

SBA's Proposal Would Help Small Business Teaming

By Franklin Turner, Alexander Major and Ethan Brown

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Federal contractors can finally look forward to simplified small-business mentor-protege programs, but also must become keenly aware of wide-ranging changes affecting certain 8(a) business development and Native American-owned programs, new recertification requirements for certain multiple award contracts, or MACs, and small-business joint ventures.

On Nov. 8, 2019, the U.S. Small Business Administration issued a proposed rule announcing its intent to merge its 8(a) Business Development and “All Small” Mentor-Protege programs, in addition to, inter alia, proposing revisions to some of its size and socioeconomic status recertification requirements.[1]

This proposed merger is welcome news for small-business contractors, as navigating the various requirements of the two current SBA mentor-protege programs can be confusing and burdensome.

Teaming relationships are also addressed in the relief offered by the proposed rule for three-time contract award-winning joint ventures who would be freed from the burden of needing to form identical joint ventures to compete for new contracts. The removal of this procedural hurdle — along with a variety of other proposed changes discussed below — may signal a favorable sea change in small-business teaming.

Below, we’ve provided a short history of the SBA’s mentor-protege programs and summarized key aspects of the proposed rule that will likely be of interest to all federal contractors — from large and small entities to Native American-owned, Alaska Native corporations and Native Hawaiian organizations.

The SBA is accepting comments on the proposed rule on or before Jan. 17, 2020. In addition, the SBA will hold a series of tribal consultation meetings around the country throughout January to address the potential impact of the proposed rule on Native American-owned corporations, Alaska Native corporations and Native Hawaiian organizations.



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Changes to Mentor-Protege Relationships

The highlight of the proposed rule for many is the welcome consolidation of the two existing mentor-protege programs into one. The older of the two programs, the 8(a) Mentor-Protege Program, was established in July 1998 with the stated purpose of utilizing mentors to assist in the development of 8(a) firms and to “improve [their] ability to successfully compete for contracts” by providing various forms of technical, management, or financial assistance.”[2]

As the designation of this program implies, only a narrow subset of small-business contractors — i.e., those contractors who meet the SBA’s 8(a) program eligibility requirements — are eligible to participate in the program. In light of the successes of the 8(a) Mentor-Protege Program, Congress passed subsequent legislation expanding the scope of this SBA program.

First, under the Small Business Jobs Act of 2010, the SBA was authorized to create new mentor-protege programs for women-owned small businesses, or WOSBs, service-disabled veteran-owned small businesses, or SDVOSBs, and historically underutilized business zone, or HUBZone, programs.

Second, under Section 1641 of the National Defense Authorization Act for FY 2013, Congress authorized the SBA to establish another mentor-protege program — similar in scope to the 8(a) program — for all small businesses. In response to these dual legislative mandates, the SBA decided to forego establishing separate mentor-protege programs for WOSBs, SDVOSBs and HUBZone programs, and instead opened its mentor-protege program to all small businesses, regardless of socioeconomic designation.[3]

Although separate programs, the 8(a) Mentor-Protege and All Small Mentor-Protege programs essentially share the same goals and member benefits. For example, the 8(a) mentor-protege relationship “[enhances] the capabilities of proteges and ... [improves] their ability to successfully compete for both government and commercial contracts.”[4]

Similarly, “the All Small Mentor-Protege Program is designed to require approved mentors to aid protege firms so that they may enhance their capabilities, meet their business goals, and improve their ability to compete for contracts.”[5]

Additionally, under both the 8(a) and All Small Mentor-Protege programs, mentors may (1) form joint ventures with proteges and bid on certain set-aside contracts, and (2) provide technical, management, financial, or contract performance assistance to proteges.[6]

These overlapping goals and benefits, and the resulting duplication, inefficiency and confusion in government and private industry serve as the impetus for the SBA’s proposed rule.[7] By proposing to consolidate its two mentor-protege programs, the SBA hopes to “eliminate confusion regarding perceived differences between the two [mentor-protege] Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protege applications.”[8]

In pertinent part, the proposed rule revises the SBA’s applicable rules to, in essence, merge the 8(a) Mentor-Protege Program into the All Small Business Mentor-Protege Program. In other words, the proposed rule seeks to revise the SBA’s regulations to recognize that an 8(a) Mentor-Protege Program participant, similar to all other small businesses, may participate in the SBA’s All-Small Mentor-Protege Program, thus facilitating the advancement and ease of the overarching mentor-protege purpose.

Additional Highlights of the Proposed Regulatory Changes

Clarifying the SBA's Position on Recertification for MACs

Presently, size certifications at the order level for MACs are not required unless a contracting officer requests a recertification in connection with a specific order.

The proposed rule would require a small-business concern to submit a recertification or confirm its size and/or socioeconomic status for all set-aside orders under unrestricted MACs, except for orders or blanket purchase agreements issued under federal supply schedule contracts.

Further, the proposed rule would also require a small-business concern to either submit a recertification or confirm its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the set-aside MAC.

Reducing Burdens on 8(a) Participants and Applicants Owned and Controlled by American Indian Tribes, Alaska Native Corporations, Native Hawaiian Organizations and Community Development Corporations

The SBA's proposed rule will also benefit tribes, Alaska Native corporations, Native Hawaiian organizations and community development corporations by:

- Eliminating the prior approval requirement for changes of ownership involving the addition or removal of a wholly-owned entity of the tribe/Alaska Native corporation/Native Hawaiian organization/community development corporation and the 8(a) participant;
- Reducing the number of rules associated with a tribe/Alaska Native organization/Native Hawaiian organization/community development corporation owning more than one 8(a) participant;
- Clarifying the admission requirements for how a tribally owned applicant to the 8(a) program demonstrates the potential for success, and
- Authorizing a process for an 8(a) participant to challenge an SBA-initiated change to its primary North American Industry Classification System, or NAICS, code.

