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VIA REGULATORY PORTAL

Ms. Holly Turner
Regulatory Reform Officer
U.S. Small Business Administration
409 3rd Street SW
Washington, DC 20416

Re: SBA Docket No. SBA-2017-0005, Reducing Regulatory Burden RFI, 82 Fed. Reg. 38617 (August 15, 2017)

Dear Ms. Turner:

On behalf of the American Bar Association ("ABA") Section of Public Contract Law ("Section"), I am submitting comments on the above-referenced U.S. Small Business Administration ("SBA") Request for Information ("Request for Information").[1] 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.

[1] Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, 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.

I. COMMENTS

In accordance with Executive Orders 13771, 13777, and 13563, and in accordance with SBA's ongoing responsibility to ensure that its regulations do not have an adverse economic impact on those affected by the rules, SBA issued its Request for Information on August 15, 2017. In the Request for Information, SBA seeks input from the public on identifying which of the agency's regulations should be repealed, replaced, or modified because they are obsolete, unnecessary, ineffective, or burdensome.

The Section is pleased to have the opportunity to provide input on this Request for Information.

A. 13 C.F.R. § 121.404(g)(2)(ii)(D): Delete This Provision Requiring Recertification by a Small Business Concern If a Merger, Sale or Acquisition Occurs After an Offer is Submitted but Before Award.

13 C.F.R. § 121.404(g)(2)(ii)(D) requires a contractor to recertify its small business size status following a merger, sale, or acquisition "[i]f the merger, sale or acquisition occurs after offer but prior to award." The Section recommends that SBA delete this requirement. A contractor already must recertify its small-business size status within 30 days after an approved contract novation or within 30 days of finalization of a merger, sale, or acquisition that will not require a contract novation. 13 C.F.R. § 121.404(g)(2)(ii)(D) is therefore unnecessary. The exception to this provision's standard 30-day notice requirement also creates confusion because contractors cannot control when an award will be made and the regulation is not clear about whether contracting agencies may proceed with an award after a recertification in this period. Recertification may wrongly result in a contracting agency's declining to award a contract to an entity that was a qualified small business when it submitted its offer, even though the regulations are not clear about whether the recertification affects eligibility for award for the entity or whether it affects only a contracting agency's ability to claim the award towards its small business contracting goals. By deleting this recertification requirement, SBA will reduce the regulatory burden on the participants in SBA's programs.

B. 13 C.F.R. §§ 124.513(c)(5), 125.8(b)(2)(v), 125.18(b)(2), 126.616(c)(5), and 127.506(c)(5): Delete the Requirement That All Joint Venture Partners Co-Sign for Withdrawals from the Joint Venture's Special Bank Account.

The provisions cited above require joint ventures to establish special bank accounts that "must require the signature of all parties to the joint venture or designees for withdrawal purposes." It is impractical, unnecessary, and unduly burdensome to have all parties sign for every withdrawal from a joint account for routine expenses. It is particularly burdensome because parties to a joint venture are sometimes not located within the same state. Given the threat of suspension and debarment for failure to meet this requirement, and minimal risk to the Government if this requirement is removed, the Section recommends that the requirement be deleted from each of these provisions.

C. 13 C.F.R. §§ 124.513(c)(6), 125.8(b)(2)(vi), 125.18(b)(2)(vi), 126.616(c)(6) and 127.506(c)(6): Eliminate These Provisions' Requirements for Joint Venture Agreements to Include a Provision Itemizing All Major Equipment, Facilities, and Other Resources to be Furnished by Each Party to the Joint Venture.

The Section recommends that the following language be deleted from the provisions cited above:

> Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available.

When SBA permitted joint ventures to be populated, these requirements may have made sense because the joint venture itself would acquire real estate and equipment. However, SBA no longer allows populated joint ventures under this program. As a result, work is likely to be accomplished by subcontract to individual members and the joint venture itself is unlikely to acquire significant equipment or facilities. It is therefore unnecessary and overly burdensome to require that the joint venture agreements detail which party/parties will supply equipment, facilities and other resources at the outset of their agreement. Instead, the parties can address these issues in the ordinary course of the joint venture's performance.

