

SBA PROPOSES OVERHAUL TO SMALL BUSINESS CONTRACTING PROGRAM

This past October, the Small Business Administration proposed potentially far reaching changes to its 8(a) small and disadvantaged contracting program. SBA has conducted hearings and solicited comments on the proposed new rules. It is not clear when SBA will issue the final revised rule. The significant changes focus on SBA's rules governing joint ventures, mentor-protégé relationships, and qualification requirements for 8(a) contractors. Generally, the changes are designed to protect the intended beneficiaries of the 8(a) program, particularly protégés under mentor-protégé relationships, from overreaching partners. The following is a brief summary of some of the proposed changes.

HOW MANY CONTRACTS CAN BE AWARDED TO A SINGLE JOINT VENTURE?

Under the current rule (13 CFR 121.103(h)), a joint venture is an entity with only a limited duration. Specifically, joint ventures are limited to submitting no more than three offers over a two year period. Firms (including an 8(a) protégé firm and its mentor) are limited to pursuing three contract opportunities under one joint venture, but there is nothing in the regulations prohibiting the same firms from forming a second joint venture and pursuing three additional contract opportunities.

Small businesses in particular complained that this approach was cumbersome and created unnecessary paperwork. On the other hand, SBA has noted that there has to be some limit on the number of times a small business can work together with a large business in a joint venture to avoid contractual dependence. In response to criticisms, SBA is proposing to change the limit of three offers to three contract awards under one joint venture agreement. If the parties to the joint venture seek a fourth award under the same joint venture agreement, the joint venturers will be deemed *generally affiliated* as opposed to being considered affiliated merely for the procurement they are targeting. It is not clear what happens if the joint venture wins three awards and the venturers then form a new joint venture to go after more awards, but at some point, a longstanding relationship between joint venture partners may lead to a finding of general affiliation.

HOW SHOULD JOINT VENTURES BE FORMED AND STRUCTURED?

Written Document Requirement. The proposed rule clarifies that while a joint venture may or may not be a separate legal entity, such as an LLC, it must exist through a written document and do business in its own name in order to facilitate the tracking of the number of awards made to the joint venture.

Populating the Joint Venture. The new rule clarifies SBA's current policy that a joint venture may or may not be *populated* (have its own separate employees). Whether a joint venture needs to be populated depends upon the legal structure of the joint venture. If a joint venture is a separate legal entity, e.g., an LLC, then it must have its own employees. If a joint venture merely exists through a written agreement between business entities, then it need not have its own separate employees and the employees of each of the entities may perform work for the joint venture.

SBA Approval of Joint Venture. SBA approval of joint ventures for non-8(a) contracts is not required under the current or proposed regulation. However, the current rule does require SBA approval of the joint venture agreement for 8(a) contracts prior to award. The new rule would permit parties to a previously approved joint venture for an 8(a) award to obtain SBA approval for a second and third 8(a) contract by submitting an addendum to the original agreement setting forth the performance requirements on that second or third contract.

When are Joint Venturers Affiliated? Generally, concerns submitting offers on a particular procurement as a joint venture are deemed affiliated with each other with regard to the performance of that contract, except in some limited circumstances spelled out in the rules such as a joint venture between a mentor and protégé (as discussed below).

How Much Work Must Be Performed By The 8(a) Participant Under a Joint Venture for an 8(a) Set-Aside? Under the current rule, the joint venture must perform the level of work required by the prime contractor under the limitations on subcontracting requirements applicable to the contract, e.g., more than 50% of the cost of personnel in the case of services contracts. The current rule also requires that the 8(a) partner, including a protégé, must perform a "significant portion" of the work. However, the current rule does not define this term. Under the new proposed rule, the 8(a) partner in a joint venture, including a protégé, "must perform at least 40% of the work performed by the joint venture". Also, the work "must be more than administrative or ministerial functions so that they gain substantive experience." So, for example, if the joint venture proposes to perform 50% of a contract, the 8(a) participant must perform at least 40% of the 50%, or at least 20% of the entire contract.

Submission of Work Report. At the completion of an 8(a) contract awarded to a joint venture, the 8(a) participant must submit a report demonstrating how the performance requirements were met.

Distribution of Profits. The current rule requires that the 8(a) member of the joint venture receive at least 51% of the net profits of an 8(a) joint venture. The new rule would replace this requirement with a provision that the 8(a) member receive "profits from the joint venture commensurate with the work performed by the 8(a) Participant(s)".

CHANGES TO THE MENTOR-PROTÉGÉ RULES

Limits on Number of Protégés. The new rule establishes a limit of three protégés per mentor.

Number of Mentors. The new rule allows the SBA to approve a second mentor for a protégé.

Mentor-Protégé Joint Venture Can Qualify as Small Business for Subcontracts. Under the current rule, a mentor-protégé joint venture can only qualify as a small business prime contractor. Under the new rule, the joint venture can also be treated as a small business for federal subcontracts.

When are Member-Protégé Joint Venturers Granted an Exception to the Deemed Affiliated Rule for A Particular Procurement? The new rule establishes that mentors and protégés that form a joint venture to pursue 8(a) or non 8(a) contracts are granted an exception to the rule that deems the parties affiliated for purposes of the procurement targeted by the joint venture, if they have a joint venture agreement that meets the requirements for a joint venture agreement under the 8(a) program. If the joint venture qualifies for the exception, the size of the joint venture merely depends on the size of the protégé. Currently, only mentors and protégés pursuing 8(a) contracts are governed by these structural requirements. This new proposed rule extends these requirements to a mentor and protégé who are pursuing a non-8(a) set-aside and failure to comply with this requirement can be protested.

Consequences For a Mentor that Fails to Provide Assistance. If SBA determines that a mentor has not provided the development assistance set forth in its mentor-protégé agreement, SBA can implement various remedial measures including recommending that a procuring agency issue a stop work order for each Federal contract under which the mentor and protégé are performing as a small business joint venture and received the exclusion from the affiliation rule. Ultimately, the mentor-protégé agreement could be terminated and the SBA could initiate proceedings to debar the mentor and/or the protégé from Federal contracting if it believes that they entered into the mentor-protégé agreement knowing that the mentor did not intend to provide developmental assistance to the protégé.

OTHER ISSUES ADDRESSED IN THE PROPOSED RULE

Change to Ownership Requirements. The SBA has also proposed significant and numerous changes to other aspects to the 8(a) Business Development and SDB programs. For example, SBA is proposing changing the ownership requirements to relax the current rule automatically disqualifying firms from admission to the 8(a) program because the individual seeking to qualify the firm has an immediate family member already participating in the program. Under the new rule, SBA will be able to look at each application on a case basis and waive the general prohibition against allowing immediate family members into the program where there are negligible connections between the firm of the family members and the family member seeking admission has sufficient technical and management experience to operate the firm separately and independently from their relative's firm.

Miscellaneous Changes. For those interested in examining all of the changes proposed by SBA, they can be found at <http://www.sba.gov/aboutsba/sbaprograms/8abd/index.html>.

SUMMARY

If you need any additional information concerning the proposed rule or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220** or **KBrody@dbd-law.com**. Additional information concerning David, Brody & Dondershine, LLP can be found at www.dbd-law.com.

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