January 26, 2020

Via regulations.gov

Brenda Fernandez
U.S. Small Business Administration
Office of Policy, Planning and Liaison
409 Third Street SW, 8th Floor
Washington DC 20416

Re: Comments on Proposed Rule – Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments, 84 Fed. Reg. 60846 (Nov. 8, 2019); RIN 3245-AG94

Dear Ms. Fernandez:

On behalf of the American Bar Association (‘‘ABA’’) Section of Public Contract Law (‘‘Section’’), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch and Douglas Mickle, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

This letter is available in pdf format at https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/ under the topic “Small Business and Socioeconomic Issues.”
BACKGROUND AND INTRODUCTION

The Section is pleased to offer comments on the Small Business Administration (“SBA”) proposed rule regarding Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments. The Section appreciates SBA’s efforts to make significant changes to its mentor-protégé programs, 8(a) program, and other areas. The proposed changes cover more subject matters and likely will have greater impact than any other regulatory changes SBA has proposed in recent years. The Section applauds SBA for taking feedback over the past several years from key stakeholders in the mentor-protégé and 8(a) programs, and turning that feedback (and other lessons learned) into a series of well-considered proposed changes.

Although the Section agrees with many of the proposed changes, that Section believes several other critical changes must be made as well. Absent these additional changes (especially in connection with joint-venture requirements under 13 C.F.R. § 125.83), continued uncertainty in the programs will likely lead to increased protest litigation and lower participation in the subject SBA programs. In addition, the Section believes that some of the proposed changes should be further clarified or revised to better serve stakeholders and the policy goals behind these SBA programs. For these reasons, the Section submits the comments below.

II. COMMENTS

A. Comments Concerning Change to Requirement for SBA Pre-Approval of JVAs for 8(a) Set-Asides (§ 124.513).

1. The Section strongly supports removing the requirement for SBA pre-approval of JVAs for competitive 8(a) set-asides.

SBA proposes to eliminate the requirement in § 124.513 for 8(a) participants to obtain SBA approval of every joint-venture agreement (“JVA”) for competitive 8(a) contracts. The Section strongly supports this proposed change, and concurs in SBA’s belief that this change will significantly decrease the regulatory burden on 8(a) participants without detrimentally impacting program integrity, which can still be enforced through size protests and enforcement actions.

One major challenge with the current requirement is that SBA’s district offices have been responsible for the pre-approvals. In the Section’s experience, these offices have varied in their standards for assessing whether agreements satisfy SBA’s regulatory requirements. For this reason most notably among others, the pre-approval requirement has caused frustration and unnecessary regulatory burdens for 8(a) contractors, mentors, and procuring agencies alike. Eliminating the pre-approval requirement accordingly eliminates an unnecessary regulatory burden.

2. The Section recommends that SBA centralize pre-approval authority for 8(a) sole source JVAs.

While the Section agrees with leaving unchanged the pre-approval requirement for 8(a) sole-source contracts, the Section recommends that SBA consolidate the authority to pre-approve

3 Unless noted otherwise, all § citations and references are to Title 13 of the Code of Federal Regulations.
these JVAs from SBA district offices to a central office that will review all JVAs requiring pre-
approval. Such a change should eliminate or at least substantially reduce the current variation
across district offices in reviewing JVAs. The location of the 8(a) contractor’s principal office
should not bear on whether its JVA meets SBA’s regulatory requirements.

B. The Section Supports Merging the 8(a) Mentor-Protégé Program into the All Small
Mentor-Protégé Program, but Urges SBA to Clarify the Status of 8(a) Mentor-
Protégé Agreements Approved under the Current/Old Rules.

The Section agrees with merging the 8(a) Mentor-Protégé Program into the All Small
Mentor-Protégé Program (“ASMPP”). This change will reduce confusion and unintended
inconsistencies while benefiting all stakeholders.

The Section is concerned, however, by the proposed rule’s silence on treatment of
existing 8(a) mentor-protégés. Will they be automatically transferred to the ASMPP? What will
be the process for transfer and amendment of 8(a) mentor-protégé agreements (“MPAs”) to
conform to the ASMPP rules? Will the duration of 8(a) MPAs be affected if they were approved
before SBA’s prior rule change in 2016? These concerns echo similar uncertainties that
followed SBA’s revision of the pre-2016 8(a) Mentor-Protégé Program rules, while allowing
existing 8(a) mentor-protégés (“MP”) to continue operating to some degree under the old rules.

To address these concerns, SBA should publish regulations, or at a minimum a guidance
document, that clearly addresses: (1) the treatment of existing 8(a) MPAs, including those
approved under the pre-2016 rules; and (2) the process and timing for transferring from the 8(a)
Mentor-Protégé Program to the ASMPP. Likewise, SBA should clarify whether 8(a) MPAs
approved before the 2016 rule change (and/or terminated before the 2016 rule change) count
against a firm’s lifetime limit of two mentors. The Section does not have specific
recommendations in these areas, but in the interest in obtaining clarity on the impact of the rules
changes, it is encouraging SBA to publish guidelines that provide a common understanding of
these rules changes for the small-business community.

C. The Section Strongly Recommends Additional Revisions to § 125.8.

The Section supports the proposed changes to § 125.8, including the revisions reflecting
the proposed merger of the mentor-protégé programs, and the change to § 125.8(b)(2)(iv)
permitting a JVA to allow its partners to allocate a greater share of profits to the protégé firm
than the protégé’s work share percentage would suggest (though the Section questions whether
mentors will be willing to agree to such terms).

But the Section urges SBA to provide more guidance on complying with the joint-venture
requirements in § 125.8. Many of these requirements have created uncertainty and confusion in
the contractor (and legal) community involved with SBA’s mentor-protégé program. This
confusion may be compounded once SBA ends pre-approvals of 8(a) joint-venture agreements,
which may be followed by an increase in size protests concerning compliance with § 125.8
requirements.
1. **More guidance is needed on calculating the performance of work requirement in § 125.8(c).**

SBA’s existing regulations have created uncertainty regarding how the 40% performance-of-work requirement in § 125.8(c) is to be calculated. Under the current rules, the joint venture must meet the limitations on subcontracting under § 125.6, and the protégé must perform at least 40% of the total work performed by the joint-venture partners. But the regulations do not specify whether calculation of the 40% share to be performed by the protégé is to be calculated using the same methodology as used for calculation of the limitations on subcontracting.

Most specifically, there is significant division in the mentor-protégé community as to:

- Whether the 40% protégé share can include work that the protégé subcontracts to another company, particularly if that other company qualifies as a similarly situated entity under § 125.1 and § 125.6(c);

- Whether the calculation of work performed by the joint venture would include work performed by a similarly situated subcontractor who was not a joint-venture partner;

- Whether the 40% calculation for protégé workshare follows the same rules as § 125.6 concerning supplies, construction, and mixed contracts, which exclude certain costs from the limitation-on-subcontracting calculation (e.g., cost of materials excluded from calculation in construction contracts); and

- What period of performance will be used to measure compliance with the 40% protégé-workshare requirement (i.e., do the same rules as § 125.6(e) apply?).

Because the current regulations are silent as to how the 40% protégé workshare is calculated, many practitioners rely on § 125.6 for guidance, in part because it would seem appropriate to calculate § 125.6 compliance and § 125.8(c) compliance using the same methodologies. But the current regulations do not state that the § 125.6 methodology applies to calculation of the 40% requirement under § 125.8(c).

To clarify this issue, the Section urges SBA to add the words “as calculated under § 125.6” at the end of §§ 125.8(c)(1) and (c)(3). Alternatively, if SBA did not intend for the § 125.6 methodology to apply to calculating the 40% requirement, the Section urges SBA to detail the exact method for how the 40% requirement is to be calculated and that it do so through a proposed rulemaking in order to permit comments from interested stakeholders in the SBA community. In this manner, there can be a thoughtful consideration of an alternative method for measurement.

2. **The project manager requirement should be revised and refined.**

The current regulations at § 125.8(b)(2)(ii) require a JVA to designate an employee of the small-business managing venturer as the project manager responsible for performance of the

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4 This is especially so because § 125.8(c)(1) includes a cross-reference to § 125.6.
contract. But this requirement has created confusion amongst the mentor-protégé and legal community.

For example, the regulations are ambiguous as to whether a specific person needs to be named in the JVA as the project manager, or whether it suffices for the JVA to state more generally that “the project manager will be an employee of the small business managing venturer as the project manager responsible for performance of the contract,” or similar language.

In addition, for many contracts, the person ultimately responsible for performance is not designated with the title “project manager”:

- Many contracts do not have a position labeled “project manager” but instead have a position named “program manager,” “program director,” or “superintendent” that is responsible for performance of the contract.

