



Dec 2nd, 2020

The New Rulemaking – Updated SBA rules affecting small businesses

Agenda

- Introductions
- Presentation by Ed Tolchin
- Q & A – please use the chat feature to ask questions

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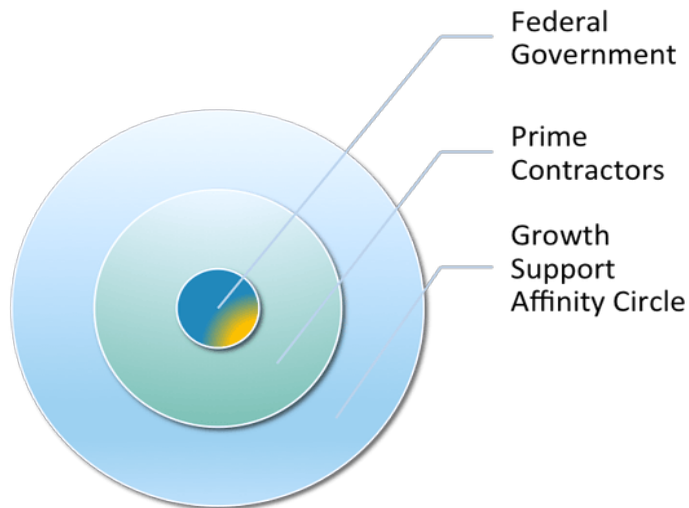
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Meet the Presenter

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How Will the New SBA Rules Impact Your Business Going Forward?

December 2, 2020

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SBA's New Rulemaking

In response to a government-wide regulatory reform initiative, the U.S. Small Business Administration reviewed its regulations to determine which might be revised or eliminated. As a result, SBA:

- Merged the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions.
- Eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award.
- Revises several 8(a) BD program regulations to reduce burdens on 8(a) Participants.
- Clarifies other related regulatory provisions to eliminate confusion.
- Requires business concerns to recertify size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required at the time of MAC award

85 FR 66146, 66146 (October 16, 2020)

Summary of Items to be Covered in this Webinar

Mentor-Protégé
Programs

Joint Ventures

Multiple Award
Contracts

Certifications

Capabilities and
Past Performance of
First-Tier
Subcontractors.

Economic
Dependence/Identity
of Interest

8(a) Program:
Administrative
Provisions

8(a) Program: BPAs
and BOA

8(a) Program:
Immediate Family
Member Eligibility

Mentor-Protégé Programs

- New rule eliminates separate 8(a) Mentor Protégé Program and combines all MP programs into All Small Mentor-Protégé (ASMP) Program.
- ASMP regulations found in 13 C.F.R. § 125.9
- Mentor-protégé relationships that have already been approved through the 8(a) Mentor-Protégé Program will continue to operate under the ASMP Program.
- A mentor-protégé relationship approved under the 8(a) Mentor-Protégé Program will count as one of the two lifetime mentor-protégé relationships permitted under the ASMPP for small businesses.

Mentor-Protégé Programs Cont'



Allows any business entity of any size to act as a mentor.



A mentor cannot generally have more than three protégés at one time, but does not count mentor-protégé relationships terminated within 18 months of SBA approval of the mentor-protégé agreement against the protégé firm's two-mentor lifetime limit. However, SBA may determine that a protégé has exhausted its participation in the mentor-protégé program if the protégé shows a consistent pattern of terminating mentor-protégé agreements within the first 18 months, and therefore SBA may not approve additional mentor-protégé relationships for that protégé.



Requires a protégé to provide “honest assessments” of its mentor's performance to SBA during each annual review, allows a protégé to request SBA to intervene with an underperforming mentor on the protégé's behalf, and allows SBA to terminate the mentor-protégé relationship or replace the underperforming mentor with a new mentor if the mentor does not overcome the protégé's allegations of poor performance.

Mentor-Protégé Programs Cont'



A concern need not be “other than small” under its primary NAICS code to qualify as a protégé under a secondary NAICS code, but instead must show how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code.



SBA may approve a mentor-protégé relationship under a concern’s secondary NAICS code where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

Joint Ventures

- SBA is no longer required to approve joint venture agreements (JVAs) for competitive 8(a) set-aside contracts. Approval of JVAs is still required for sole source 8(a) contracts.
- Removes three-contract limitation for joint ventures, but retains two-year joint venture activity limit, beginning from the date of first award.
- A joint venture still cannot bid on contracts after its two years are up, but it can receive more than 3 contracts within that period.
- As is the case under the current regulation, the parties to a joint venture whose two-year program has expired may form a new joint venture. And as also is the case under the current regulation, the two-year term for the *new* joint venture will begin on the date the new joint venture receives its first contract award.
- If a partner to the joint venture has been acquired, is acquiring or has merged with another business entity, that partner must recertify its size status, and based on that, the joint venture will recertify its size status.

Joint Ventures Cont'

- A joint venture cannot be populated with individuals intended to perform contracts awarded to the joint venture, but can only directly employ administrative personnel and such personnel may specifically include Facility Security Officers.
- A joint venture between a protégé and mentor may seek a Federal prime contract, subcontract or sale as a small business, HUBZone small business, SDB, SDVO small business, or WOSB provided the protégé individually qualifies as such.
- Protégé must perform at least 40% of the work performed by the joint venture and cannot include work subcontracted to a similarly situated entity in that calculation.
- Joint venture partners may agree to distribute profits from the joint venture to the small business participant(s) in excess of the percentage commensurate with the work performed.

