where the small business mentor protégé program and the 8(a) mentor protégé program regulations differed, the final rule amends the 8(a) regulations to ensure consistency between the programs and streamline the SBA's administration and oversight.

Mentor Eligibility. Under the final rule, only “for profit” entities can be mentors in the small business and the 8(a) mentor protégé programs. The SBA requires mentors to have the financial capabilities to fulfill their business development assistance as described in the mentor protégé agreement.

Protégé Eligibility. A protégé must qualify as small under its primary NAICS code to be eligible for the small business mentor protégé program. The final rule eliminates the more limited 8(a) protégé eligibility requirements (i.e., half of the NAICS size standard, in the developmental phase of the 8(a) program, or never received an 8(a) contract) and revises the 8(a) regulations to implement the same expanded standard as it employs for small business protégés.

Duration and Number. The SBA limits small business and 8(a) mentor protégé agreements to an initial term of three years, with an option to extend for three additional years, for a total of six years. Graduating 8(a) protégés can transfer their mentor-protégé arrangement to the new small business program by providing notice to the SBA. Additionally, the SBA limits mentors to one protégé and protégés to one mentor. The SBA, however, has discretion to permit mentors to have up to three protégés in the aggregate and protégés to have up to two mentors if certain circumstances are met.

Simultaneous Status. In a change from the current 8(a) rule, the SBA permits a small business to be simultaneously a protégé and a mentor.

Elimination of Size Determination Requirement. The final rule removes the requirement for a protégé to obtain a size status determination prior to participating in the small business mentor protégé program. Instead, the SBA will rely on small business self-certifications and the current size protest system to protect the integrity of the program.

Application and Approval of Mentor Protégé Arrangements. The SBA has created a new unit within the Office of Business Development solely dedicated to processing and reviewing applications to the small business mentor protégé program. The new unit will make recommendations for approval, and the ultimate authority for decisions will rest with the director or his designee (who also processes and approves applications for the 8(a) mentor protégé program). The SBA is not currently imposing open and closed enrollment periods, but reserves the right to implement such periods in the event that demand becomes unsustainable.

Ownership Interests. The final rule permits mentors to retain up to a 40 percent ownership interest in protégés at the completion of the mentor protégé arrangement. The SBA will rely on the affiliation rules to determine whether the large business' ownership interest creates affiliation.

Past Performance. The SBA mandates that procuring agencies must consider the past performance of the mentor and the protégé when evaluating the proposal of a joint venture.

Impact to Agency Mentor Protégé Programs. Except for the Department of Defense's mentor protégé program, agency-specific mentor protégé programs are likely to be eliminated, unless the agency seeks

approval from the SBA within one year. Businesses participating in agency mentor protégé programs will likely need to transition to the SBA's small business mentor protégé program.

Mentor Protégé Joint Ventures

All small business mentor protégé joint ventures are now eligible for all procurement opportunities for which the protégé possesses eligibility (i.e., if the procurement is a SDVOSB set-aside, the protégé must be an SDVOSB, regardless of the mentor's size). The SBA revises the joint venture affiliation regulations and the program-specific regulations to ensure that all socio-economic programs are eligible to utilize the joint venture affiliation exception. The final rule also implements the following requirements for joint ventures.

Structure. The SBA prohibits populated joint ventures, requiring performance by the mentor and protégé to occur at the subcontract level. Unpopulated joint ventures, however, are permitted to have employees who perform only administrative functions.

Written Agreement. The final rule clarifies that all joint ventures, whether formal or informal, must be set forth in writing.

Contents of Joint Venture Agreement. The SBA adopts most of the small business mentor protégé joint venture agreement requirements from the current 8(a) mentor protégé joint venture requirements. The final rule, however, provides several key revisions regarding mentor protégé joint venture content regulations. First, the joint venture's project manager is not required to be a protégé employee at proposal submission. Instead, the protégé can submit a letter of intent stating that the project manager will become an employee of the protégé. The revised regulations state, however, that the project manager cannot be employed by mentor and then become an employee of the protégé. The SBA also amends the joint venture content requirements for itemizing facilities and equipment and labor responsibilities for indefinite contracts. The final rule permits mentors and protégés to provide a general description to specify how the parties will provide the resources and labor responsibilities, or in the alternative, how the parties will furnish the anticipated resources and responsibilities when the scope of work becomes available.

SAM Registration. The final rule requires that joint ventures are identified in SAM with DUNS and CAGE numbers distinct from the mentor and protégé.

Compliance and Penalties. The SBA mandates significant compliance and penalties for joint ventures in the final rule. First, the SBA requires a signed certification by the mentor and the protégé regarding (1) the joint venture agreement's compliance with the content regulations; (2) the joint venture's compliance with the terms established in joint venture agreement; and (3) the joint venture compliance with the performance of work requirements between the mentor and the protégé (which varies depending on the type of contract). During performance, the protégé must annually, and at contract completion, report on how the joint venture complied with the performance of work requirements. Finally, the final rule authorizes willful violation of the joint venture agreement or the performance work requirements as a basis for suspension and debarment.

Conclusion

The final rule, effective August 24, 2016, heralds significant new contracting opportunities for small and large businesses. Parties considering mentor and protégé arrangements should carefully review the final rule during the development of new arrangements, in seeking approval from the SBA, and during the pursuit of new set-aside opportunities.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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