- In some cases, the “project manager” reports to another contractor employee on the project (such as a “program manager”) and is not the contractor employee ultimately responsible for performance of the project.

- In indefinite-delivery/indefinite-quantity (“IDIQ”) contracts, the project manager ultimately responsible for performance of the contract is often not the same person as the project manager who is responsible for individual task orders later issued under the contract.\(^5\)

To address these uncertainties, the Section recommends revising § 125.8(b)(2)(ii) to require named employees; provide for a more flexible definition of the person ultimately responsible for contract performance; and account for the practicalities of identifying managers for task orders performed under IDIQ contracts:

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the project manager with ultimate responsibility for performance of the contract (the “Responsible Manager”). The individual identified as the project Responsible M manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the project Responsible M manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture. While the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the

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5 If SBA intended for the JVA to identify project managers by name, then it would be impracticable to apply this requirement to task orders, since contractors often do not know the identity of project managers for future task orders before winning the underlying IDIQ contract, especially task orders awarded years after the initial IDIQ award.
protégé, those managers must report to and be supervised by the joint venture’s Responsible Manager.

The Section believes the revised language would result in the most fair, consistent, and effective application and understanding of § 125.8(b)(2)(ii).

3. The requirement for dual signatures on “withdrawals” from joint venture’s special bank account needs clarification.

The current § 125.8(b)(2)(v) requires the JVA to provide for the establishment and administration of a special bank account in the name of the joint venture, and that the special bank account “must require the signature of all parties to the joint venture or [their] designees for withdrawal purposes.” However, ambiguity in the term “withdrawal” has led to conflicting interpretations and conflicts in the mentor-protégé community.

By “withdrawal” did SBA intend to encompass all funds that exit the bank account, such as wire transfers, electronic payments, and paper checks to subcontractors, employees, and suppliers? Or did it instead only apply to payments made by the joint venture to its members for services performed? Or did “withdrawal” only apply to the removal of funds from the bank account for purposes of a profit distribution? If this latter definition is all that SBA intended, then the restriction may not be effective, because a protégé could drain a special bank account by issuing payments (without profit) to itself without any of these payments triggering the restrictions on “withdrawal” of funds.6

The Section believes it is imperative that SBA clarify the term “withdrawal” to ensure this provision is effective and applied consistently with SBA’s intent. As with certain other issues, the Section does not advocate a specific definition, but instead recommends that SBA clarify the meaning it intended.

4. More guidance is needed on the “managing venturer” requirement.

The current regulations lack a clear definition for “managing venturer” in § 125.8(b)(2)(ii), which has led to confusion and concern as to the powers and responsibilities mandated for this position.

The regulations currently require that JVA include a provision naming the small business as the “managing venturer”:

Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract.

6 An added problem is that mentor-protégés attempting to use clearer language in their JVAs do so at risk that the language might be found to conflict with SBA’s ultimate interpretation of this requirement, and therefore their JVA being found non-compliant with § 125.8(b)(2) in a size protest. If the JVA were found non-compliant with § 125.8(b)(2), the joint-venture partners would be deemed affiliated (and likely other than small for the subject procurement).
The mentor-protégé regulations provide no further guidance to define how the JVA must allocate the duties and responsibilities of the managing venturer. The regulations do not state whether this managing venturer requirement at § 125.8(b)(2)(ii) is subject to SBA and Office of Hearing and Appeals (“OHA”) definitions and interpretations of “control” (particularly those concerning negative control) as applicable in other contexts, such as the 8(a) or veteran-owned small-business programs. Nor do the regulations or caselaw provide guidance on the level of rights that the non-managing venturer may have without rising to the level of impermissible control or negative control. Although some OHA decisions from veteran-program JV agreements have shed light on what may or may not be acceptable,7 mentors and protégés would benefit from clearer direction.

The Section accordingly recommends that SBA adopt the following definition of “managing venturer” and that it be included in § 125.8(b)(2)(ii):

The “managing venturer” is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other venturers may fully and equally participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

This definition is consistent with OHA’s case law concerning the managing venturer’s role in other contexts. Small business protégés most benefit from leading the contractual efforts of the joint venture, while many are already burdened with the corporate-governance responsibilities of their own businesses. Indeed, given the requirements for “control” under the various socioeconomic programs, protégés are already gaining this valuable business experience and should be allowed to share the burden of managing these aspects of the joint ventures with their mentors. Mentors, too, would benefit from clarification of the extent to which they can guide their protégés in this area without exceeding SBA limits.

5. The JVA content requirements in other applicable regulations do not all match with the requirements in § 125.8(b)(2).

Although § 125.8(b)(2) applies to small-business set-asides, when a mentor-protégé joint venture competes in a subset of a set-aside, an additional JVA content regulation will also apply:

- 8(a) subset: § 124.513(c)
- Service Disabled Veteran-Owned Small Business (“SDVOSB”) subset: § 125.18(b)(2)

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7 See Asirtek Federal Services, LLC, SBA No. VET-269 (2018) (stating that non-managing venturer’s control over certain task orders was “potentially problematic”); Hana-JV, SBA No. VET-227 (2012) (holding that veto powers over “significant decisions” held by all ventures negated designation of small business as the managing venturer); Criteroem, LLC, SBA No. VET-246 (2014) (finding violation of “managing venturer” requirement where JV agreement provided “overall management and control of the joint venture shall vest equally in the parties”).
These other sections are, in parts, inconsistent with each other and/or with §125.8, and they lack a clear legal or programmatic explanation for their inconsistencies. For example, the SDVOSB provision differs significantly from HubZone or WOSB project-manager requirements, i.e., it does not prohibit the project manager from being an immediate former employee of the mentor. Compare §125.18(b)(2)(ii) with §125.8(b)(2)(ii).

To avoid these inconsistencies, the Section recommends that SBA amend the four regulations listed above to state that the content requirements of §125.8(b)(2), as modified, apply to the four subset set-aside types as well.

The Section accordingly recommends that SBA revise §124.513(c) for 8(a) to read as follows:

Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by §124.520 or §125.9, must contain a provision: the provisions required by §125.8(b)(2), except that all references therein to “small business” therein be read to mean “8(a) Participant.”

The Section also recommends revising §125.18(b)(2) covering SDVOSB:

Every joint venture agreement to perform an SDVO contract, including those between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor authorized by §124.520 or §125.9 of this chapter, must contain a provision: the provisions required by §125.8(b)(2), except that all references therein to “small business” therein be read to mean “SDVO SBC.”

The Section recommends revising §126.616(c) regarding HUBZones:

Every joint venture agreement to perform a HUBZone contract, including those between a protégé firm that is a certified HUBZone SBC and its SBA-approved mentor authorized by §124.520 or §125.9 of this chapter, must contain a provision: the provisions required by §125.8(b)(2), except that all references therein to “small business” therein be read to mean “HUBZone SBC.”

The Section likewise recommends revising §127.506 concerning WOSBs:

The parties to the joint venture must enter into a written joint venture agreement. The joint venture agreement must contain a provision: the provisions required by §125.8(b)(2), except that all references therein to “small business” therein be read to mean “WOSB.”
6. The various joint venture regulations are inconsistent in the terminology used to describe what contracts/subcontracts a mentor-protégé joint venture can perform as a small business or subset thereof.

Current § 125.8 clearly states that mentor-protégé joint ventures can compete as small businesses for both prime contracts and subcontracts. See § 125.8(a) (permitting offers as a small business for a “Federal procurement, subcontract or sale”). But the joint-venture regulations concerning the set-aside subsets are less clear on this point. For example, the SDVOSB, WOSB and HUBZone joint-venture provisions use the term “procurement or sale” but omit the term “subcontract.” See §§ 125.18(b)(1)(i); 126.616(b)(1); 127.506(a)(1). And the 8(a) provision uses only the term “procurement” and omits both “sale” and “subcontract.” See § 124.513(b)(1). And the provisions do not define the term “sale.”

The Section does not believe that SBA intended to allow mentor-protégé joint ventures with, for example, a WOSB protégé to compete for a subcontract opportunity as a small business generally but not as a WOSB specifically. But because of the inconsistencies identified above, and the lack of definition for the term “sale,” the provisions could be interpreted in this manner. Accordingly, to avoid confusion and potential inequities, the Section recommends that §§ 124.513(b)(1), 125.18(b)(1)(i), 126.616(b)(1) and 127.506(a)(1) be amended to include the same “Federal procurement, subcontract or sale” language as in § 125.8(a).

7. The rules in § 125.8(e) concerning evaluation of joint venture past performance and experience need refinement to achieve SBA’s apparent intent.

The proposed rule slightly amends § 125.8(e) concerning evaluation of joint-venture past performance/experience on small-business set-asides to also encompass evaluating business systems and certifications. Although the Section concur with this expansion of § 125.8(e), the Section recommends additional and related changes to mitigate existing challenges with § 125.8(e) and avoid creating further problems.