In addition, on any long-term contract or construction project, any such itemization will be, by its nature, a rough estimate. Under the current regulatory language, the parties to the joint venture might be required to amend the agreement to update this rough estimate throughout the course of performance—and to seek SBA's approval of that amendment—with any failure to do so potentially leading to suspension or debarment. Because unpopulated joint ventures are unlikely to be able to comply with this requirement by providing anything beyond an uncertain estimate that is unlikely to accurately capture how the joint venture will work over time, this requirement does not add significant protection for the Government's interests. The Section therefore recommends that it be deleted.

D. 13 C.F.R. § 124.513(e): Delete Language Requiring SBA to Approve a Joint Venture Agreement Before Award of an 8(a) Contract.

The Section recommends that the following language be deleted from 13 C.F.R. § 124.513(e):

> Prior approval by SBA.
> (1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. A Participant may submit a joint venture

agreement to SBA for approval at any time, whether or not in connection with a specific 8(a) procurement.
(2) Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award. (i) After approving the structure of the joint venture in connection with the first contract, SBA will review only the addendums relating to performance of work on successive contracts. (ii) SBA must approve the addendums prior to the award of any successive 8(a) contract to the joint venture. (iii) If a second or third contract to be awarded a joint venture is not an 8(a) contract, the Participant would not have to submit an addendum setting forth contract performance for the non-8(a) contract(s) to SBA for approval.

These deletions would leave only the current subparagraph (e)(3).

This requirement should be deleted to match the terms of the All Small Mentor-Protégé program, as well as the terms concerning non-8(a) set-aside awards to joint ventures. Requiring SBA's pre-approval of joint venture agreements introduces significant uncertainty because parties are unsure when agreements will be approved and what standards each SBA office will apply. This uncertainty and the associated delays have resulted in the loss of awards to otherwise qualified joint ventures. Further, joint venture agreements that are inconsistent with SBA requirements can be challenged through size protests. This requirement also contributes to a significant demand on SBA's staffing in district offices; this time could be devoted to advising 8(a) participants on other matters.

In addition, this requirement no longer provides any benefit to joint ventures because pre-approval no longer insulates a joint venture from a size protest. Instead, the pre-approval process has the potential for different SBA offices to issue conflicting determinations about joint venture agreements' acceptability. This is because if a size protest is filed arguing that the joint venture agreement fails to meet the requirements of 13 C.F.R. § 124.513(c), an SBA Area Office (Office of Government Contracting) could find the joint venture agreement non-compliant even if the joint venture agreement had been approved by an SBA District Office (Office of Business Development) before. *See* Small Business Mentor Protégé Programs, 81 Fed. Reg. 48558, 46567-68 (July 25, 2016).[2]

In addition, the requirement for pre-approval chills innovative terms and conditions or structures for joint venture agreements. SBA's District Offices commonly use a checklist to

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[2] In relevant part: "The rule also proposed to amend § 124.513 to clarify that interested parties may protest the size of an SBA approved 8(a) joint venture that is the apparent successful offeror for a competitive 8(a) contract. This change alters the rule expressed in *Size Appeal of Goel Services, Inc.* and *Grunley/Goel Joint Venture D LLC*, SBA No. SIZ–5320 (2012), which concluded that the size of an SBA-approved 8(a) joint venture could not be protested because SBA had, in effect, determined the joint venture to qualify as small when it approved the joint venture pursuant to § 124.513(e). SBA's decision to authorize a joint venture between a current 8(a) Program Participant and another party by its Office of Business Development was never intended to act as a formal size determination. Only SBA's Office of Government Contracting may issue formal size determinations."

determine whether or not a submitted 8(a) joint venture agreement complies with 13 C.F.R. § 124.513. Many firms attempting to create joint ventures for 8(a) contracts have reported that if the form of the joint venture agreement does not mirror the terminology and order appearing in the checklist, SBA will reject the joint venture agreement, even though the joint venture agreement meets all the requirements in Section 124.513(c). With pre-approval required for 8(a) contracts, these joint ventures are prevented from taking innovative approaches to drafting joint venture agreements that comply with Section 124.513(c).

E. 13 C.F.R. § 124.513(h): Delete the Requirement for SBA Approval of Amendments to a Joint Venture Agreement for a Joint Venture Awarded an 8(a) Contract.

