VIA REGULATORY PORTAL AND ELECTRONIC MAIL

Ms. Brenda Fernandez  
Office of Policy, Planning and Liaison  
U.S. Small Business Administration  
409 3rd Street SW, 8th Floor  
Washington, DC 20416


Dear Ms. Fernandez:

On behalf of the Section of Public Contract Law of the American Bar Association (the “Section”), I am submitting comments on the above-referenced Small Business Administration (“SBA”) Proposed Rule (the “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service.1 The Section’s governing Council and substantive committees have 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 have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.2

The Proposed rule seeks to implement provisions of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013 that provide the SBA with the authority to establish a government-wide mentor-protégé program for all small-business concerns, consistent with the SBA’s mentor-protégé program for

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

2 This letter is available in pdf format under the topic “Small Business and Socioeconomic Issues” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
participants in SBA’s 8(a) Business Development (BD) program. As set forth below, the Section encourages the SBA to provide additional clarification and guidance in the final rulemaking to ensure that this expanded program is implemented appropriately.

COMMENTS

The Section’s comments address six areas intended to improve the final rule and address the SBA’s request for comments. The Section: (1) requests clarification to the revised definition of “joint venture”; (2) requests that the SBA provide advance notice of admittance periods for mentor-protégé applications; (3) recommends that the SBA consider allowing a small business to be both a mentor and a protégé; (4) recommends that the SBA consider limiting the term of a mentor-protégé agreement to three contract awards rather than three years; (5) recommends that the SBA consider adopting the benefits of other agency mentor-protégé programs; and (6) recommends that the SBA clarify when a failure to enter into a joint-venture agreement that complies with all regulatory requirements is grounds for suspension or debarment.

A. The Section Recommends That the SBA Clarify Two Aspects of the Definition of a Joint Venture.

1. Form of Joint Venture

The SBA proposes to make a number of changes to the definition of what constitutes a joint venture for SBA programs. Among other changes, the SBA proposes to clarify that “[i]n all instances where two (or more) parties execute a written document setting forth their responsibilities as joint venture partners, it is SBA’s view that the parties have formed a partnership. It may not be a formal partnership, but the responsibilities of the parties are as partners.” 80 Fed. Reg. 6618, 6619 (Feb. 5, 2015). The text of the Proposed Rule would provide that a joint venture “may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity.” Id. at 6631.

The Section recommends that the SBA remove or clarify the term “partnership” in the definition of a joint venture. Entering into a formal or informal partnership often comes with certain obligations under the Uniform Partnership Act and state law. For example, partners generally have fiduciary duties to each other, bind one another with their actions, and are jointly and severally liable for the debts of the business. It is rarely appropriate (or desirable) for the members of a joint venture to take on these obligations for the purpose of jointly pursuing a federal procurement.

The SBA appears to recognize this issue in the Proposed Rule by including language that would allow a joint venture to “be in the form of a formal or informal partnership.” Id. (emphasis added). Even “informal” partnerships can be construed by state courts as giving rise to fiduciary duties among partners, however. The Section believes that the SBA’s regulations should not include language suggesting that small businesses should enter into a partnership when forming a joint venture to pursue a federal procurement. The Section thus recommends that the SBA replace the phrase “formal or informal partnership” with “contractual affiliation.”
The SBA has also requested comments on whether it should require all joint ventures formed under mentor-protégé agreements to be formed as separate legal entities. The Section supports this approach. Requiring the formation of a separate legal entity would allow the joint venture partners to clearly define their obligations to each other in the entity’s operating agreement or bylaws, and requiring such entity’s would avoid the unintended creation of fiduciary duties or other obligations consistent with partnership. Although requiring the formation of a separate legal entity would increase the cost and administrative burden to small businesses of forming a joint venture, the costs could be shared with (or borne entirely by) the mentor firm. Also, the Section believes that small businesses without access to sophisticated legal counsel are the most vulnerable to unwittingly entering into a general partnership that could create fiduciary duties and other duties to their fellow joint venturers.