Currently, § 125.8(e) reads as follows:

Past performance and experience. When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

The Section understands that SBA included the subject language in the 2016 revision to the mentor-protégé regulations to preclude agencies from requiring mentor-protégé joint ventures to meet past performance/experience criteria exclusively through projects performed by the joint venture entity itself or the protégé individually, and to address the fact that certain agencies’

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8 See Final Rule: Small Business Mentor Protégé Programs, 81 Fed. Reg. 48558, 48568 (July 25, 2016) (“This proposal was in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity. Where an agency required the specific joint venture entity itself to have experience and past performance, it made it extremely hard for newly established (and impossible for first-time) joint venture partners to demonstrate positive past performance.”)
applications of the pre-existing past performance regulations to mentor-protégé joint ventures appeared inconsistent with SBA’s intent of the mentor-protégé program.\(^9\)

The Section believes this regulation has not been universally implemented by agencies as SBA had anticipated. Rather than applying the rule expansively as SBA intended, some agencies have interpreted the rule in a manner that still creates barriers to mentor-protégés.

For example, some solicitations have had evaluation criteria requiring that both the mentor and protégé each individually meet the solicitation’s experience/past performance criteria, and agencies have contended that such evaluation criteria are consistent with § 125.8(e) because the agency is considering experience of both the mentor and protégé (even if individually rather than in the aggregate).\(^10\) This result appears to be inconsistent with SBA’s intent.

Accordingly, the Section recommends that § 125.8(e) be amended to read as follows:

> When evaluating the past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. When considering the past performance, experience, business systems or certifications of a joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 of this chapter), a procuring activity may not require the protégé firm to meet any such evaluation or responsibility criteria.

Each partner to a joint venture may have individually performed on one or more similar contracts previously, but the joint venture would not be credited with any experience or past performance of its individual partners.”); Enola–Caddell JV, B–292387.2, B–292387.4, Sept. 12, 2003, 2003 CPD ¶ 168 n.7 (citing SBA’s view that it appeared contrary to the intent of SBA’s 8(a) mentor-protégé program for a procuring agency to downgrade a proposal based on the lack of experience/past performance of its individual partners.); JACO & MCC Joint Venture, LLP, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 at 7 n.7 (quoting SBA’s Comments in that protest: “While the Army’s decision to consider the experience and past performance qualifications of both JACO and MCC in evaluating the joint venture's bid proposal appears to be permissible under current GAO case law, it is SBA’s contention that, on policy grounds, awarding agencies should look only to the qualifications of a mentor firm in such circumstances. However, in this instance, it does not appear that JACO/MCC was actually prejudiced by the Army’s chosen method of evaluation.”).

\(^9\) See Enola–Caddell JV, B–292387.2, supra (quoting SBA’s Comments in that protest: “While SBA’s regulations provide no guidance on the technical evaluation of joint ventures between mentor-protégé participants by procuring agencies, it does appear contrary to both the intent of SBA’s 8(a) BD [business development] mentor-protégé program and FAR § 15.305(a)(2)(iv) for a procuring agency to downgrade a proposal based on the lack of experience/past performance of a protégé. In order to be a protégé, an entity must lack experience. 13 C.F.R. § 124.520(c). In our view, if a mentor has excellent experience/past performance and is legally obligated to perform the entire requirement [as was the case here], there is no reason why the joint venture should not receive an excellent technical rating in those areas.”); JACO & MCC Joint Venture, LLP, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 at 7 n.7 (quoting SBA’s Comments in that protest: “While the Army’s decision to consider the experience and past performance qualifications of both JACO and MCC in evaluating the joint venture's bid proposal appears to be permissible under current GAO case law, it is SBA’s contention that, on policy grounds, awarding agencies should look only to the qualifications of a mentor firm in such circumstances. However, in this instance, it does not appear that JACO/MCC was actually prejudiced by the Army’s chosen method of evaluation.”).

\(^10\) This is a much bigger concern with experience criteria in solicitations, since a protégé’s lack of experience may result in a negative rating (or even a determination of technical unacceptability) in an experience evaluation, whereas in a past-performance evaluation the joint-venture offeror may not be evaluated “unfavorably” on account of the protégé’s lack of past performance. See FAR 15.305(a)(2)(iv).
individually. The procuring agency likewise may not downgrade or otherwise unfavorably evaluate a proposal based on any lack of experience/past performance of the protégé individually.

The Section believes that this language more clearly expresses SBA’s intent for the regulation.

Second, the Section recommends revising §§ 124.513(f), 125.16(b)(5), 126.616(f), and 127.506(f) to match the revision to § 125.8(e) proposed above so as to avoid confusion and inconsistency between the joint-venture regulations.

D. Comments on § 125.9.

1. The Section opposes a $100 million cap on mentor size.

SBA has requested comments on limiting mentors to companies under $100 million in average annual receipts. The Section strongly opposes such a cap.

Although the Section concurs with SBA’s goal to ensure that the program benefits small protégés, a cap on mentor size would not effectuate this goal. The beneficiaries from such a cap would not be small protégés, but instead would be mid-large mentors who would no longer have to compete against joint ventures with $100+ million large-firm mentors in the program. To be sure, the Section has no doubt that many mid-size firms could benefit from help competing against the largest firms, but the mentor-protégé program is not the right vehicle for such assistance. The mentor-protégé program is intended to facilitate the growth of small businesses, not mid-size firms that already exceed applicable size standards.

The Section also does not see a basis to conclude that only “recently small” mid-size firms can effectively mentor small businesses. Larger firms have plenty of technical expertise and organizational advice to offer. In fact, many larger firms may be better suited to serve as mentors due to the level of success they have achieved, and their expertise and contracts in the relevant industry, which small-business protégés can benefit from.

Further, in the Section’s experience, other-than-small firms with receipts below $100 million are few in number relative to firms with receipts over $100 million. A hard cap on mentor size would severely limit available large mentors, exacerbating the existing shortage of capable firms willing to serve as mentors. The Section believes it benefits the Government and small businesses to increase available mentors, not decrease them.

Also, capping receipts at $100 million precludes solidly established companies from serving as mentors. Small businesses may have only two mentors (at present); thus, small businesses will seek stable firms with, at the very least, the financial security to provide excellent mentorship during the mentor-protégé period. A larger firm may provide this security to a protégé better than a mid-sized firm.

If SBA is concerned about the ability, capacity, or earnestness of a particular mentor, regardless of its size, SBA should use existing processes to reject certain mentor-protégé
applications. Applying a strict size limit would create a bright-line test that arbitrarily eliminates many potential mentors that could benefit small businesses.\(^{11}\)

2. **The Section opposes the proposed provision in § 125.9(d)(1)(iii) that once a protégé exceeds the size standard of the NAICS code in its MPA, its MP joint ventures are no longer exempt from affiliation under any size standard.**

   It has been the Section’s understanding that under existing SBA rules, if a protégé outgrows the size standard for the NAICS code identified in its MPA, then the mentor-protégé joint venture is no longer considered small for procurements under that NAICS code, though the joint venture could still compete as a small business for procurements under NAICS codes with higher size standards.\(^{12}\)

   SBA appears to be proposing to change this rule with the following language added as § 125.9(d)(1)(iii):

   Once a protégé firm no longer qualifies as a small business for the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will not continue to receive the exclusion from affiliation authorized by paragraph (a) of this section. However, a change in the protégé’s size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

   See 84 Fed. Reg. at 60878. The proposed rule’s preamble does not address this proposed change, and its impetus is unclear.

   The Section opposes the change. This rule could result in mentors’ terminating many mentor-protégé joint ventures early, to the detriment of protégés who could still receive significant mentoring benefit if the relationship runs its full term. Even if a protégé is no longer small in the NAICS code under which the MPA was approved, that development does not prevent a mentor from continuing to provide mentoring to the protégé related to that NAICS code. This mentoring should include the ability to pursue contracts as a mentor-protégé joint venture in related NAICS codes. If only the pursuit of contracts within the applied NAICS code were relevant to mentoring, then SBA’s rules would limit the affiliation exemption to contracts

\(^{11}\) Finally, while the Section opposes any size cap on mentors, the Section would further oppose setting a hard $100 million cap across the board. A universal dollar cap is impracticable in the federal market because (as the current NAICS-based size-standard system recognizes) a company with $100 million in average annual receipts in one industry may be very large, whereas in another industry (such as one that has an employee-based size standard) that company may be considered a small business. And in some industries, there would be few if any companies that could serve as mentors under a $100 million cap. Accordingly, if a cap were to be implemented, it should be done using a universal multiplier of the applicable NAICS code, not simply a single dollar amount. For example, with a universal multiplier of 10, a company could not serve as a mentor in Air Traffic Control (NAICS code 488111, $35m size standard) if it had average annual receipts above $350 million. If SBA ultimately concludes that a cap is appropriate the Section requests that SBA initiate a new proposed rule so that interested parties can comment on the multiplier and methodology proposed.

