

Guest Article

Changes to SBA's 8(a) Joint Venture and Mentor-Protégé Rules Will Alter Current Industry Practices

by Dirk Haire

Effective March 14, 2011, 8(a) firms and the large businesses that team with them must follow new rules for mentor-protégé relationships and joint ventures. The primary theme running through the changes is that the Small Business Administration (SBA) wants large business activity in small business set-asides further restricted. The new rules apply prospectively, meaning that approved mentor-protégé agreements and joint ventures in effect prior to March 14, 2011 will not be affected.

Mentor-Protégé Agreements

Right up front, on the first page of a 42-page rulemaking, SBA hammers home the point that SBA is judge, jury, and executioner when it comes to determining if a mentor-protégé program qualifies for an exception to SBA's affiliation rule. As a result, with the exception of DOD's statutorily-authorized mentor-protégé program, large businesses and set-aside contractors can not use other agencies' mentor-protégé agreements to avoid affiliation. For example, a VA-approved mentor-protégé agreement between a SDVOSB protégé and a large mentor will not be protected from affiliation.

The new rules also require that large businesses and their 8(a) protégés must follow 8(a) mentor-protégé requirements on *non-8(a)* set-asides. Previously, approved 8(a) mentor-protégé teams could pursue HUBZone, SDVOSB, and other small business set-asides without following 8(a) restrictions. That is no longer the case.

Another potentially significant change is that a mentor-protégé joint venture may now qualify as small for federal subcontracting plan purposes. The rules did not previously address if this was permitted. Interestingly, the SBA's comments assume that absent mentor-protégé protection, the affiliation rule could be used to challenge a first-tier small business/second-tier large business subcontracting team on an unrestricted procurement. FAR 52.219-9, which governs small business subcontracting plans, does not on its face provide any basis for such a challenge. It is also unclear if SBA has jurisdiction over a size protest challenge where there is no set-aside contract involved. And there are no reported decisions to answer these questions. Nevertheless, the SBA's comments may indicate a willingness by SBA to police first-tier subcontract mentor-



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protégé joint ventures and sub-subcontracts between first- and second-tier subcontractors where the first-tier is a small business set-aside contractor and the second-tier is a large business.

The new rules clarify a few other items. Mentors may have up to three simultaneous protégés, while protégés may have a second mentor in a secondary and unrelated NAICS code. Mentor-protégé agreements must be approved by the SBA *before* submitting a joint venture offer. SBA will not approve mentor-protégé agreements if the protégé has six months or less of eligibility remaining in the 8(a) program. And SBA adds a 45-day request for reconsideration process if a mentor-protégé application is denied.

Finally, on the enforcement side, SBA's Inspector General is given authority to request a formal size determination. The prior regulations required the inspector general to make a request through a local SBA office. This change is consistent with the recent trend of Office of Inspector General small business audits. Similarly, the rule adds consequences for a mentor who fails to provide the assistance provided for under an approved agreement. The consequences include termination of the mentor-protégé agreement, stop work orders for each contract currently underway, a two-year bar on participation in the program, and even a Government-wide suspension or debarment.

Joint Ventures

The rules make a few key changes to joint ventures. First, the 8(a) venturer must receive profits "commensurate" with the 8(a) venturer's work, instead of at least 51 percent of the profits. SBA's comments indicate that a non-8(a) large business mentor may claim as much as 60% of the profit of a joint venture.

Second, the SBA significantly tightened the 8(a) venturer's performance of work requirements. The new rules require an 8(a) participant to perform at least 40 percent of the joint venture's work. This requirement replaces the "significant portion"

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language of the old rule. The rules also apply this new 40 percent requirement to 8(a) joint ventures used to compete for HUBZones, SDVOSBs, and other set-asides. To ensure compliance, contractors must document how the performance of work requirements are met on every 8(a) joint venture contract. Additionally, the 40 percent calculation must include a joint venture's subcontracts to the non-8(a) venturer (typically a large business). This will greatly restrict prior industry practice. For example, it is unlikely that the 40 percent requirement can be met if the 8(a) joint venture awards a significant subcontract, such as for concrete, to the non-8(a) large business venturer. The rules also set new and separate standards for populated versus unpopulated joint ventures. The project manager in an unpopulated joint venture, or a joint venture populated with administrative personnel only, must be an employee of the 8(a) venturer. For a joint venture populated with individuals who will perform contracts, the joint venture must demonstrate that contract performance is "controlled" by the 8(a) venturer. These new restrictions are likely to result in significant changes in how construction mentor-protégé joint ventures operate.

Third, joint ventures are now eligible to receive three contract awards in a two-year period, instead of submitting three proposals in a two-year period. In addition, the same two companies in a joint venture may form subsequent joint ventures with the ability to be awarded an additional three projects in an overlapping two-year period. Contractors should be aware, however, that several repeated joint ventures between the same two entities may eventually result in a finding of general affiliation based upon a longstanding relationship of contractual dependence.

Conclusion

These and other changes to the 8(a) program are substantial and will change several current industry small business teaming practices. Contractors must review their current practices and be prepared to make changes in future mentor-protégé and joint venture agreements to comply with these new requirements. **B**



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