The Section recommends that the following language be deleted from 13 C.F.R. § 124.513(h): "Amendments to joint venture agreement. All amendments to the joint venture agreement must be approved by SBA." This requirement should be deleted to match the terms of the All Small Mentor-Protégé program. SBA approval of joint venture agreement amendments introduces significant uncertainty because parties are unsure when agreement amendments will be approved and what standards each SBA office will apply. This requirement also contributes to a significant demand on the time of the staff of SBA's District Offices that could be devoted to advising 8(a) participants on other matters.

F. 13 C.F.R. § 125.9(b)(2): Delete This Provision Requiring Applicants to the All Small Mentor-Protégé Program to Submit Financial Documents to SBA.

The Section recommends that the following language be deleted from 13 C.F.R. § 125.9(b)(2):

> In order to demonstrate that it is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement, a firm seeking to be a mentor may submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings required by the Securities and Exchange Commission (SEC), for the past three years.

This requirement[3] can create unnecessary burdens for mentor firms and dissuade them from entering the All Small Mentor-Protégé program. Consistent with the 2016 amendments to the sister provision in 13 C.F.R. § 124.520, which replaced the requirement that the mentor "[p]ossesses favorable financial health" with the requirement that the mentor be "capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement," SBA should request these documents only if it has some question about the mentor's viability.

[3] Although the provision provides that a prospective mentor "may" provide this information, SBA's analysis in the publication of this final rule reflects that it is a requirement: "The information requested is necessary for SBA to determine whether prospective mentors are in good financial condition and capable of meeting their obligations under the mentor–protégé´ agreement to provide assistance to protégé's and enhance their ability to successfully compete for Federal contracts." 81 Fed. Reg. at 48575.

G. 13 C.F.R. § 125.9(e)(5): Revise to Eliminate the Limit on Mentors a Protégé May have Over its Lifetime.

In its implementation of the All Small Mentor-Protégé program, SBA has interpreted[4] the following language in 13 C.F.R. § 125.9(e)(5) to limit a protégé to two mentors over its lifetime:

> The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years. A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.[5]

The Section recommends that the word "two" be deleted from the second sentence in the above paragraph, which would thereby remove the two-per-lifetime restriction. Pursuant to 13 C.F.R. § 125.9(c)(2), protégés would still be limited to no more than two mentors at any one time.

The restriction to only two mentors over the protégé's lifetime should be deleted because it is not flexible enough to accommodate the individual needs of the widely varying protégés that benefit from SBA's program. For example, the current hard cap punishes protégés for a mentor/protégé relationship that does not work for reasons that are not the fault of either party and is concluded after one year without any benefit to the protégé. It also has the effect of limiting an entity's ability to adapt to focus on emerging developments or areas that will enable them to better meet customer needs. Entities that evolve in this way may benefit from having more than two mentors over their lifetime. And ultimately, the Government will benefit if companies that are small businesses are encouraged and mentored to provide more cutting edge technological innovation. The Section believes that SBA can better control the extent and number of mentors each protégé has through its individual review process.

The limitation also has the potential to punish small businesses who graduated from the 8(a) program and were participants in mentor-protégé agreements through that program before SBA created the All Small Mentor-Protégé program. These small businesses could not have known at the time they were in 8(a) mentor-protégé agreements that they might again be eligible

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[4] *See, e.g.,* SBA, The All Small Mentor-Protégé Program Overview (MCS-0064 March 2017) ("Protégés may only have a maximum of two SBA Mentor Protégé Agreements (MPAs) in its lifetime."), *available at* https://www.sba.gov/sites/default/files/articles/All_Small_Mentor_Protege_Program_Overview_Final_508.pdf.