2. Application of the 3-in-2 Rule to Task Orders

Although the SBA’s proposed changes to the definition of a joint venture do not specifically address the “3-in-2” rule, the Section recommends that the SBA clarify one aspect of that rule as part of this rulemaking as well: the Section recommends that the SBA clarify that the 3-in-2 rule does not apply to task order awards.

The 3-in-2 rule currently provides that a joint venture “generally may not be awarded more than three contracts over a two year period.” 13 C.F.R. § 121.103(h). Although the rule uses the term “contracts,” the definition of that term in the Federal Acquisition Regulation includes task orders. See FAR 2.101 (defining “Contract” to include “orders, such as purchase orders”).

Contracting agencies conduct a significant portion of their acquisitions through the issuance of task and delivery orders under large, multiple-award indefinite-delivery, indefinite quantity (“IDIQ”) contracts. These contracts often last for five or ten years, or more. If the 3-in-2 rule were interpreted as applying to task-order awards, an IDIQ contract holder structured as a joint venture could be precluded from competing for additional task orders under the contract after winning three awards.

The Section does not believe that the SBA intended this result, as it would reduce competition, deprive small businesses of the benefit of their IDIQ contract awards, and, ultimately, reduce the use of joint-venture arrangements on federal procurements. The Section thus recommends that the SBA clarify in 13 C.F.R. § 121.103(h) that the 3-in-2 rule applies only at the contract level, and does not apply to task-order awards.

B. The Section Recommends That the SBA Provide Advance Public Notice of Any “Open” and “Closed” Periods for the Receipt of Mentor-Protégé Applications

The SBA acknowledges in the Proposed Rule that it is uncertain how many mentor-protégé applications it will receive once the regulations are finalized. See 80 Fed. Reg. at 6621. The SBA thus proposes that “[i]f the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy, SBA may institute certain ‘open’ and ‘closed’ periods for the receipt of further mentor-protégé applications.” Id.
The Section expects that many firms will seek approval of mentor-protégé relationships once the rule is finalized. The Section understands and appreciates that the SBA is unlikely to receive significant additional resources to aid it in evaluating this large volume of new applications. Once the rule is finalized, many small and large businesses will be relying on the SBA’s approval of a mentor-protégé agreement so that they can create a mentor-protégé joint venture and pursue set-aside procurements. The SBA’s institution of “open” and “closed” periods leading up to these procurements could have significant consequences for individual vendors and the overall competitive landscape for federal acquisitions. The Section thus recommends that the SBA provide as much advance public notice as possible of upcoming “open” and “closed” periods to allow contractors and contracting agencies to plan for set-aside procurements accordingly.

C. The Section Recommends That The SBA Consider Allowing A Small Business To Be a Mentor and a Protégé For Different Industries.

In the Proposed Rule, the SBA requested comments on “whether the same firm should be permitted to be both a protégé and mentor . . . in appropriate circumstances.” Id. The Section believes that the SBA should consider allowing the same small-business firm to be both a mentor and a protégé, for two reasons.

First, the SBA has proposed to expand the eligibility criteria for protégés to allow any small business to be a protégé. Under the current rules for the SBA’s 8(a) program, a protégé must be in the early stages of its development. See 13 C.F.R. § 124.520(c)(1) (requiring a protégé to be in the developmental stage of the 8(a) program, have never received an 8(a) contract, or have a size that is less than half the size standard corresponding to its primary NAICS code). As a result, firms currently eligible to be a protégé generally are not in a position to also serve as a mentor. The proposed expansion of the mentor-protégé program to allow any small business to be a protégé will allow more well-established firms to participate in the program. Many of these firms may be well-positioned to act as a mentor to other small businesses by, among other things, (1) assisting with that firm’s entry into a new market; (2) guiding the firm’s transition from subcontractor to prime contractor; and (3) providing support and guidance as the firm grows beyond small-business set-aside contracts.