Loosening Regulations Regarding Joint Ventures

The current version of Title 13 of the Code of Federal Regulations Section 121.103(h) generally limits joint ventures to receiving no more than three contract awards over a two-year period.

In order to "lessen the burden on small business, while preserving the SBA's belief that a joint venture is not intended to be an ongoing business entity," the proposed rule seeks to eliminate the three contract limit, but also to keep in place the two-year restriction on joint ventures. Thus, under the proposed rule, a joint venture may be awarded an unlimited number of contracts within the two-year life of the agreement.

Eliminating SBA Prior Approval for 8(a) Mentor-Protege Joint Venture Awards

The proposed rule also seeks to eliminate the current requirement under 13 C.F.R. Section 124.513(e) that requires SBA preapproval of a joint venture agreement prior to the award of an 8(a) contract to the joint venture.

In effecting this revision, the SBA seeks to “significantly lessen the burden imposed on 8(a) small business Participants,” as 8(a) participants would, under the revised regulation, neither be required to submit additional paperwork to the SBA nor wait for SBA approval in order to seek competitive 8(a) awards.

This proposed change only applies to 8(a) opportunities awarded through competitive procurements — the SBA’s prior approval will still be required for 8(a) sole source contract awards to 8(a) joint ventures.

Eliminating SBA Approval for Minor Changes in Ownership of 8(a) Participants

In order to lessen the burden on 8(a) participants seeking minor changes in ownership, the SBA proposes to eliminate the need for prior SBA approval of ownership changes in situations where an owner holds less than a 20% interest in the concern both before and after the transaction.

This proposed revision expands the current requirement that only permits an 8(a) participant to change its ownership interest without SBA’s prior approval where the previous owner held less than a 10% interest. In addition, the proposed rule eliminates the requirement for SBA approval in situations where the disadvantaged individual/entity controlling the 8(a) participant will increase their percentage of ownership interest as a result of the change.

Confirming That a NAICS Code for a Task Order Issued Under a MAC Reflects the Principal Purpose of the Task Order

The proposed rule also confirms that specific NAICS codes and size standards must be an accurate reflection of the contracts and orders being awarded and performed. In particular, the proposed rule requires a contracting officer to assign a single NAICS code for each order issued against a MAC, and specifies that the NAICS code must be included in the underlying MAC and represent the principal purpose of the order.

This proposed revision aims to end unintended confusion over which regulations apply to contractors working under certain NAICS codes, such as when a MAC is assigned a NAICS code for supplies but a particular order under that MAC is almost entirely for services.

Altering the Lifetime Limitation on the Number of Mentor-Protege Relationships

The proposed rule also revises 13 C.F.R. Section 125.9(e)(6) so as to not count any mentor-protege relationship toward a firm’s two permitted lifetime mentor-protege relationships in the event that the mentor-protege agreement is terminated within 18 months from the date SBA approved the agreement.

Although the SBA notes that it has “informally permitted a mentor-protege relationship not to count against the limit of two such relationships in total where the protege can demonstrate that it has not received any assistance from its mentor under the mentor-protege relationship,” this proposed revision codifies the SBA’s informal policy.

Impact on Native American-Owned 8(a)s

In light of the significant changes in the proposed rule that will impact the Native Hawaiian organizations, Alaskan Native corporations, community development corporations and Native American-owned companies, the SBA has also announced a series of tribal consultation meetings to address the proposed revisions across the country.[9]

With the meeting in Minneapolis recently passed, the upcoming meetings will be held:

- Wednesday, Jan. 8, 10 a.m. to 4 p.m. Alaska Standard Time, Anchorage, Alaska.
 - The preregistration deadline for this tribal consultation meeting was Jan. 2.
- Tuesday, Jan. 14, 10 a.m. to 2 p.m. MST, Albuquerque, New Mexico.
 - The preregistration deadline for this tribal consultation meeting is Jan. 7.
- Thursday, Jan. 16, 10 a.m. to 2 p.m. CST, Oklahoma City, Oklahoma.
 - The preregistration deadline for this tribal consultation meeting is Jan. 9.

Notably, the testimony presented at these tribal consultations will become part of the administrative record that SBA will consider before finalizing the proposed rule. If your company is interested in the contemplated changes discussed above, consider attending these sessions to better understand the effects should the proposed rule become final.

Practical Guidance

As noted above, the proposed rule includes sweeping changes that are designed to consolidate overlapping programs, streamline regulatory requirements and reduce confusion for contractors of all sizes. Accordingly, we recommend that small and large businesses carefully review their existing policies, plans and ongoing contractual efforts to determine the extent to which they can maximize the beneficial impact of the proposed rule if it is adopted without change.

Of course, as federal rulemaking is an iterative process, remember that the final rule may add, revise or eliminate certain sections of the proposed rule based on public comments and/or further consideration. Until the proposed rule is finalized, contractors should ensure that their policies and procedures remain compliant with all existing regulations.

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[1] 84 Fed. Reg. 60846 (Nov. 8, 2019).

[2] 13 C.F.R. § 124.520(a); 84 Fed. Reg. 60846.

[3] 81 Fed. Reg. 48558 (July 25, 2016) (Final Rule) (i.e., the “All Small Mentor-Protege Program”).

[4] 84 Fed. Reg. at 60847.

[5] *Id.*

[6] *Id.*

[7] See, e.g., 84 Fed. Reg. at 60847 (“Because the benefits and purposes of the two programs are identical, SBA believes that having two separate mentor-protege programs is unnecessary and causes needless confusion in the small business community.”).

[8] *Id.* at 60846.

[9] See 84 Fed. Reg. 66647 (Dec. 5, 2019).