

## EXPERT ANALYSIS

### New Opportunities For All: SBA Expands The Small Business Mentor-Protégé Programs

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On July 25, 2016, the Small Business Administration (“SBA”) released a much-anticipated Small Business Mentor Protégé Programs Final Rule that created a new expanded mentor-protégé program, modeled on the existing 8(a) mentor-protégé program, open to all categories of small businesses. Contractors have been waiting for this change — one of the most significant in recent years — since Congress authorized the expansion of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013.

The new program, which became effective on August 24, 2016, will provide significant benefits to potential protégés and mentors alike, and will likely lead to a groundswell of mentor-protégé joint ventures (“MPJVs”) across all categories of small businesses.

So, what are they key points? Here are five that stand out to us:

- Any small business, not just 8(a) small businesses can be a protégé.
- Any business, including small businesses, can be a mentor and pursue any set aside contract for which the protégé qualifies.
- Mentors to have up to three protégés and protégés may have up to two mentors.
- MPJVs must be unpopulated.
- Except for long-term contracts (where recertification is required after year five), a contract awarded to an MPJV joint venture qualifies as an award to a small business (or the relevant socio-economic category) for the life of that contract.

#### PROGRAM OVERVIEW

SBA’s new mentor-protégé program is modeled after its long-standing 8(a) mentor-protégé program. Although that program was successful, the pool of protégé firms was limited to early-stage or very small firms that qualified for the 8(a) program.

The new mentor-protégé program allows for small businesses of any size, as long as they qualify as small under their primary (or in some instances secondary) North American Industrial Classification System (“NAICS”) code, to partner with a mentor business in an area in which the protégé would like to grow.

The mentor may provide, among other things, technical, financial, and management assistance to aid the protégé in growing and developing its business. Notably, the mentor can also be a small business itself, as long as it can demonstrate its ability to assist the protégé.

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As in the 8(a) program, the mentor contractor may own up to a 40 percent equity share in the protégé without triggering affiliation and jeopardizing the size status of the small business. Mentor businesses may also perform 60 percent of any awarded contracts. Thus, mentors will be able to form joint ventures with small businesses of all varieties and sizes to pursue set-aside contracts for which the protégé may be eligible.

The protégé company gains the benefit of a mentor's experience and expertise, as well as the past performance record of the mentor. As a result, a protégé may be able to compete for larger, more complex contracts than it could reasonably compete for on its own. Moreover, contracts awarded under the general small business mentor-protégé joint venture program will qualify as awards to the small business category of the protégé for the life of that contract, except in the case of long-term contracts for which recertification is required after year five.

Given these benefits, it is no surprise that the existing program was used by 8(a) businesses in a variety of fields and the expansion will likely lead to a rush of mentor-protégé applications.

### CHANGES AND CLARIFICATIONS FROM THE PROPOSED RULE

As evidence of how closely watched this rule was, SBA received 113 comments on its February 2015 Proposed Rule. After picking through and responding to those comments, SBA set out a new rule with notable detail and significant changes from the Proposed Rule.

#### *Application process*

Mentor-protégé agreements must be approved by SBA. However, SBA did not receive additional funding to review applications for this significantly expanded program. As a result, there were concerns that SBA did not have the resources to handle the increased volume of program applications. In its Final Rule, SBA explains that it will establish a separate office within the Office of Business Development to review and approve mentor-protégé applications. Of course, SBA also has the option to establish enrollment windows to prevent application backlogs.

For contractors, the creation of a new office may lead to more predictable review of mentor-protégé agreements, which are currently subject to inconsistent standards and reviews under the 8(a) program. Although 8(a) mentor protégé applications will continue to be processed in the same way, applicants for the expanded program would be well-served to submit applications promptly and be ready for some significant delays, as there will almost certainly be growing pains and delays as the new program is rolled out, especially given the lack of additional funds.

SBA had also proposed a requirement that protégé firms should be subject to formal size determinations confirming their small business status. Commenters noted that that this was unduly burdensome and unnecessary as MPJVs competing for contracts would be subject to size protests in the same manner as if the protégé firm were competing itself. As a result, SBA removed the size determination requirement from the Final Rule. Per the Final Rule, applicants may self-certify their size for purposes of the mentor-protégé approval process. SBA further clarified that approval of a mentor-protégé agreement thus may not be considered a formal size determination. Mentors that are concerned about a potential protégé's status should, however, consider the SBA advisory opinion program. See 13 CFR §§ 121.108-109.

#### *Program participation*

The Final Rule provides that mentors are typically limited to one protégé and protégés to one mentor, as is the rule under the existing 8(a) program. However, at its discretion, SBA may grant permission for mentors to have up to three protégés and for protégés to have up to two mentors, so long as the mentors are in different, unrelated NAICS codes. Furthermore, a concern may serve as both a mentor and a protégé at the same time.

The new expanded program will include mentor-protégé approval for a three year period, but this may be extended for an additional three years provided the protégé continues to qualify as a small business, has received the anticipated assistance from the mentor, and will continue to benefit from the program. Although they may be required to recertify their size, SBA's rule is clear that MPJVs may continue to perform awarded contracts after their mentor protégé period has expired. This would likely mean that the joint venture would have to recertify as a large business after the fifth year of a long-term contract, but performance would be allowed to continue.