\(^{12}\) The protégé would, of course, still need to qualify as small under those other, higher size standards.
in that NAICS code regardless of the protégé’s size. No such limit exists in the rules. Nor should the proposed § 125.9(d)(1)(iii) be included in the final rule.

Furthermore, if proposed § 125.9(d)(1)(iii) were finalized, firms could circumvent it by submitting their MPAs under NAICS codes with higher size standards. For example, consider a protégé that works in general facilities services and in the more specific facility landscaping services. Even if that protégé really needs mentoring in landscaping services, it would likely apply for the ASMPP under the NAICS code for general facilities services (561210 – $41.5M) simply because the size standard is over five times that of landscaping services (561730 – $8M). The incentives created by proposed § 125.9(d)(1)(iii) thus would not be beneficial to the ASMPP as a whole.

Alternatively, if SBA keeps proposed § 125.9(d)(1)(iii), then the Section recommends including a procedure for mentor-protégés to convert their MPA to a different NAICS code if the protégé grows above the size standard of NAICS code in its MPA, so long as: the protégé has prior experience performing work in the new NAICS code (see proposed § 125.9(c)(1)(ii)); the mentor is qualified to mentor in the new NAICS code (see § 125.9(b)(1)); and such conversion would not cause a violation of § 125.9(c)(2) or proposed § 125.9(b)(3).

3. **The Section opposes the proposed exemption to the two-in-lifetime rule for MPAs terminated within 12 (or 18) months, as the exemption is currently written.**

SBA has proposed allowing MPAs terminated within 12 or 18 months to not count against a protégé firm’s lifetime limit of two mentors. The Section supports the concept and intent behind this proposed exception. But the Section opposes a bright-line and automatic test based on the MPA’s duration, because such an exception could be abused and is unlikely to curb the practice of mentors’ failing to fulfill their duties under an MPA.

On its own, this proposed exception to the two-in-lifetime rule will incentivize protégés to, for business reasons, analyze whether to break from their mentors after 12 (or 18) months regardless of whether the mentors have been fulfilling their MPA duties. Within 12 (or 18) months of signing the MPA, a protégé could receive several awards and then terminate the MPA, in good or bad faith, to pursue other mentor relationships without penalty. Affording such an easy out for protégés would increase the risk of participation in the program by potential mentors, and as a result could act as a deterrent to firms that would otherwise be willing to serve as mentors.

Instead, the Section proposes adding limited procedures for a protégé to terminate an MPA. Under those procedures, the protégé could request that SBA determine that the MPA will not count against the protégé’s lifetime mentor limit because the mentor failed to assist the protégé as required by the MPA’s terms. This procedure would allow SBA to assess on a case-by-case basis whether a protégé terminated an MPA because of the mentor’s shortcomings in providing guidance or instead for other reasons not warranting an exception to the two-in-lifetime rule. Further, this process would allow SBA to better track mentors falling short of their

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13 The preamble says 18 months but the proposed regulation text says one year.
MPA obligations, which could incentivize better performance by mentors since it could bear on whether SBA approves those firms’ future participation as mentors.\footnote{In addition, while the Section opposes a bright-line test of 12 or 18 months, the Section would not oppose including certain time periods or indicators as rebuttable presumptions or similar factors that SBA would consider in evaluating exceptions on a case-by-case basis.}

Alternatively, the Section recommends abolishing or amending the two-in-lifetime rule. It is unclear to the Section why there is such a limit on mentors. The Section does not believe that removing the lifetime limit would result in protégés’ abusing the system by intentionally taking steps to remain small, as effective mentor-protégé relationships cause protégés to grow to become other than small—and thus ineligible for further participation as a protégé.

Rules applicable to mentors provide a model for this alternative. Mentors may have an unlimited number of protégés overall but no more than three at a time. SBA should consider a similar rule for protégés: no more than two mentors at one time and no limit on the number of mentors during the protégé’s lifetime. The Section suggests adding that the protégé must show how each new mentor would provide mentoring support different than the protégé received under prior mentor-protégé relationships.

4. Comments on SBA’s consideration of requiring a joint venture to recertify its size if its MPA is terminated early by a mentor.

SBA received several complaints from small businesses whose mentor-protégé relationships were terminated by the mentor soon after their mentor-protégé joint venture received a government contract as a small business. Based on these complaints, SBA has requested comment on requiring a mentor-protégé joint venture to recertify its size if the mentor-protégé relationship prematurely ends. In such a case “if the mentor was an other than small business and the joint venture could not recertify as small, the procuring agency could no longer count the contract as an award to small business.” 84 Fed. Reg. at 60861.

The ASMPP’s primary purpose is not to provide large businesses a conduit to win small-business set-aside contracts, and the Section agrees that mentors should be dissuaded from early termination of an MPA following the award of a contract to the joint venture, even if pursuing that contract was the primary (or sole) reason the mentor agreed to participate in the program. The Section thus would not oppose requiring recertification in general. But the rules should be narrowly tailored to require recertification only if the relationship is terminated early by the mentor, not the protégé.

In addition, SBA should consider making recertification discretionary, rather than mandatory, based on its review of the early termination’s circumstances. In some cases, mentor-protégé relationships break down for legitimate business reasons that lead the mentor to terminate early. These circumstances should not require measures that may dramatically affect the mentor, protégé, and Government alike. Requiring recertification would punish the procuring agency, which will not be able to keep claiming small business credit, for example. So although recertification could be a useful tool for SBA, it should not be a mandatory act.
5. The Section supports eliminating the reconsideration process for declined mentor-protégé agreements.

The Section concurs with eliminating the process to reconsider MPA applications. The Section suggests shortening the lock-out period for re-applying from 60 days to 45 days in order to match the current reconsideration timeline and thus minimize the potential adverse effect this rule change might have on firms seeking to submit a reconsideration (or new) application when the change takes effect.

6. The Section requests clarification regarding proposed § 125.9(b)(3)(i).

SBA has proposed to add the following language to § 125.9 to clarify the restrictions on a mentor having competing mentor-protégé relationships: “A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.” 84 Fed. Reg. at 60878. Although the Section generally concurs with this proposed language, the Section also suggests further clarification to ensure that the resultant practice comports with SBA’s intent.

In some situations, a procuring agency will conduct a multiple-award procurement for several different pools/reserves of set-aside contracts. For example, an agency may issue a single solicitation that calls for awarding IDIQ contracts in unrestricted, small business, HUBZone, WOSB, 8(a) and SDVOSB pools. All offerors submit proposals in response to the same solicitation and indicate for which pool(s) they are competing. While technically this is a single procurement, a company submitting in the HUBZone pool would not compete with a company pursuing a SDVOSB-pool contract.\footnote{Assuming of course the SDVOSB company did not also submit for the HUBZone pool.}

The Section does not believe that a mentor with a HUBZone protégé and an SDVOSB protégé would be placing its two MP relationships in competition with each other if both mentor-protégé joint ventures submit offers in response to the same solicitation under these circumstances. As a result, the Section recommends clarifying that the above scenario does not represent “competing offers” and therefore would not be prohibited under proposed § 125.9(b)(3)(i).

E. Comments on Changes in Section 121.103(h).

1. Change from 3-in-2 Rule to ∞-in-2 Rule is a positive step, but the Section recommends that the rule be changed to ∞-in-3 or ∞-in-6 in order to better match temporal limits on the duration of MPAs, or alternatively that SBA mentor-protégé joint ventures be exempt from this requirement.

The Section applauds SBA for proposing the bold step of changing the 3-in-2 Rule to the ∞-in-2 Rule. The 3-in-2 Rule was confusingly written, and the primary text of the rule arguably conflicts with the examples in that rule.\footnote{Under SBA’s current rules, joint-venture partners are deemed specifically affiliated for any contract where they joint venture together (unless an exception applies under § 121.103(h)(3)), and also are considered generally}
both contractors and the Government. The proposed ∞-in-2 Rule is a significant improvement because it should be much easier for stakeholders to understand and comply with.

But the Section believes that an ∞-in-2 Rule will still place an undue burden on mentor-protégés, which may lead to cases of accidental affiliation and also make it harder for mentor-protégés to compete for contracts. For the reasons discussed below, the Section recommends that SBA either (a) convert the proposed ∞-in-2 Rule to an ∞-in-3 Rule or ∞-in-6 Rule to better align with the regulatory duration of MPAs, or (b) exempt ASMPP joint ventures from the ∞-in-2 Rule.

