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It's About Time - SBA Proposes To Merge Small Business Mentor-Protégé Programs & Other Proposed Changes to the Small Business Program Regulations

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For those of you who are long time readers of this author and blog, I have talked regularly about the United States Small Business Administration ("SBA") and its various iterations of the Mentor-Protégé Programs ("M-P") over the years. The SBA has announced some changes that will have significant, and overly positive, impacts on the M-P Programs.

SOME CONTEXT - A RE-INTRODUCTION TO THE M-P PROGRAMS

Originally, the M-P Program was designed to allow only SBA 8(a) certified economically disadvantaged small business concerns to "partner" with a mentor (usually an other than small (nee large) business) to develop themselves by learning from the mentor and in return they could joint venture ("JV") to pursue 8(a) and other small business set aside contracts. That program has had a great deal of success over the past 21+ years (since it was created in 1998). As a result, in 2016, the SBA expanded the M-P Program to include all small business programs, calling it the "All Small Mentor-Protégé Program". This expanded program included all small business concerns other than those under the 8(a). As a result, any Service-Disabled Veteran Owned ("SDVO"), Woman-Owned ("WOSB"), HUBZone and any other small business could now partner up with a mentor and gain the benefits of learning from that mentor, while allowing any such Mentor-Protégé team to pursue small business contracts in that given program for which the Mentor-Protégé team qualified. This program has many benefits for the small, protégé, business, but also allowed the mentor (typically a large) business, in return for its "teaching" the mentor, to gain "legal" access to small business contracts for which it would otherwise not be permitted to bid/propose upon.

Every indication from my experience is that this program works. What has been more problematic, however, is that with the expansion or addition of the All Small M-P Program, there was never articulated a real consistent explanation as to why it was necessary to have two programs, with two bureaucracies and similar, but not identical, rules. As announced on November 8, 2019, the SBA has proposed to combine all of its mentor-protégé programs into one omnibus program, thereby reducing the level of bureaucracy and (hopefully) streamlining the program and underlying processes.

BACKGROUND

For those of you who have kept abreast of the current presidential administration's early efforts, an Executive Order was issued under which all executive agencies were directed to effectuate regulatory reform (remember the "1-2" rule in which for every one new regulation promulgated, agencies were to remove two existing ones?). E.O. 13771 (Jan. 30, 2017). This current rulemaking falls out of that Executive Order.

The M-P Programs allow small businesses to gain technical and management assistance from large businesses. That assistance can take the form of financial assistance via equity or loans, subcontracting and joint venturing with a mentor to perform prime government contracts, and other technical assistance. By doing this, the protégé small businesses is given access to, and learns from, the mentor on how to run their business, develop themselves and (hopefully) grown and succeed. This was particularly important in the 8(a) program, as that program has a nine-year duration, after which the small business loses its 8(a) preferential status.

HIGHLIGHTS OF THE PROPOSED CHANGES

On November 8, 2019, the SBA issued a Notice of Proposed Rulemaking, entitled "Consolidation of Mentor Protégé Programs and other Government Contracting Amendments" (84 Fed. Reg. 215 60846-60881), findable at: https://www.federalregister.gov/documents/2019/11/08/2019-23141/consolidation-of-mentor-protg-programs-and-other-government-contracting-amendments). This lengthy document describes how the SBA has proposed to "revamp" and consolidate its various M-P Programs and address other government contracts-related issues. While focused on the M-P Programs, there are other critical changes as well. As it is quite voluminous, some highlights that bear noting from this rule making are as follows:

1. Programs Merged: As briefly set-forth above, the All-Small and 8(a) M-P Programs will be merged. This is to simplify the regulations and reduce the duplicative bureaucracy. This is also being done to reduce or "eliminate confusion regarding perceived differences between the two programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications."

2. 8(a) JV Agreement Approval: 8(a) SBCs seeking award of an 8(a) contract will no longer need to submit their JV agreement for pre-approval by the SBA.

3. Affiliation Modifications: Interestingly, this proposed rulemaking seeks to modify the affiliation rules found in 13 C.F.R. §121.103(g). Some highlights include:

    1. "Newly Organized Concern": The "newly organized concern" rule (where a new entity which has employees or management/officers from a prior entity in the same or similar industry can be found affiliated with the prior business), is modified so that it adds the word "current" to the term "former" officers, directors, etc. This is intended to show that affiliation under the newly organized concern rule can arise both where the officers, directors, major stockholders, key employees, etc., are "former"

employees of the old concern (as presently written) or remain "currently" in such a role with that old entity. This is the first change to this regulatory definition in some time, but has always been the way in which this author has read and interpreted the regulation.