SBA removed the requirement that mentors must establish “good financial standing” as required under the existing 8(a) program. Commenters said that under the 8(a) program, potential mentors had been denied for showing a loss, which is not the right lens through which to review a firm’s potential to be a successful mentor. SBA agreed. Per the Final Rule, a mentor must demonstrate only that it can fulfill its obligations under the mentor-protégé agreement.

### **MPJV organization requirements**

The Final Rule provides clarification regarding the contents of mentor-protégé agreements and how MPJVs should be organized.

First, as with the current program, a written mentor-protégé agreement is mandatory to receive the MPJV affiliation exception. Should the participants fail to comply with the terms of the agreement, SBA may terminate the agreement or, if the noncompliance is more than *de minimis*, may pursue suspension or debarment.

Second, there has been significant litigation around the requirements that mentor-protégé agreements must include a detailed schedule of “facilities, and other resources to be furnished by each party to the joint venture,” and “specify[] the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance.” See, e.g., *Size Appeal of Kisan-Pike*, SBA No. SIZ-5618, Nov. 24, 2014; *Size Appeal of IEI-Cityside*, SBA No. SIZ-5664, June 16, 2015.

SBA recognized that these requirements are challenging when bidding contracts that may not have immediately defined requirements and added new flexibility into its Final Rule. Specifically, with regard to facilities and equipment, SBA explained that “where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party,” or “specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available.”

Similarly, when requirements are not defined, SBA will only require “a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance . . . or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available.”

Third, the Final Rule provides that MPJVs need not be established as separate legal entities, but the arrangement must be formalized in a written document that sets forth the responsibilities of the joint venture partners.

Fourth, populated joint ventures (with their own employees), an already uncommon practice, were eliminated in the Final Rule in favor of unpopulated joint ventures where both the mentor and protégé perform as subcontractors. In SBA’s view, this structure facilitates accurate workshare calculations.

Fifth, although the program manager for each contract won by an MPJV must be an employee of the protégé firm, SBA clarified in the Final Rule that the program manager must only be an employee at the start of contract performance, not at the time of the submission of a bid. Thus, a signed letter of intent is sufficient to meet this requirement.

Sixth, SBA’s Office of Inspector General (“OIG”) must be given access to an MPJV’s records at any time. SBA declined to guarantee reasonable notice of this access, noting that advance scheduling may lead to destruction of records and the OIG “must be able to have unlimited access when investigating potential violations of SBA’s regulation.”

### **MPJV contracting issues**

SBA’s Final Rule addresses several contracting issues relating to MPJVs, including issues with evaluations, compliance, and reporting.

The Final Rule first clarifies that MPJVs may compete for any contract for which the protégé firm qualifies, including program-specific requirements such as ownership or location requirements. This clarification is especially important in the HUBZone context because that program includes location requirements that are unlikely to be met by a large business mentor.

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In evaluating the past performance of an MPJV, the Final Rule provides that contracting officers must consider work done both individually by each of the joint venture partners as well as the MPJV itself. This is contrary to the current trend towards evaluating only the performance of the joint venture itself and not its component members. SBA introduced this provision to combat that trend and to give MPJVs the ability to successfully compete for contracts immediately.

Borrowing a page from other agency mentor-protégé programs, the Final Rule also provides that, in recognition of the benefits provided by several agencies as part of their agency-specific mentor-protégé programs, agencies may provide incentives in contract evaluations to firms that will provide significant subcontracting opportunities to their SBA-approved protégé.

With respect to compliance, the Final Rule provides that MPJVs must certify and report compliance with the joint venture regulations and the joint venture agreement to the contracting office annually. Further, to facilitate tracking of MPJV awards, joint ventures must be separately identified in the System for Award Management ("SAM") (which requires a separate CAGE code and DUNS number), with both joint venture members listed in the SAM entry.

### CHANGES TO THE 8(A) MENTOR-PROTÉGÉ PROGRAM

Finally, in an effort to provide uniformity between the new program and the existing 8(a) program, SBA has made a few modifications to the existing 8(a) mentor-protégé program:

- The current 8(a) requirement that a protégé be less than half the size standard corresponding to its primary NAICS code has been eliminated.
- 8(a) mentor-protégé arrangements are limited to the time period in which the protégé remains in the 8(a) program. However, graduating 8(a) protégés may transfer their mentor-protégé arrangement to the new general small business program.
- Unsuccessful offerors on a competitive 8(a) set-aside may protest the size of an apparently successful joint venture offeror.
- As with the small business mentor-protégé program described above, the project manager for each contract won by an 8(a) joint venture must be an employee of the protégé 8(a) firm (or at least provide a signed letter of intent for the project manager).

The new mentor-protégé program will ultimately benefit both large and small contractors alike. Although the Final Rule became effective on August 24, 2016, it is not clear whether SBA is prepared to accept and process MPJV applications at this time.



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