

ALERT

SBA Changes Mentor Protégé Programs and Other Small Business Contracting Rules

October 22, 2020

WHAT: The U.S. Small Business Administration (SBA) issued a final rule consolidating the 8(a) and All-Small Mentor-Protégé Programs. The rule eliminates the 8(a) version of the program, including its unique requirements and separate review process for 8(a) mentor-protégé agreements. Besides this primary purpose, the final rule also amends several other small business contracting rules, including those related to the 8(a) program, recertification, joint ventures, and affiliation.

WHEN: The final rule was issued on October 16 and is effective on November 16, except for changes to the women-owned small business rules that are effective immediately.

WHAT DOES IT MEAN FOR INDUSTRY: This final rule eliminates the distinctions between the 8(a) program mentor-protégé rules and the All-Small mentor-protégé program rules. Mentor-protégé relationships involving an 8(a) protégé will now be governed by the same requirements and processes as any other small business protégé. For example, the final rule eliminates the requirement that joint ventures between an 8(a) protégé and its mentor obtain pre-approval from SBA before receiving a contract award.

But the rule is more extensive than its headline suggests. In addition to eliminating the 8(a) mentor protégé program, the final rule includes a host of other changes unrelated to the mentor protégé program. Buried within the rule, for example, is a change that will increase the risk that a small business that is acquired will no longer be eligible to continue receiving set-aside orders or even option exercises under set-aside contracts. For further details on the final rule, visit the link below.

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Practice Areas

Government Contracts
Small Business Programs and
Nontraditional Defense Contractors

Small businesses of all types, and the large businesses who partner with them, should familiarize themselves with these changes. Wiley is available to help your business navigate the final rule and how it might impact your pursuit and performance of government contracts.

The SBA's final rule makes number of changes to both the mentor protégé program and other SBA requirements. Below is a summary of the most impactful changes.

Changes to the Mentor Protégé Rules

- Eliminates the 8(a) mentor protégé program;
- Formalizes SBA's practice of allowing a mentor-protégé relationship cancelled within the first 18 months to not count towards the firm's two-mentor lifetime limit provided that the protégé does not abuse the privilege;
- Formalizes how a protégé can provide feedback to SBA on an underperforming mentor and obtain SBA assistance in corrective action or termination of the relationship; and
- Clarifies rules to qualify as a protégé when the concern is small under its secondary North American Industry Classification System (NAICS) code but other than small under its primary NAICS code.

Changes to Joint Venture Rules

- Eliminates the requirement for all 8(a) joint ventures (including those between an 8(a) protégé and its mentor) to obtain approval from SBA prior to award;
- Eliminates the 3-in-2 rule for all joint ventures that limited the joint venture to receiving three contracts in two years, and establishing a blanket rule that all joint ventures have a two-year time limit starting from the date of its first contract award;
- Clarifies that joint ventures may be populated with administrative personnel that include a Facility Clearance Officer, and that the joint venture may rely on the facility clearance of its members (whether the U.S. Department of Defense (DOD) and Defense Security Cooperation Agency (DSCA) will accept the latter is not addressed in the rule);
- Joint ventures may assign profits to small business participants in excess of the work performed by those participants; and
- Clarifies that the limitations on subcontracting rules in 13 C.F.R. § 125.6 are used to determine a protégé's compliance with the 40% workshare requirement for joint ventures, and that the protégé's workshare may not subcontracted to a similarly-situated entity.

Changes Related to Multiple-Award Contracts (MAC)

- Consistent with the Federal Acquisition Regulation (FAR), the rule adds requirements that contracting officers assign the most appropriate NAICS code at the order level under a MAC, and that orders may not have NAICS codes other than those listed in the MAC;

- Requires offerors to certify their size and status at the time of initial offer, including price, for a set-aside order under an *unrestricted* MAC. The rule does not require such certification for orders or BPAs under FSS contracts, or for small business pools within an otherwise unrestricted MAC. The rule also permits size protests at the time of such an order rather than only at the time of the MAC award. The new rule does not require certification of size and status for orders under set-aside MACs, though existing regulations allow contracting officers to request certification for such orders if they want; and
- For set-aside MACs based on size alone, awardees must qualify for a socio-economic status (HUBZone, VOSB, WOSB, etc.) at the time of the first such order under that MAC set-aside based on the more restrictive status.

Changes Related to Recertification

- Renders a firm ineligible for a pending set-aside award if a merger, sale, or acquisition occurs within 180 days of the proposal submission and the transaction causes the concern to be other than small.