While the Section understands that SBA intended for small-business joint ventures to be temporary in duration, SBA’s changes in 2016 to MPAs’ permissible duration (from up to the entire duration of the protégé’s time in the 8(a) program to 3 years x 2) effectively accomplished this goal on its own for mentor-protégé joint ventures. SBA’s rules preclude a mentor-protégé joint venture from continuing to compete for contracts after its MPA expires after three or six years. Accordingly, mentor-protégé joint venture entities are not indefinite in duration.

Setting a limit of two years from first award, as opposed to three or six years (the MPA’s duration), thus does not appear to promote small-business growth. Forcing a mentor-protégé to restart by creating a brand-new joint-venture entity in the middle of this relationship appears to provide no meaningful benefit to SBA or procuring agencies or small businesses. Instead, it unnecessarily increases the management, accounting, and compliance burden that the small-

affiliated for all purposes if they violate the 3-in-2 Rule. See § 121.103(h). Likewise, certain joint ventures (such as a joint venture between an SBA-approved mentor and protégé) that would normally be exempt from affiliation pursuant to § 121.103(h)(3) do not receive the benefit of that exemption if they violate the 3-in-2 rule. See id.; e.g., Size Appeal of Excellus Sols., LLC, SBA No. SIZ-5999 (Apr. 26, 2019).

As recently explained by SBA OHA, the 3-in-2 rule, as currently written, is easily misunderstood if one just reads the main portion of the rule without also reading all the examples in the rule:

Under the regulation, violation of the 3-in-2 rule occurs when a joint venture receives ‘more than three contracts over a two year period, starting from the date of the award of the first contract.’ [13 C.F.R. § 121.103(h).] While such language, read in insolation, might be understood to mean that a joint venture may not be awarded more than three contracts over any two-year period, the regulation goes on to provide an example clarifying that a joint venture actually cannot receive any additional contract awards arising more than two years after the date of its first contract award:

Example 2 to paragraph (h) introductory text. Joint Venture XY receives a contract on December 19, year 1. It may receive two additional contracts through December 19, year 3. On August 6, year 2, XY receives a second contract. It receives no other contract awards through December 19, year 3 and has submitted no additional offers prior to December 19, year 3. Because two years have passed since the date of the first contract award, after December 19, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

business protégé must shoulder to participate in the program. It also has the potential to cause competitive harm to mentor-protégés.\textsuperscript{17} In addition, the rule places an additional burden on SBA in terms of tracking joint-venture entities under the ASMPP.

Because another SBA regulation already places a (similar) temporal limitation on the duration of a mentor-protégé joint venture, the Section recommends that such joint ventures be exempt from the ∞-in-2 Rule.\textsuperscript{18} The Section proposes that the following language be added to § 121.103(h): “The two-year limitations set forth in this paragraph (h) do not apply to joint ventures between a protégé firm and its SBA-approved mentor (see § 125.9 of this chapter).”

Alternatively, if SBA still finds it imperative to add a temporal limitation on mentor-protégé joint ventures beyond that already imposed by current § 125.9(e)(5) (proposed to move to § 125.9(e)(6)(i)), the Section proposes that the ∞-in-2 Rule be changed to a ∞-in-3 or ∞-in-6 Rule to better align with the MPA time limit in the aforementioned regulation. Aligning these time limits would reduce the administrative burden on small-business protégés, and increase their chances of competitive success, without any discernable negative impact to SBA or the small-business community.

2. The Section recommends clarifying the novation aspect of revised § 121.103(h).

The Section recommends clarifying what happens under the ∞-in-2 Rule when a joint venture submits a novation package for contracting officer approval after commencement of (but within) the two-year period for awards, but where approval is not granted until after the two-year period ends. While the Section agrees that a novation should be treated as an “award” that starts the two-year period, the Section is concerned that treating a novation as a “contract” for purposes of the new ∞-in-2 Rule when the novation is not the event that starts the two-year period. Novation packages sometimes take many years to be finally reviewed and approved. The Section suggests that the submission of a complete novation package be deemed the “offer” date for the novated contract, for purposes of compliance with this new ∞-in-2 Rule. This approach would enable JVs to perform novated work without fear that government delays in approval of the novation package could cause the JV to fall out of compliance with the new ∞-in-2 Rule.

\textsuperscript{17} One way in which the 3-in-2 rule or ∞-in-2 Rule causes competitive harm for MPs is that some agencies will give less weight to projects performed by entities other than the proposing joint venture itself when evaluating past performance or experience. Because the 3-in-2 rule or ∞-in-2 Rule forces an MP to form multiple joint-venture entities, an MP may receive less weight for past performance/experience performed together under the first joint-venture entity when submitting a proposal in the name of the subsequent joint-venture entity—even though the same joint venturers performed under the first entity. This competitive harm would be removed entirely if the MP joint ventures were exempt from the proposed ∞-in-2 Rule.

\textsuperscript{18} The Section does find that the ∞-in-2 Rule makes sense for non-MP small-business joint ventures. Unlike MP joint ventures, other small-business joint ventures are not limited in duration other than by the ∞-in-2 Rule (or in-3 or in-6 Rule). The ∞-in-2 Rule thus does work to prevent a non-MP small-business joint venture from being indefinite in duration.
3. The Section concurs, in part, with measuring the size of a multi-small joint venture based on size of all past and present joint venture partners.

SBA has accurately recognized a problem with the multi-small joint-venture regulations enacted in 2016, whereby joint ventures composed of multiple small businesses have firms that enter and leave the joint venture based on their size status. SBA likely did not contemplate this “JV Member shuffle” when it added the affiliation exception for multi-small joint ventures in 2016, a practice that may allow firms to game the regulations.

The Section supports closing this loophole. But the Section believes that SBA’s proposal to measure the size of a multi-small joint venture based on the size of all past and present joint venture partners is not a fair method for measurement as the multi-small joint venture would not have all of these partners if there were not partners departing and others entering thereafter.

The Section suggests a more targeted solution: once a multi-small joint venture wins its first multiple-award contract (“MAC”), its size going forward (for future contracts or any recertification required under the awarded MAC) would be determined based on the size of the JV’s present members and any former members that were members as of the date the JV received its first MAC. This approach would allow a JV to remove members for legitimate reasons before the first MAC award, but not allow the JV to change members after such an award just to be able to recertify as small for an order under that MAC.

4. The Section supports SBA’s proposed solution to the facility security clearance problem.

The Section applauds SBA for recognizing the facility security clearance (“FSC”) dilemma that small-business (including mentor-protégé) joint ventures have encountered, and supports allowing a small-business joint venture to meet a solicitation’s FSC requirement through the JV itself, the lead small-business partner, or the non-lead partner (if the FSC is ancillary to the principal purpose of the procurement). The Section requests that SBA publish a draft of this language for comment. The comments will help ensure that such a provision is appropriately worded so that procuring agencies apply it as SBA intends.

5. Proposed § 121.103(h)(5), as it concerns the number of joint venture employees attributable to each joint venture member, should be modified.

SBA has proposed to add § 121.103(h)(5) to clarify apportioning receipts and employees of a joint venture for purposes of calculating the size of each joint-venture partner. While the Section concurs with the proposed approach for apportioning receipts, the Section recommends revising the method of apportionment of joint-venture employees.
It is the Section’s understanding that employee apportionment was intended to impact only the very limited number of individuals employed by the joint venture itself. While at first glance SBA’s proposed rule for employees is appealing, it fails to account for the following:

1. Some or all of the joint venture’s employees may also be employed separately/concurrently by a joint-venture member. For example, the joint-venture employee serving as the facility security officer may also be employed by a joint-venture member. SBA’s proposed method of apportionment would effectively double-count such employees.

2. The joint venture can employ only administrative employees, such as accounting staff. If the joint venture holds multiple contracts, these administrative employees likely perform tasks for all joint venture contracts. The joint-venture members may have different work-share percentages across these multiple contracts. Accordingly, relying on the work-share percentage for a single contract would lead to inaccuracies and conflicts in apportioning joint-venture employees to each joint-venture partner for size purposes.

To avoid the two issues outlined above, the Section recommends that proposed § 121.103(h)(5) be revised to read as follows:

For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For both the calculation of receipts and of employees, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner’s percentage share of the work performed by the joint venture. For the calculation of employees, the appropriate proportionate share is the same percentage of employees as the joint venture partner’s percentage ownership share in the joint venture, after first subtracting any joint venture employees already accounted for in one of the partner’s employee count (e.g., if a joint venture employee is also employed separately and concurrently by one of the joint venture partners, that person is subtracted from the total number of joint venture employees before apportionment based on ownership share).

The Section believes that ownership percentage makes more sense for employee apportionment than work-share because it remains static across all contracts held by the joint venture.

