

ALERT

SBA Proposes Significant Changes to Multiple Programs and Policies

August 28, 2024

WHAT: The U.S. Small Business Administration (SBA) issued a proposed rule that's directed principally at amending its regulations governing the Historically Underutilized Business Zone (HUBZone) program, but also proposes significant changes to many other important SBA programs and policies. The proposed rule addresses several topics that will be of interest to both small- and large-business government contractors, including joint ventures, the mentor-protégé program, and recertification requirements under multiple-award contracts.

WHEN: The SBA issued the proposed rule on August 23, 2024. Comments are due on or before October 7, 2024.

WHAT DOES IT MEAN FOR INDUSTRY: The proposed rule is a must-read for participants in SBA's HUBZone program. Although characterized as mere "updates and clarifications," the proposed rule would make significant changes to many of the current requirements governing HUBZone contractors. These changes expand upon (and in some cases, materially alter) changes SBA made in 2019 when it published a comprehensive revision to the HUBZone program regulations. But the proposed rule also contains many other provisions that will impact both small- and large-business government contractors.

Of broader interest to the government contracting community, the proposed rule would consolidate and harmonize recertification requirements governing its small business, 8(a), HUBZone, Veteran-Owned and Service-Disabled Veteran-Owned Small Business (VOSB and SDVOSB), and Women-Owned Small Business (WOSB) programs. In response to several recent protest decisions that SBA believes

Authors

George E. Petel
Partner
202.719.3759
gpetel@wiley.law

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"adopted incorrect interpretations" of its regulations, SBA proposed to clarify and/or change its recertification rules governing multiple-award contracts so that:

- A firm that recertifies as other than the size or small business program status required for a multiple-award contract that it is currently performing may continue to perform the current period of performance. But the firm would be ineligible to receive new options or orders set aside for small businesses. The prohibition on new orders would apply to all multiple-award contracts, including Federal Supply Schedule (FSS) contracts.
- If a firm is involved in a merger, sale, or acquisition after submitting an offer for a set-aside opportunity but before award, it must recertify its size and status to the contracting officer.
- If the firm recertifies that it no longer has the size and/or status required for the award, the firm is *ineligible* for award if the merger, sale, or acquisition occurred within 180 days of offer submission and before award. This requirement would apply to contracts and orders issued under multiple-award contracts.
 - If the firm recertifies that it no longer has the size and/or status required for the award, the firm is *eligible* for award if the merger, sale, or acquisition occurred more than 180 days after the date of offer but prior to award. This requirement would apply to contracts and orders issued under multiple-award contracts. *However*, where the underlying award is a multiple-award small business set aside or reserve, the firm is *ineligible* for the pending award because the firm would not be eligible for orders set aside for small businesses or set aside for a specific type of small business under that award.
- If a firm is required to recertify its size or status for a particular set-aside order under a multiple-award contract and cannot recertify as having the applicable size or status, the firm is ineligible for that specific order but remains eligible for other set-aside orders under that contract.

If and when implemented in a final rule, these changes will create more certainty for parties involved in the acquisition of a small-business contractor and clarify the impact on the target's set-aside work.

SBA also proposed changes to the rules governing how agencies evaluate the capabilities, past performance, and experience of joint ventures, including SBA mentor-protégé joint ventures. This responds to a recent bid protest decision by the U.S. Court of Federal Claims, *SH Synergy, LLC v. United States*, 165 Fed. Cl. 745 (2023), which, according to SBA, "has caused some confusion as to what past performance a procuring activity can require of a protégé joint venture partner and how that past performance should be evaluated." The proposed rule provides guidance, in the form of an example, for how contracting agencies could require some past performance for the protégé at a contract dollar level below what would be required of joint venture mentor partners or of individual offerors.

The proposed rule also includes a new restriction on mentors that acquire another mentor firm. To avoid situations in which protégé firms with related mentors would be competing against each other, the rule provides that if a mentor acquires another mentor and both firms are participating in joint ventures under the same multiple award contract, the mentor must exit one of those joint venture relationships. The proposed rule

would also add a new requirement that protégé firms be given a right of first refusal to purchase a mentor's interest in a mentor-protégé joint venture where the mentor seeks to sell its interest in the joint venture.

Finally, SBA proposed numerous substantive changes to the rules governing the 8(a) Business Development program. These provisions address, among other things, ownership and control by non-disadvantaged individuals and SBA's acceptance of procurements into the 8(a) program.

Current participants in SBA's small business programs, as well as large-business contractors that partner with, mentor, or acquire small businesses, should review the proposed rule and consider submitting comments on SBA's proposed policy changes relevant to their business. Wiley's Government Contracts Practice will continue to monitor these issues and keep contractors apprised of new developments.