[5] 13 C.F.R. § 125.9(e)(5), when read together with 13 C.F.R. § 125.9(c)(2) ("A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm . . . ."), is ambiguous as to whether the restriction is *at one time* or over a *lifetime*. The intent to make this a lifetime restriction is found in SBA's commentary on the final rule. *See* 81 Fed. Reg. 48558, 46567 (July 25, 2016) ("the final rule will continue to authorize two three-year MPAs with different mentors, but will allow each to be extended for a second three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance. SBA intends to limit all small businesses, including 8(a) Participants, to having two mentors. Although an 8(a) Participant can transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) BD program, it can have only two mentor- protégé relationships in total. If it transfers its 8(a) mentor-protégé relationship to a small business mentor- protégé relationship after it leaves the program, it may enter into one additional mentor-protégé relationship. It cannot enter into two additional small business mentor-protégé relationships.").

to be protégés after graduation from the 8(a) program or that they would one day be subject to a two-per-lifetime limitation. Therefore, these contractors may have been less selective in entering a mentor-protégé agreement at the time than they would have been had they known that it would count against their ability to partner in a future SBA program.[6]

H. 13 C.F.R. § 125.13(e)(1): Revise This Provision to Remove the Ban on Supermajority Voting Requirements for Service Disabled Veteran Owned Small Business Concerns.

13 CFR § 125.13(e)(1) specifies the requirements to establish that a service-disabled veteran controls the company's board of directors, including that one or more service-disabled veterans own at least 51% of all voting stock and are on the board of directors. The Section recommends deleting the requirement that service-disabled veterans also "have the percentage of voting stock necessary to overcome any super majority voting requirements." SBA has recognized that some super majority voting requirements are consistent with protecting minority shareholder rights. The existing language, however, effectively bans any super majority voting requirements. SBA should instead rely on standard affiliation and control analysis to confirm that service-disabled veterans control the company at issue.

I. 13 C.F.R. §§ 124.513(d)(2), 125.8(c)(1), 125.18(b)(3)(ii), 126.616(d)(2), and 127.506(d)(2): Revise to Specify How to Measure That the Status-Bearing Venturer(s) Will Perform at Least 40% of the Work.

The regulations covering each size/status-based set-aside contract requires that the status-bearing venturer(s) "must perform at least 40% of the work performed by the joint venture." But unlike the regulation concerning limitations on subcontracting, *see* 13 C.F.R. § 125.6, these regulations fail to state how and when the 40% is calculated.

Because there is insufficient guidance on this calculation, many contractors assume that the 40% rule must be calculated using the same guidelines and compliance periods as those described in the limitation-on-subcontracting rule. Contractors have applied the limitation-on-subcontracting calculation not only because of the silence in the joint-venture regulations, but also because reading the two rules together produces the most logical result. In addition, the 40% rule is ambiguous because it is unclear whether "the work performed by the joint venture" includes work that a joint venture partner subcontracts out to a third party (as opposed to work subcontracted by the joint venture to a third party), or if it counts only work performed by the joint venture partners themselves.[7] This ambiguity results in uncertainty for contractors.

Without additional guidance, the ambiguities in the 40% regulations create significant risk for joint ventures—failing to meet any unstated expectations on the basis or period or calculation could result in suspension or debarment. *See* 13 C.F.R. § 124.513(l). Accordingly,

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[6] Although SBA has informally stated that 8(a) mentor-protégé agreements that ended before August 24, 2016, do not count against the two-per-lifetime rule, the regulation itself provides no such exception. *See* 13 C.F.R. §§ 124.513(d)(2)(ii), 125.8(c)(3), 125.18(b)(3)(ii)(B), 126.616(d)(2)(ii), and 127.506(d)(2)(ii).

[7] The regulations are clear, however, that any work subcontracted to an affiliate of the non-status-bearing venture(s) counts as work performed by that venturer(s).

the Section recommends that these regulations be revised to add the following underlined language: "must perform at least 40% of the work performed by the joint venture members themselves, and not the member's subcontractors, as measured in the same manner as compliance with 13 C.F.R. § 125.6."

J. 13 C.F.R. §§ 124.513(c)(4), 124.8(b)(iv), 125.18(b)(2)(iv), 126.616(c)(4), and 127.506(c)(4): Revise Provisions Requiring That the Status-Bearing Partner(s) Receive Profits Commensurate with the Percentage of Work Performed by that Partner(s).