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19 Per § 121.103(h), a relevant joint venture may not be populated with individuals intended to perform contracts awarded to the joint venture; the joint venture may have its own separate employees only for purposes of performing administrative functions.

20 The work-share approach would be feasible only if the joint venture had the same work-share percentage across all its contracts at all times, which is neither required not practical. The Section also notes any advantage a protégé or mentor could gain from apportioning based on ownership percentage would be *de minimis* because the joint
F. The Section Recommends Implementing the Snapshot-in-Time Rule for JVA Compliance in Proposed § 121.404(d), and Recommends that Conflicting Proposed § 121.103(h)(3)(ii) Be Deleted.

1. Under current rules, snapshot-in-time for JVA compliance is the date of initial offer including price, unless a procurement-type specific exception applies.

For a joint venture to qualify for the exception to affiliation under § 121.103(h)(3), the joint venture must meet the requirements of §§ 125.8(b) and (c), which include the JVA’s mandatory-content requirements. And if the procurement is an 8(a), SDVOSB, HUBZone, or WOSB set-aside, then the joint venture must satisfy §§ 124.513 (c) and (d), §§ 125.18(b)(2) and (3), §§ 126.616(c) and (d), or §§ 127.506(c) and (d), respectively.

Under current rules, unless a special exception is enumerated in §§ 121.404(b)-(h), an offeror’s size—including whether a mentor-protégé offeror’s JVA complies with § 125.8(c) (and other applicable JV regulations) in order to be exempt from affiliation pursuant to § 121.103(h)(3)—is measured using the “snapshot in time” of the date the offeror submits its initial proposal that includes price. See § 121.404(a).

SBA OHA has concluded multiple times that no special exception to this snapshot-in-time rule exists for determining JVA compliance: “OHA has recognized on numerous occasions that issues of affiliation, including whether a joint venture is eligible for the mentor-protégé exception to affiliation, are examined as of the date of initial offer including price.” Size Appeal of Glob. Dynamics, LLC, SBA No. SIZ-6012 (June 18, 2019); see also Size Appeal of Precision Asset Mgmt. Corp. & Q Integrated Companies, LLC, SBA No. SIZ-5801, Petition for Reconsideration of SBA No. SIZ-5781 (Jan. 3, 2017) (SBA OHA rejected SBA Office of General Counsel’s argument that under current regulations the compliance with JVA requirements is measured from date of final proposal revisions).21

2. The proposed rule adds two provisions with conflicting language on the snapshot-in-time rule.

Under proposed § 121.103(h)(3)(ii), the snapshot-in-time for measuring a JVA’s compliance with § 125.8(c) (and other applicable SBA joint-venture regulations) would be “the date of initial offer that includes price.” This conflicts with SBA’s proposed change to § 121.404(d), which sets the snapshot in time for JVA compliance to the “date of the final proposal revision for negotiated acquisitions.”22

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21 An exception under current rules could apply if, for example, the subject procurement is conducted as “architect-engineering, design/build or two-step sealed bidding procurements,” in which case the snapshot-in-time for compliance would be the date of the joint venture’s “initial bid or proposal (which may or may not include price).” See § 121.404(f). But SBA OHA has concluded as shown in the cases above that, under current rules, no special exception exists to the standard snapshot-in-time rule for JVA compliance.

22 The preamble’s explanation for proposed § 121.404(d) appears to contain an error:
3. The Section recommends implementing the snapshot-in-time rule set forth in proposed § 121.404(d) and deleting the conflicting proposed § 121.103(h)(3)(ii).

Faced with conflicting snapshot-in-time provisions, the Section believes that evaluating JVA compliance as of the date of final proposal revisions, as set forth in proposed § 121.404(d), is the better approach. Because a solicitation and/or technical or price proposal may be significantly amended between initial and final proposals, and there may be a significant gap in time between initial and final proposals, certain JVA content may also be significantly amended between initial and final proposals. Given the possibility for these types of changes, the better approach is not to examine the JVA as of initial proposal, but rather as of the date of final proposals.

With this approach, SBA would adopt a practice analogous to its evaluation of prime-sub teaming agreements. Like JVAs, teaming agreements’ contents may change between initial and final proposals due to changes in a solicitation or proposal. In reviewing compliance with the ostensible-subcontractor rule, SBA Area Offices and OHA focus on the content of the teaming agreement as of the date of final proposal provisions. For similar reasons, the relevant date for examining content of a JVA (for determining whether the joint-venture affiliation exception applies) should be no different.

Furthermore, if the approach in proposed § 121.103(h)(3)(ii) were instead adopted, a joint venture could execute a JVA on the date of its initial proposal submission that complied with § 125.9(e), but modify the JVA to become non-compliant (by, for example, changing the way profits are split to be based on ownership percentage instead of work-share) before final proposal revisions. If the date of initial price proposal submission were to apply in this circumstance, the joint-venture affiliation exception would still apply even though the final JVA was clearly non-compliant with SBA’s rules.

The proposed rule would also amend § 121.404(d) to clarify that size status for purposes of compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. Currently, only compliance with the nonmanufacturer rule is specifically addressed in this paragraph, but SBA’s policy has been to apply the same rule to determine size with respect to the ostensible subcontractor rule and joint venture agreement requirements. This would not be a change in policy, but rather a clarification of existing policy.

84 Fed. Reg. at 60851.

First, this statement appears to be in error because the existing § 121.404(d) does cover compliance with the ostensible-subcontractor rule in addition to covering the nonmanufacturer rule; both are discussed expressly.

Second, if SBA’s current “policy [is] to apply the same rule to determine size with respect to the . . . joint venture agreement requirements,” that policy conflicts with SBA OHA’s rulings on this same issue. See Size Appeal of Glob. Dynamics, LLC, supra.; Size Appeal of Precision Asset Mgmt. Corp & Q Integrated Companies, LLC, supra. This rule change thus would be more significant than just clarifying existing policy on JVA compliance.
G. The Section Supports Proposed § 121.404(g)(2)(ii)(C), which Clarifies Recertification Requirements for When a Joint Venture Partner Is Acquired.

In proposed § 121.404(g)(2)(ii)(C), SBA has included language clarifying that when one joint-venture partner undergoes a merger or acquisition, only that partner must recertify its size. The other joint-venture partner, not a party to the transaction, need not recertify its size. The Section agrees with the proposed new language.

H. The Section Opposes Proposed § 121.404(g)(2)(ii)(D).

In proposed § 121.404(g)(2)(ii)(D), SBA has included language stating that if a concern undergoes a merger, sale, or acquisition after submitting an offer but before award, and the transaction causes the concern to recertify as other than small, the concern “will not be eligible as a small business for the award of the contract.” The Section recommends SBA make changes to this proposed language.

The Section understands that, through this proposed language, SBA is attempting to prevent agencies from awarding set-aside contracts to concerns who are “other than small” as of the date of award. The Section agrees that such awards can be viewed as frustrating the purpose of small-business set-asides, which are premised on competition between like-sized firms.

But the Section notes that the default rule for when size is determined is the date of proposal that first includes price, per § 121.404(a). Further, when a small business is acquired after award of a small business set-aside contract, if the business recertifies itself as a large business, the business generally may continue performing the set-aside contract. See § 121.404(g) (also providing that agencies may no longer count options and orders towards small-business goals in these circumstances).

The proposed change to § 121.404(g)(2)(ii)(D) therefore creates an exception to these default rules. Although the Section recognizes that this exception is well-intentioned to promote fairness in set-aside competitions, the Section is concerned that the change will create confusion as to the appropriate size certification date (i.e., Why is this circumstance treated differently than any other?); create unnecessary inconsistency for contracting officers seeking to make awards by removing companies from consideration at any time before award; make small-business programs less attractive for government customers by creating an ever-changing pool of offerors (or, perhaps, eliminating one of only two offerors); and hurt owners of growing small businesses. The Section is also concerned that the change will increase contracting officers’ uncertainty over whether the proposed awardees will be eligible to receive contracts that require longer timelines to award because of protests, procedural delays, or other reasons.

Also, the Section does not believe that a post-offer transaction affects the fairness of a set-aside competition. In these circumstances, an agency evaluates proposals submitted before any merger or other transaction, and will not be considering the resources or capabilities of the

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23 SBA’s rules do require terminating an 8(a) set-aside contract in these circumstances, unless SBA grants a waiver of such termination. 13 C.F.R. § 124.515.
buyer or the new post-acquisition entity. Therefore, the Section opposes this proposed change in § 121.404(g)(2)(ii)(D).

Should SBA seek to adopt a change in this area, which the Section does not believe is required, the Section recommends adopting a specific time period in which a recertification makes an offer ineligible. Proposal evaluations can require months or years before an award determination is made and all post-award protests are finally resolved. The Section believes it would be unduly punitive—to both contractors and agencies, who have undertaken significant effort to prepare and evaluate, respectively, proposals for award—to declare a company ineligible for the award, just because of the timing of a transaction vis-à-vis a long-awaited award date.

