NEWSLETTER

On Your Mark, Get Set . . . SBA Proposes to Open Up Mentor-Protégé Program to All Small Businesses

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In a long-anticipated rulemaking, the U.S. Small Business Administration (SBA) recently released a proposed rule that would establish a Government-wide mentor-protégé program for all small businesses. Once finalized, the rule would represent a "sea change" that will significantly alter the competitive landscape for all small business set-aside contracts.

Currently, the SBA's mentor-protégé program is available only to participants in the 8(a) Business Development program. The program is used as a business development tool in which mentors provide diverse types of assistance to their 8(a) protégés, including technical and management assistance, financial assistance in the form of equity investments or loans, subcontracts, and assistance in performing Federal prime contracts through joint venture arrangements.

That final form of assistance-participation in joint ventures-is the prime incentive for large business mentors to participate in the program. A joint venture comprised of a mentor and its 8(a) protégé can chase small business set-aside contracts as long as the 8(a) protégé qualifies as small for the procurement. Whereas a large business subcontractor would be limited to performing 49% of the contract or less, under the rubric of a mentor-protégé joint venture the large business mentor can perform up to 60% of the work.

In a major coup for both small and large business contractors, the SBA has proposed to extend that incentive to mentor-protégé joint ventures involving all types of small businesses, including Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC), HUBZones, Women-Owned Small Businesses (WOSB), and "regular" small businesses not in a designated SBA program. Under the proposed rule, all mentor-protégé joint ventures would be required to comply with the current requirements for 8(a) joint ventures (*e.g.*, protégé must own at least 51% of the joint venture, employee of protégé must be designated as project manager, protégé must perform 40% of the work performed by the joint venture).

The SBA proposes to retain essentially the same qualification requirements for becoming a mentor that currently apply for the 8(a) mentor-protégé program. A mentor must be a for-profit business that demonstrates a commitment and the ability to assist small business concerns. Generally, a mentor participating in any SBAapproved mentor-protégé program will have no more than one protégé at a time. SBA may authorize a company to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés in the aggregate across all SBA mentor-protégé programs.

The proposed rule would make significant changes to the qualification requirements for protégés, however, by opening the mentor-protégé program up to "larger" and more established small businesses. Presently, in order to qualify as a protégé for the 8(a) mentor-protégé program, an 8(a) firm must (i) have a size standard that is less than half the size standard corresponding to its primary NAICS code, (ii) be in the developmental stage of the 8(a) program, or (iii) not have received an 8(a) contract. The SBA has proposed to eliminate these criteria for all mentor-protégé programs, including the 8(a) program, and allow firms to qualify as protégés as long as they qualify as small under their primary NAICS code. Prospective protégé firms would have to obtain SBA verification of their small business size status before receiving approval to participate in a mentor-protégé relationship.

In a word of caution to prospective mentor-protégé participants, the SBA notes in the proposed rule that "joint ventures permitted by SBA's regulations must benefit small businesses, and must not be used as vehicles to allow companies to fraudulently or improperly benefit from SBA contracting programs." To prevent such abuses, the rule would require all joint venture partners participating in a small business set-aside contracts to certify to the contracting officer and to the SBA prior to performing the contract that they will perform the contract in compliance with the joint venture regulations. They must also submit annual reports certifying compliance with joint venture requirements and explaining how the performance of work requirements are met. The SBA states that these certifications "will help to ensure accountability within these programs, and assist the Government's ability to deter wrongdoing through criminal and civil fraud prosecutions as well as other administrative remedies such as suspension and debarment."

In anticipation of the flood of mentor-protégé applications the SBA will receive once the rule is finalized, the SBA states in the proposed rule that if the number of mentor-protégé applications becomes "unwieldy," the SBA may institute "open" and "closed" periods for the receipt of mentor-protégé applications. The SBA would then accept applications only during "open" periods.

Particularly in light of this final point, small and large businesses should start planning now if they are interested in participating in a mentor-protégé program. Although a final rule is likely still several months away, it is not too early to start talking to prospective joint venture partners and even beginning to prepare some of the key documents that will be needed to apply to a mentor-protégé program and form a joint venture.

Once the rule is finalized and the SBA begins approving new mentor-protégé applications, contractors can expect that virtually every small business set-aside competition will involve one or more newly-minted mentor-protégé joint ventures. If the SBA becomes overwhelmed by the wave of applications and institutes a "closed" period-a very possible, if not likely, scenario given the significant interest in this new program-you do not want to be caught on the outside looking in.