Pursuant to these regulations, the joint venture agreement must state that the status-bearing partner(s) in the joint venture "must receive profits from the joint venture commensurate with the work performed by [that partner]." In other words, in an 8(a) mentor-protégé joint venture, if the 8(a) protégé performs 40% of the work, the 8(a) protégé must receive 40% of the joint venture's profits. These regulations could be improved with further specifics.[8]

First, these regulations do not specify how or when compliance is calculated. The regulation should be amended to state that compliance is calculated based on the amount paid to the joint venture by the Government. The period of compliance is also not stated, so there are open questions as to whether it is upon each distribution to the parties, upon each yearly allocation for tax purposes, or at the end of the project/contract.

Second, the regulations concern only profit split and do not address loss split. If an agreement is silent on how losses are split, under some state statutes the default rule would be that losses would be split in accordance with capital contributions. *See, e.g.*, 6 Del. C. § 18-503. As a result, if a joint venture agreement is silent as to loss split, the loss split likely would not mirror the profit split. Such a result could not have been intended by SBA when drafting these regulations.

Without additional guidance, the ambiguities of this section create significant risk for the protégé and mentor, in that failure to meet any expectations on the basis or period of calculation, even if those expectations are not expressly stated, could result in suspension or debarment. *See* 13 C.F.R. §§ 124.513(l), 124.8(i). In addition, the ambiguities create significant risk of internal disputes between joint venture partners on the split of profits and losses on a contract. Further, they limit flexibility in achieving innovative joint ventures.

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[8] For joint ventures with a service disabled veteran owned small business member, this language also creates an apparent conflict with 38 C.F.R. § 74.3(d)(2), which provides that "[o]ne or more veterans or service-disabled veterans must be entitled to receive . . . [a]t least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern . . . ."

Accordingly, the Section recommends that these regulations be revised to add the following underlined language:

> Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.250, must contain a provision:
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> * * *
>
> (4) Stating that the 8(a) Participant(s) must receive profits <u>and be allocated losses</u> from the joint venture commensurate with the <u>percentage of</u> work performed by [that partner]. <u>This allocation shall be recalculated on the base year and each option year, if any.</u>

K. 13 C.F.R. § 121.104(c) and (d): Revise to Change the Period of Measurement for Average Annual Receipts from Three to Five Years.

In today's marketplace, many small businesses have a difficult time transitioning from a small to a mid- or large-size business. As a result, many small businesses try not to grow out of their small-business status and are ultimately purchased by or merged with larger businesses—or they fail. None of these options helps accomplish the SBA's goals.

Most size standards are measured by average annual receipts. SBA regulations call for a three-year lookback when calculating a concern's average annual receipts. To improve the survivability of small businesses transitioning to mid-or large-size businesses, the Section recommends that SBA revise 13 C.F.R. § 121.104(c) and (d) to extend this period to five years. This change would provide small businesses more time to grow and prepare themselves at higher revenue levels before transitioning to mid-size companies, potentially improving their survival rate in a manner easier and more likely to succeed than alternatives that have been tried or suggested in the past, such as creating a set-aside category of mid-size companies. The measurement period for employee-based size standards could be extended similarly to five years.

L. 13 C.F.R. §§ 124.1002(f)(4), 124.513(c)(2), 125.8(b)(ii), 125.18(b)(2)(ii), 126.616(c)(2), and 127.506(c)(2): Revise to Account for Variations in the Titles of Employees Who Are Ultimately Responsible for Performance of the Contract.

On certain contracts, including some construction projects with the United States Army Corps of Engineers and most services contracts, the contractor's employee ultimately responsible for the contractor's performance of the contract does not hold the title of "project manager." Often this person is a "program manager"; sometimes ultimate responsibility for performance is assigned at a level above the project manager. The Section therefore recommends that SBA revise these regulations to add the words "or functional equivalent" after the word "project manager" to ensure that SBA's requirements for individuals responsible for contract performance apply regardless of title.

II. CONCLUSION

The Section applauds SBA's use of the notice-and-comment process and its solicitation of recommendation for reducing unnecessary regulatory burdens. The Section hopes that these comments are useful to SBA's effort, and encourages SBA to continue seeking assistance from other agencies and the public while refining its regulations. The Section is available and willing to provide any additional information and assistance as SBA may require.

Sincerely,

Aaron Silberman
Chair, Section of Public Contract Law

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