Therefore, the Section recommends adding language to proposed § 121.404(g)(2)(ii)(D) as follows:

(D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the offeror is unable to recertify as small, and the transaction leading to the recertification occurred within 30 days after the first offer including price, it will not be eligible as a small business for the award of the contract.

This added language would discourage submitting offers immediately before a known potential transaction, but would still give the agency the option, in certain circumstances, to award to a concern notwithstanding the concern’s recertification as large. And this recommended language would not change the rule that after a concern’s recertification as large, the agency cannot count that award towards its small-business goals.

I. The Section Recommends Revising Proposed § 121.402 to Match SBA’s Stated Intent.

The proposed rule’s preamble explained that revisions to § 121.402 are intended to prohibit a contracting agency from procuring any order under a MAC if the order’s principal purpose is other than the NAICS code(s) assigned to that MAC. See 84 Fed. Reg. at 60848-49.24 The Section agrees with SBA’s stated intent. Allowing contracting officers to assign a NAICS code to an order that differs from the NAICS code(s) already contained in the MAC could unfairly disadvantage contractors who did not compete for the MAC because they did not know orders would be placed under NAICS codes not in the MAC’s solicitation.

Despite SBA’s stated intent, the proposed § 121.402 appears to allow a contracting officer to use a NAICS code for the order that is not a NAICS code contained in the MAC: “If the base contract has not been assigned a NAICS code that reflects the principal purpose of the

24 The text reads: “There will still be anomalies where a procuring agency seeks to award an order whose principal purpose is different than the assigned NAICS code for the MAC until the Federal Acquisition Regulation (FAR) and the FPDS is amended to include multiple NAICS codes at the contract level. SBA does not believe that the order should be assigned a NAICS code that does not properly reflect its principal purpose. SBA believes that the better approach would be to fulfill such requirement through a different contracting vehicle.”
order, the contracting officer shall select a new NAICS code and corresponding size standard for the order.” 84 Fed. Reg. at 60869.

The Section accordingly recommends revising the proposed § 121.402 to match the intent stated in the preamble: “If the base contract has not been assigned a NAICS code that reflects the principal purpose of the order, the contracting officer shall select a new NAICS code and corresponding size standard for the order. may not issue that order under said base contract.”

But if this proposed change is intended to allow a contracting officer to assign a NAICS code not contained in the MAC to an order placed under that MAC, the Section opposes that change. Such a rule could unfairly disadvantage contractors who did not compete for the base MAC because they did not know that orders would be placed under NAICS codes that were not in the solicitation. Contracting officers should be required to include all possible NAICS codes in the underlying solicitation, and those that are not included in the underlying solicitation should not be added to an order without requiring new competition for the MAC.

Lastly, the Section notes that while the proposed text contains substitute language for § 121.402(c)(2)(ii), it appears that this proposed language was intended to substitute for § 121.402(c)(2)(i), and that § 121.402(c)(2)(ii) would remain unchanged.

J. The Section Recommends Further Study of Requiring Recertification for Small Business Set-Aside Orders under Unrestricted Multiple-Award Contracts, but Disagrees with SBA’s Proposed Exception for FSS Orders (§§ 121.404(a)(1), 124.503(i), 125.18(d), and 127.504(c)).

SBA is proposing to require recertification of size and status for orders set-aside for small businesses (or sub-sets thereof) under an unrestricted MAC, except when the unrestricted contract is a Federal Supply Schedule (“FSS”) contract. The Section believes that potentially requiring recertification needs significantly more study and information exchanges with key stakeholders.

Also, the Section disagrees with exempting FSS contracts if SBA ultimately decides to implement the recertification requirement. SBA’s own data reflects that the problem it is trying to correct with this change has a much greater impact in terms of numbers of orders and dollars in FSS-order procurements than other MAC-order procurements. According to SBA’s research, there were approximately double the number of orders and $10 million more dollars in orders awarded to large businesses as small-business set-aside orders under unrestricted FSS contracts versus under unrestricted GWAC contracts. If a recertification rule were implemented, exempting FSS contracts would allow the apparent problem to continue in the area of MACs that account for the largest dollar and quantity portion of this problem. If SBA thinks this problem needs correction through a recertification process, it should address the issue for all MACs.

K. The Section Recommends Further Changes in Connection with Removal of Follow-On Procurements from the 8(a) Program (§§ 124.3 and 124.504(d)).

The Section agrees with SBA that the current regulations on limitations and procedures for removal of work from the 8(a) program need revision. The current regulations lack clarity,
have received inconsistent interpretation by SBA,\textsuperscript{25} have been the subject of several bid protests, and have not accomplished their purpose.

SBA has proposed to revise the regulation by adding a definition of “[f]ollow-on requirement or contract” to § 124.3, then revising §124.504(d) to align with this new definition. The new definition starts with three considerations to be reviewed in determining whether a procurement represents a “follow-on”:

(1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities;

(2) Whether the magnitude or value of the requirement has changed by at least 25 percent; and

(3) Whether the end user of the requirement has changed.

84 Fed. Reg. at 60871.

The proposed rule then states how findings for each of these considerations translate into whether or not the procurement is a “follow-on”:

As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. Conversely, if the procurement satisfies none of these conditions, it is considered a follow-on procurement. The 25 percent rule, however, cannot be applied rigidly in all cases because by doing so could encourage a result that is inconsistent with the intent of another provision in this part.

See 84 Fed. Reg. at 60871.

Although the proposed rule is a good first step, the Section does not believe that the proposal will resolve the issues with the existing rule. Accordingly, the Section suggests several additional changes.

1. **SBA should not use the term “new requirement” in proposed § 124.3.**

The term “new requirement” should not be used in the “follow-on” definition. “New requirement” is a different term with a different test for a different application, see § 124.504(c)(1)(ii), and using that term in the “follow-on” definition will create further confusion and compound inconsistencies that exist in applying the current rule for removal of

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\textsuperscript{25} Compare, e.g., *Blue Ridge Limousine & Tour Serv., Inc.*, B-407020, Oct. 19, 2012, 2013 CPD ¶ 131 (SBA argued that the 25% magnitude change element of the “new requirement” test in § 124.504(c)(1)(ii) had no bearing on whether a procurement represented a “follow-on” acquisition under § 124.504(d): “In this regard, the SBA states that the ‘new requirement’ provision in 13 C.F.R. §124.504(c)(1)(ii) only addresses situations where the requirement is not in the 8(a) program and is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program.”), with *eAlliant, LLC*, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 (SBA advanced the opposite position in interpreting these regulations).
work from the 8(a) program. Therefore, the Section recommends replacing the words “new requirement” in proposed § 124.3 with “not a follow-on requirement.”

2. The proposed “follow-on” definition in § 124.3 should be clearer, provide for less agency subjective judgment, and reserve the “follow-on” determination to SBA.

The proposed definition of “follow-on” is vague and too subjective. First, the definition is vague as to how agencies are to compare procurements under the three-prong “follow-on” test, stemming in part from there being no definition of “value” or “magnitude” in the second prong of the test. Second, the rule lacks an objective standard for any of the test’s three prongs. Third, the rule does not identify the cases in which the second prong (25% threshold) may be inappropriate—an issue the proposed rule recognized in stating that the threshold “cannot be applied rigidly.” And fourth, the rule states that the three-prong test’s results are merely a “general guide” as to whether a procurement should be considered a “follow-on.”

Due to the subjective nature of the proposed “follow-on” test, the Section believes that the proposed rule will not cure the existing problems, especially because it does not reserve to SBA final discretion to apply and interpret the definition. Instead, each individual contracting officer will have discretion to apply this ambiguous definition and make the subjective determination. Because SBA’s proposed rule anticipates a flexible approach, SBA should itself be making these determinations. Otherwise, inconsistent application is likely to occur without SBA’s guidance, and the intent behind the proposed rule is unlikely to be achieved.

In addition, giving contracting officers discretion to determine whether a procurement represents a “follow-on” requirement, without SBA review and concurrence, could give agencies an easy way to avoid obtaining 8(a) program releases from SBA. Some agencies have already complained about having to obtain these releases, and this proposed definition would only further encourage and allow agencies to avoid getting them. Even when a procurement clearly appears to be a “follow-on” requiring release from SBA for removal from the 8(a) program, the proposed rule will arguably give contracting officers a way to determine that no release is required based on the contracting officer’s subjective application of the “follow-on” test.