Joint Ventures Cont'



For contracts requiring a facility security clearance, procuring agencies will no longer be allowed to require as a condition of award that a small business joint venture possess a clearance in its own name. Instead, the lead joint venture member may have the required clearance and can keep the contract records at its cleared facility. For contracts where the security portion is ancillary to the contract's principal purpose, the non-lead partner (including a large-business mentor) might supply the clearance. QUESTION: Will the agencies comply with this rule?



A solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (e.g., each partner to have individually previously performed 5 contracts of at least \$10 million) is not permitted.

Joint Ventures Cont'

For revenue-based size standards, receipts of joint venture attributed to each partner based on percentage of work performed (not ownership). Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by lower tier subcontractors.

For employee size standards, individuals employed by the joint venture are apportioned using the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

Multiple Award Contracts

On unrestricted MAC contracts, the appropriate size standard code – and the associated North American Industry Classification System (NAICS) code – should be assigned at the task order level and certification required at that time.



Where unrestricted MAC has been awarded to a pool of concerns for which small business status is required, if an order or a BPA under that MAC is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status (unless a contracting officer requests recertification with respect to an order or BPA).



Federal Supply Schedule (FSS) program contracts are excepted from new requirements.

Multiple Award Contracts Cont'

Where a MAC is set-aside for small business, the procuring agency can set-aside orders issued under the MAC to a more limited type of small business, so long as the agency attempts to allocate at least 50 percent of the award dollars under the MAC to all contract holders of the underlying MAC.



Where a MAC is set-aside for a subcategory of small business (e.g., 8(a), HUBZone, WOSB), it cannot be further set aside for smaller subcategories (e.g., a dual 8(a) HUBZone business).



Where the required status for an order differs from that of the underlying contract (e.g., the MAC is a small business set-aside award, and the procuring agency seeks to restrict competition on the order to only certified HUBZone small business concerns), a firm must qualify for the socioeconomic status of a set-aside order at the time it submits an offer for that order. Although size may flow down from the underlying contract, status in this case cannot.

Certifications

Merger or Acquisition While Proposals Are Pending. Previously, SBA required recertification of size status whenever there was M&A activity up to the time of award. Under the new rule, if the transaction occurs within 180 days of the date of initial offer for the contract, the offeror becomes ineligible for award. If it occurs after 180 days, the firm remains eligible for award, but the agency may not count an award to that firm as a small business contract.

Capabilities and Past Performance of First-Tier Subcontractors.

Procuring agencies will now be required to consider the certifications, qualifications, capabilities, and past performance of first-tier subcontractors that a small business offeror specifically identifies in its proposal if the small business's own capabilities and past performance are not independently strong enough to justify award.

Economic Dependence/Identity of Interest

The new rule retains the general presumption of affiliation where a company derives more than 70 percent of its revenue from an alleged affiliate over the previous three fiscal years. But, now, the presumption may be rebutted by showing “that despite the contractual relations with another concern, the concern at issue is not **solely** dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.”

8(a) Program: Follow-On Contract Requirements

Whether a procurement requirement may be considered a follow-on procurement is important in several contexts related to the 8(a) BD program. First, SBA's regulations provide that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) BD program. However, an adverse impact analysis is not required for follow-on or renewal 8(a) acquisitions or for new requirements. Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, NHO, or CDC.

8(a) Program: Follow-On Contract Requirements Cont'

The new rule adds non-dispositive guides for defining a follow-on requirement: (1) whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent, inclusive of all periods of performance and in determining the change, equivalent periods of performance relative to the incumbent or previously-competed 8(a) requirement should be compared.; and (3) whether the end user of the requirement has changed. In all cases, a procuring activity is required to notify SBA if work previously performed through the 8(a) program will be performed through a different means to allow SBA input.

8(a) Program: Follow-On Contract Requirements Cont'

A procuring activity must notify SBA where it seeks to re-procure a follow-on requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., any multiple award or Government-wide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract)—but, if an agency seeks to re-procure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence will not be required because such a competition would be available to all 8(a) BD Program Participants.



Where a MAC is set-aside for a subcategory of small business (e.g., 8(a), HUBZone, WOSB), it cannot be further set aside for smaller subcategories (e.g., a dual 8(a) HUBZone business).



The value of a bridge contract should not typically be considered in determining whether an offered procurement is a new requirement.

8(a) Program: Administrative Provisions

When an application for the 8(a) program is declined, the firm can reapply after a 90-day wait period, but where a concern has been declined three times within 18 months of the date of the first final agency decision finding the concern ineligible, the concern cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decline decision.

8(a) Program: BPAs and BOAs

A procuring activity must offer, and SBA must accept, each task order under a Basic Ordering Agreement (BOA) in addition to offering and accepting the BOA itself. The same rules apply to a blanket purchase agreement (BPA). Once a Participant leaves the 8(a) BD program or otherwise becomes ineligible for future 8(a) contracts (e.g., becomes other than small under the size standard assigned to a particular contract) it cannot receive further 8(a) orders under a BOA or BPA. Similarly, a (BPA) is also not a contract.

8(a) Program: Immediate Family Member Eligibility

Instead of requiring no connections at all for immediate family members to be eligible to apply to the 8(a) Program, applies immediate family member restriction in instances where there is common ownership or management, regardless of amount or position, or where the companies share facilities or have a contractual relationship that was not conducted at arm's length.

Allows individuals applying to the 8(a) Program in the same primary NAICS code to have gained the required management or technical experience in that primary NAICS code by working for an immediate family member's current or former 8(a) Participant and removes the presumption against granting an application when the NAICS codes are the same for the new applicant and the family member.

Clarifies that SBA will continue to determine whether ownership, management, and facilities remain separate as part of the 8(a) annual review and that SBA would not initiate termination proceedings if the firms enter into fair market value contracts after the second firm is admitted to the 8(a) Program.

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