Second, there is little risk that allowing a business to be a mentor and a protégé would lead to abuse of the program. The SBA will retain the ability to approve or disapprove any mentor-protégé relationship on both an initial and annual basis. As a result, SBA can determine on case-by-case basis if the proposed agreement will provide any real developmental gains for the firms involved.

D. The Section Recommends that the SBA Consider Limiting The Mentor-Protégé Program To Three Contract Awards Rather Than Three Years.

The SBA also invited “comments regarding whether three years is an appropriate length of time . . .” for a mentor-protégé agreement. Id. at 6623. Aside from the nine-year duration of the 8(a) program, the SBA’s current mentor-protégé
program is not limited by a specific time period, nor is there any special importance to the growth that a protégé can experience within three years. As a result, the SBA should consider modeling the duration of the mentor-protégé program on the 3-in-2 rule set forth in 13 C.F.R. § 121.103(h) (i.e., allowing a mentor-protégé relationship to continue until the mentor and protégé are awarded three new contracts as a joint venture). That is, the maximum length of a mentor-protégé agreement would be capped by the receipt of three contract awards by a mentor-protégé joint venture. If the mentor and protégé elect not to form a joint venture and pursue contracts together, the term of the mentor-protégé agreement would be governed by the SBA’s annual review process and the ability of the parties to voluntarily terminate the relationship.

If SBA adopts a three-year rule, it should consider optional annual extensions of that period if SBA, the mentor, and protégé agree that the relationship is still producing the intended benefits to the mentor and protégé. This option for extension will prevent a premature expiration of the mentor-protégé agreement from interrupting the protégé’s growth.

E. The Section Recommends that the SBA Consider Adopting The Benefits of Other Agency Programs.

In the Proposed Rule, the SBA asks the related questions of whether there will be “a continuing need for other small business mentor-protégé programs once SBA’s various mentor-protégé programs are implemented” and “whether the subcontracting incentives authorized by mentor-protégé programs of other agencies should specifically be incorporated into SBA’s mentor-protégé programs.” Id. at 6622-23. As the SBA is aware, many businesses have been confused by what benefits are available under each of the various agency mentor-protégé programs. As a result, the Section believes that these programs should be consolidated into SBA’s expanded mentor-protégé program.

If SBA adopts this approach, it should consider allowing a mentor to take subcontracting-plan credit for costs related to its work with the protégé. As the ten agencies that incorporated this benefit into their mentor-protégé programs recognized, subcontracting credit provides an additional incentive for the mentor to provide the protégé with tangible assistance.

F. The Section Recommends That The SBA Clarify When Failure To Enter Into a Joint Venture Agreement That Complies With All Regulatory Requirements Will Lead to Suspension or Debarment.

Lastly, the Proposed Rule would add language to 13 C.F.R § 125.8 explaining that the Government may consider the “failure to enter a joint venture agreement that complies [with regulatory requirements]” as a ground for suspension or debarment. Id. at 6635. As SBA will be required to approve mentor-protégé agreements before they are executed and the remedy of suspension or debarment is a significant action, the Section recommends that SBA clarify under what circumstances a concern may be suspended or debarred for “failure to enter a joint venture agreement that complies [with regulatory requirements].” Id. For example, would the failure to include one of
the required elements of a joint-venture agreement alone be grounds for suspension or debarment? Or does the SBA contemplate that this drastic action would be limited to situations in which the mentor and protégé were deemed to have intentionally tried to subvert the purposes of the program? The Section recommends more guidance in this area.

CONCLUSION

The Section applauds the SBA’s use of the notice-and-comment process and its efforts to expand the mentor-protégé program. These comments are meant to suggest improvements to the SBA’s implementation effort and to encourage the SBA to continue seeking assistance from other agencies and the public while refining its regulations. The Section respectfully requests that the SBA consider the issues identified in these comments in developing any final rule to implement the Proposed Rule. The Section is available and willing to provide any additional information and assistance as the SBA may require.

Sincerely,

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Chair, Section Public Contract Law

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