Unless SBA reserves to itself the discretion to determine whether a procurement is a “follow-on,” there will be limited opportunities to check procuring agencies’ variability and potential shortcuts in applying the definition. This would be especially true when disappointed

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26 See Section 809 Panel, 3 Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 414-15 (based on a complaint from DoD personnel regarding the need to obtain the need to obtain a release from SBA, the Section 809 Panel proposed that “SBA should be allowed 15 working days after receipt of the contracting officer’s written request, described at FAR 19.815(b), to respond with a determination whether to release a requirement from the 8(a) program. If SBA does not provide the requesting contracting officer with a determination within that period, release from the 8(a) program should be presumed and the contracting officer should be authorized to proceed with award outside the 8(a) program.”).
8(a) firms lack standing to protest or otherwise could not challenge a procuring agency’s determination at GAO or the Court of Federal Claims.\textsuperscript{27}

Accordingly, the Section proposes that the following language be added (between the first and second sentence) to proposed § 124.504(d), which will require a procuring agency to obtain SBA approval to find that a procurement is \textit{not} a “follow-on” when some of the requirements to be solicited are already being performed under an 8(a) contract:

\begin{quote}
Where a procurement will contain work currently performed under an 8(a) contract, and the procuring agency determines that the new procurement is \textit{not} a follow-on requirement to that 8(a) contract, the procuring agency must obtain written concurrence from SBA’s Associate Administrator for Business Development (or his/her designee) that the procurement does not represent a follow-on requirement before issuing a solicitation for the procurement.
\end{quote}

3. \textbf{The Section recommends changes to SBA’s proposed “follow-on” considerations, because almost any procurement could be determined to not be a “follow-on” under the proposed test.}

The proposed “follow-on” test may provide too much room for a contracting officer to find that a procurement is \textit{not} a “follow-on,” because a contracting officer can do so upon finding \textit{any} of the following five conditions are met:

- The scope has changed significantly by requiring meaningful different types of work;
- The scope has changed significantly by requiring meaningful different types of capabilities;
- The magnitude of the requirement has changed by at least 25 percent;
- The value of the requirement has changed by at least 25 percent; or
- The end user of the requirement has changed.

And as noted above, the proposed rule places discretion entirely with the contracting officer. Consider the following examples, all of which arguably comport with SBA’s proposed definition of “follow-on” even though they would appear to run counter to the purpose and intent of §124.504(d):

- Contract A is an 8(a) contract to provide solid waste collection services (NAICS 562111) to Agency X. Agency X wishes to remove the work from the 8(a) program, but cannot meet the standard required to obtain a release from SBA. To remove the work, Agency X decides to conduct a new procurement—for Contract B—combining the solid waste collection services covered by Contract A with hazardous waste collection and other waste collection services (NAICS 562112 & 562119). These added elements are very small compared to the solid waste work, and change the total magnitude/value by less than 25%. But these elements require different personnel to accomplish and constitute a different type of work. Yet by adding these two new

\textsuperscript{27} See, \textit{e.g.}, 41 U.S.C. § 4106(f)(1); 10 U.S.C. § 2304(c(e)).
elements, Agency X can re-classify Contract B as facilities support services (NAICS 561210) because it “requires the performance of three or more separate activities in the areas of services.”

Agency X concludes that the procurement for Contract B is not a “follow-on” to Contract A because “the scope has changed significantly, requiring meaningful different types of work or different capabilities,” and therefore does not request a release from SBA.

- **Contract A** is a three-year 8(a) contract to provide engineering services to Agency X (one year base plus two option years). Agency X wishes to remove the work from the 8(a) program, but cannot meet the standard required to obtain a release from SBA. So Agency X decides to procure the new contract (Contract B) for the same work as a four-year contract, thereby increasing the requirement’s value by 25%. Agency X concludes that the procurement for Contract B is not a “follow-on” to Contract A because the “value of the requirement has changed by at least 25 percent,” and therefore does not request a release from SBA.

- **Contract A** is an 8(a) contract to provide engineering services to Agency X. Agency X wishes to remove the work from the 8(a) program, but cannot meet the standard required to obtain a release from SBA. So Agency X structures a new procurement (for Contract B) that covers all the work under Contract A, but also adds tasks included as optional elements (which may never be exercised) that change the potential “magnitude” of the requirement by over 25%. Agency X concludes that the procurement for Contract B is not a “follow-on” to Contract A because the “magnitude of the requirement has changed by at least 25 percent,” and therefore does not request a release from SBA.

- **Contracts A1 and A2** are 8(a) contracts to provide similar engineering services to Agency X. Agency X wishes to remove the work covered by both contracts from the 8(a) program, but cannot meet the standard required to obtain a release from SBA. So Agency X structures a new procurement (for Contract B) that consolidates the work under Contracts A1 and A2. Agency X concludes that the procurement for Contract B is not a “follow-on” to Contract A1 and/or A2 because the “magnitude” and “value” of “the requirement has changed by at least 25 percent.”

- **Contract A** is an 8(a) contract to provide engineering services to Division Y of Agency X. Agency X re-organizes its internal divisions, and determines it will move Division Y’s engineering responsibilities to Division Z once Contract A is completed. Agency X initiates a new procurement for future Contract B, which will cover the same services as Contract A, but those services will be provided to Division Z instead of Division Y. Agency X wishes to remove the work from the 8(a) program. To avoid having to request a release from SBA, Agency X concludes that the procurement for Contract B is not a “follow-on” to Contract A because “the end user of the requirement has changed” from Division Y to Z.

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28 See SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at n.12 (Effective Aug. 19, 2019).
It is unlikely that SBA intends to permit removal from the 8(a) program without a release in these circumstances. But the ambiguous language in the “follow-on” test proposed in § 124.3 would permit a contracting officer to not obtain a release from SBA by structuring procurements to avoid the proposed § 124.3 factors in ways that have little to do with satisfying the agency’s actual needs.

Moreover, although the proposed “follow-on” definition appears to be based on a 2017 SBA internal policy memo, that memo contains detailed guidance on what constitutes a “change in scope” “change in magnitude” and “change in end-user,” almost all of which is absent from the “follow-on” definition in proposed § 124.3. See John W. Klein, Esq., SBA, Associate Gen. Counsel for Procurement Law, to Ajoy Singha, SBA, Acting Association Administrator for Business Development, Follow-on Procurement (Sept. 29, 2017) (the “2017 Memo”). Accordingly, to avoid a “follow-on” test that procuring agencies can easily circumvent, the Section urges SBA to include detailed guidance, such as the guidance in the 2017 Memo, in the “follow-in” definition in proposed § 124.3.

The Section recommends that the additional guidance for the “follow-on” definition differ from the 2017 Memo in the following ways:

- The 2017 Memo states that value of the old and new contract should be based on the base period only if it appears that the procuring agency has proposed a different duration for an upcoming procurement in an effort to circumvent the applicable regulation. It would be difficult if not impossible for SBA, or any other adjudicative body, to determine whether the procuring agency’s actual motive for changing duration was tied to circumventing the regulations. Instead, the Section believes a more workable and enforceable rule would be for change in value to be based on an average periodic value (annual or monthly) of both contracts, regardless of the motive for the change in contract duration.

- When a procurement involves consolidating work under multiple 8(a) contracts, the comparison should treat the multiple 8(a) contracts as if they were a single contract. Otherwise, an agency could use strategic consolidation to take requirements out of the 8(a) program, and then at a later date de-consolidate the work into separate procurements.

- If the contract immediately after an 8(a) contract is not a follow-on because the contract is interim in nature (such as a bridge contract), the bridge contract should be

29 Unless the guidance is detailed in SBA’s regulations, procuring agencies may not be aware of, or bound by, SBA’s more nuanced interpretation of the “follow-on” definition. Cf. Latvian Gen. Trading & Constr. LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 224 (holding that Air Force was not bound by SBA’s interpretation, which was merely SBA’s “informal legal opinion . . . which is not reflected in its own implementing regulation”).

30 See 2017 Memo at 3.

31 While this concept is generally encompassed in the 2017 Memo, the memo is somewhat confusing on how the rule should be applied under this circumstance. See 2017 Memo at 4.
ignored in the analysis, and the comparison should be exclusively between the old 8(a) contract and the new non-interim contract.\(^{32}\)

There should be a rebuttable presumption that any procurement containing all or nearly all of the work encompassed under an existing 8(a) contract is a follow-on to that 8(a) contract, regardless of other changes in scope, magnitude, value, or end-user. This presumption would make it more difficult for a procuring agency to use strategic consolidation to remove an existing 8(a) contract from the 8(a) program without a release. For the test to have teeth, the number one focus of the “follow-on” definition should be the degree to which the existing 8(a) requirement is incorporated into the new acquisition, not the overall size/scope of the new acquisition.

### III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

/s Linda Maramba
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\(^{32}\) Here, too, although this concept is generally encompassed in the 2017 Memo, the memo is somewhat confusing on how the rule should be applied under this circumstance. See 2017 Memo at 3.