2. Affiliation by Family Relations (Identity of Interest): Traditionally, the regulations and SBA have found that affiliation between different businesses exist if they are both owned by separate immediate family members in the same or similar line of business or industries. This is called having an "identity of interest". The SBA, after many years, has decided to change this, thankfully. The new rule proposes to modify this such that "an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern or the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the owners have a contractual relationship that was not conducted at arm's length." Id. at 60852. In other words, if two immediate family members are in the same or similar lines of business or industries, they will not be found affiliated as long as there is no common ownership or management and they conduct business (contract) at arm's length. This is a very positive development for families with members in the same or similar lines of separate businesses. Note that this is limited to the 8(a) BD program.

4. Joint Venture Modifications: One of the key benefits of the M-P Programs is that it excludes M-P JVs from being found affiliated merely for being a JV. That does not mean that affiliation cannot be found under other bases but a number of significant modifications have been proposed to JVs.

    1. An interesting proposed change is a modification to section 103(h), in which the SBA seeks to revise the definition of a JV (at least for regulatory purposes), such that a JV is not considered an "on-going business" but is formed for a limited purpose and duration. Critically, if two or more business entities desire to join through another entity on a "continuing, unlimited basis", then that is not the intention of the SBA Regulations on a M-P Program JV and those entities will be treated as "affiliated". In other words, if the parties JV for an M-P purpose, they must state so and limit the duration and scope of that JV. If, on the other hand, they want to form a separate, on-going concern, then they are not consider a JV for purposes of the M-P regulations and can be found to be affiliated.

    Presently, the regulations provide for these limitations via the "3-2" rule, in which a given JV can only receive three contact awards in a two-year period from the receipt of a first contract award (subject to certain exceptions discussed in prior Client Alerts and Blog Posts). Now, upon expiration of the two-year period, the M-P parties must form a new JV if they intend on jointly seeking work beyond the "3-2" rule. The SBA seeks to modify this limitation by removing the three-contracts limitation, but keeping the two-year duration, such that an M-P JV can seek and receive a virtually unlimited number

of contracts (subject to the size standards and other affiliation obligations of course), but the JV duration is limited to two years from the date of its first award. To surmount this, formation of a second JV is appropriate. We view this as a positive change.

2. MAC Contracts & JVs: SBA is seeking comments on the treatment of JVs which receive IDIQ/Multiple Award Schedule Contracts (collectively, "MACs"), with particular focus on the Government Services Administration ("GSA") Federal Supply Schedule ("FSS") program. Apparently, some JVs were moving co-venturers in and out of the JVs to maintain size status and to try to get around the "3-2" rule to allow recertification by exchanging one partner for another. As SBA states, the intention was that an M-P-specific JV always have the same "partners" for the lifetime of the JV and that each JV with a different pairing of "partners" is viewed by SBA as a different JV (that was also this author's understanding and belief). SBA is in the process of trying to clarify this regulation to reflect this understanding.

3. JV-Direct Employees: Another clarification is whether a JV is "populated" or "unpopulated". These terms were developed when the M-P program was under development expanded in 2016. Populated meant that the M-P JV had its own employees. Unpopulated, means it did not. The SBA removed this distinction with its 2016 expansion of the M-P Programs, and actually stated that these JVs should be unpopulated. Now, the proposed regulatory revisions seek to allow an M-P JV to have limited direct administrative personnel, including a Facility Security Officer for secure work. The Defense Security Service which oversees security clearance issues, has taken the position that a JV must have its own clearance, even if both JV partners individually hold such a clearance. SBA seeks comments from industry on this and how to address it. SBA is considering a provision which requires that either the mentor or the protégée partner have a facility security clearance. In the case where the non-small partner had the clearance, it could retain all secure documents relating to the JV, despite the typical requirement that the small protégé remain all JV-related records. This is a logical and appropriate modification.

4. JV Receipts Percentage: Another clarification, which we have understood was required, is the fact that the small business protégé include its percentage share of JV receipts and employees in its own receipts or employees in determining the size standard compliance (on an average annual revenue basis for the past three (and soon five years) or employee basis depending upon the applicable size standard. For size status and size protest purposes this is how we have determined this figure and SBA has agreed, at least in some cases.

5. JV Recertification: Without getting into too much detail, the proposed regulatory adjustments discuss various issues with size certification of JV members, including when size recertification is required in the context of a JV member being acquired or novating a contract.

6. Protests: Currently, a size status protest can be filed if the Contracting Officer ("CO") requires a recertification in the award of a specific MAC task order. The regulations are now being updated to allow size protests under unrestricted MACs where the task order is set-aside for small businesses and also authorizes protests based on socioeconomic protests where the set-aside order is based on a different status than that for which the set-aside MAC was awarded (e.g., if the MAC was awarded under an 8(a) set aside status but the task order is set aside for WOSBs , not 8(a) set aside).

7. 8(a) JV Agreement Pre-Approval by SBA: SBA is removing the current requirement that all 8(a) JV Agreements be pre-approved by SBA. Instead, SBA is allowing industry to effectively self-regulate this by permitting them to file size status protests on JVs. The SBA is retaining pre-approval for JVs only in the situation of an 8(a) sole-source award, as there is no basis to protest such awards, and therefore some form of SBA oversight is required to remain.

5. MAC/IDIQ TASK ORDER CONTRACTS: The regulations are being clarified on a number of levels to address questions that have arisen as a result of the government's increasing use of different types of IDIQ/MAC contract vehicles in which a group of contractors are "pre-qualified" for a contract vehicle and then compete among that limited competitive range for individual task or job orders. Some MACs are open to all competitors, others fully set aside, and others have a mix of open and set-aside.

    1. NAICS Code Applicability: One of these significant changes requires that a contracting officer on an IDIQ contract must assign a single NAICS code for each task order issued against a MAC and that the code must be based on the work awarded and be part of the underlying MAC. This makes sense and should have been mandated from the beginning.

    2. UNRESTRICTED MACS: Another area that SBA is seeking to address under unrestricted (e.g., not small business set-aside) MACs is the situation where a company becomes other than small during the life of a multi-year MAC and the government seeks to award a task order that is restricted to small businesses. While the awardee may have been small at the time of award (and would qualify as small for up to five years under that MAC if it were small as of the time of price proposal submission), there are concerns that if that business becomes other than small during the life of the MAC that it should not receive a 100% set-aside/restricted task order for small businesses, where it is no longer one. To address this concern, SBA is proposing to (with the exception of GSA FSS orders or Blanket Purchase Agreements), that where any order under an unrestricted MAC that is set aside solely for small businesses is to be issued, a concern must recertify its small or WOSB status as of the time it submits its initial offering inclusive of price for that order. A firm whose current size status is accurate on SAM will not be required to recertify. In contrast, where a base MAC is set-aside, the size status of the offerors will be determined as of the date of submission of their initial base MAC proposal with price, and that status will remain for the life (up to five years) of that MAC vehicle. This is subject to

the CO's exercising its right to seek small business status recertification post-award.

In the case of socio-economic status, SBA maintains that firms seeking status due to their status as an 8(a), HUBZone, SDVO or WOSB, that such firm must have the status as of the time that it makes an offer on a given task order. In other words, "size may flow down from the underlying contract, [but] status in this case cannot." Id. at 60850. Stated differently, an entity is small per the prior paragraph, can have its status as socially disadvantaged, WOSB, HUBZone or SDVO entity change, even if it remains small. As such, that status must remain as of the time of proposal for a task order.

6. Section 124.109 et seq. – Tribal/Native Owned Entities: The regulations governing various tribally-owned 8(a) entities are also being slightly changed for the better. For example, where an entity owned by a native-American entity (ANC, Native American, Native Hawaiian, etc.) has a change in ownership, it no longer needs to seek SBA approval as long as the change relates to reorganize its ownership by adding or removing a wholly-owned triable entity. A number of other changes are promulgated too, however, they will be the subject of a separate alert given their focus and limitation to Native American entities.

7. SOME OTHER HIGHLIGHTS: There are a number of other changes made in this rulemaking, however, a few additional highlights include:

    1. Mentor Approval: The SBA seeks to clarify the fact that it will review the quality and qualifications of a mentor to confirm its capability to perform its obligation under a M-P Arrangement. Towards this end, SBA will "decline an application if SBA determines that the mentor does not possess good character." Likewise, where a mentor has more than one protégé, it cannot submit competing bids/offers in response to a solicitation on a specific procurement via different JVs. This has always been the intent but it is now clarified.

    2. Possible Limitation on Mentor Size: Interestingly, the SBA seeks comment on whether to limit mentors to only those entities with average annual venues of less than $100 million. At present, any concern that meets its commitment duties can act as a mentor regardless of revenue volume.

CONCLUSION

As the foregoing shows, there are a number of substantial changes being proposed to the SBA M-P Program. This program, which has shown significant levels of success, continues to evolve and develop. This latest rulemaking seems to make a number of positive changes for the benefit of all involved, including the mentors and their protégés. While not final, there is little likelihood that most, if not all, of these changes will be formally adopted.

Industry is invited to submit comments to the SBA, with a current deadline of January 17, 2020. We are happy to

assist in developing any comments or answering any questions that may arise.