



SBA's Final Rule on SBA's MP Program, Joint Ventures, Affiliation and 8(a) Regulations

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Tony has over 30 years of experience representing government contractors and commercial businesses. His practice encompasses all aspects of federal government contracting. As Chair of PilieroMazza's Government Contracts Group, he works closely with the firm's Business & Corporate Group on corporate transactions and the Labor & Employment Group in the highly regulated market of government contracting.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client’s best interests into consideration. Moreover, PilieroMazza’s efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Business & Corporate
- Business Succession Planning
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Labor & Employment for Government Contractors
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Private Equity & Venture Capital

Overview

SBA's October 16th Final Rule: "Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments"

Effective Date: November 16, 2020

- Mentor-Protégé Program Limitations and Requirements
- Joint Ventures
- Small Business Rules Generally
- 8(a) Program

Mentor-Protégé Program Limitations and Requirements

- Merges the 8(a) Mentor-Protégé Program into the All Small Mentor-Protégé Program
 - Transitioning 8(a) mentor-protégé agreements to the All Small Mentor-Protégé Program and general program changes
- Eliminates the reconsideration process for declined mentor-protégé agreements
- Mentor eligibility
 - Entity must demonstrate both commitment and ability to assist small business concerns
- Includes provisions giving certain benefits to mentors with protégés whose principle place of business is in Puerto Rico

Mentor-Protégé Program

Limitations and Requirements

- Does not count mentor-protégé relationships terminated within 18 months of SBA approval of the mentor-protégé agreement against the protégé firm's two-mentor lifetime limit
- If a protégé shows a consistent pattern of terminating mentor-protégé agreements within the first 18 months, SBA may refuse to approve additional applications

Mentor-Protégé Program

Limitations and Requirements

- Protégé must provide “honest assessments” of its mentor’s performance to SBA during each annual review
- Protégés can request SBA intervention where mentor is underperforming
- SBA may terminate the agreement and / or replace the mentor if the mentor does not correct its underperformance

Mentor-Protégé Program

Limitations and Requirements

- Provides that SBA may approve a mentor-protégé relationship under a concern's secondary NAICS code:
 - Protégé does not necessarily need to be small under its primary NAICS code
 - Where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or
 - Where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern
 - However, SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the small business concern has no prior experience

Joint Ventures

- Changes the three awards in two years rule to a straight two years rule
 - A joint venture is eligible for the exemption from affiliation so long as it only submits proposals for two years from the date of award of the first contract to the joint venture
 - Firms may establish multiple joint ventures
- SBA will no longer approve joint ventures on 8(a) competitive procurements
- SBA will continue to require prior approval for 8(a) sole-source awards

Joint Ventures

- Novation of contract to the joint venture would start the two-year activity clock:
 - If that were the first award to the joint venture and
 - If a novation could be approved after the two-year period if the novation package was submitted for approval within the two-year period
- Joint ventures may be populated with administrative personnel, including Facility Security Officers
 - Provides for situations where the joint venture could rely on the facility security clearance of the partner(s) where a facility security clearance is required for the contract

Joint Ventures

- For revenue-based size standards:
 - Receipts of joint venture attributed to each partner based on percentage of work performed (not ownership)
- For employee-based size standards:
 - First subtracting any joint venture employee already accounted for in the employee count of the partner, then apportion individuals employed by the joint venture by the same percentage as ownership share
- Joint venture partners may agree to distribute profits from the joint venture to the small business participant(s) in excess of the percentage commensurate with the work performed

Joint Ventures

- The same rules in 13 C.F.R. § 125.6 apply to calculation of work performed by a protégé in a joint venture
 - The rules concerning supplies, construction, and mixed contracts apply to joint ventures, and certain costs are excluded in the calculation
- A protégé must perform at least 40% of the work performed by the joint venture and cannot include work subcontracted to a similarly situated entity in that calculation

Small Business Rules Generally

Affiliation, Size, and Status Rules

- Clarifies that size status is determined as of the date of final proposal revisions for negotiated acquisitions and final bids for sealed bidding for purposes of determining compliance with:
 - The nonmanufacturer rule,
 - The ostensible subcontractor rule, and
 - SBA's joint venture agreement requirements
- Allows the AGC/PL to initiate or file size protests
- Clarifies that Women-Owned Small Businesses/Economically Disadvantaged Women-Owned Small Businesses and Service-Disabled Veteran-Owned Small Businesses may request formal size determinations in connection with applications and continued eligibility for these programs

Small Business Rules Generally

Affiliation, Size, and Status Rules

- Clarifies that the presumption of identity of interest due to economic dependence of 70% or more on another contractor can be rebutted by showing that, despite the contractual relations, the small business contractor is not solely dependent on the other company, either:
 - Because the concern in question has only been in business for a short time and thus has only a limited number of contracts, or
 - Because the contractual relations do not restrict the concern's ability to sell the same type of products or services to another purchaser

Small Business Rules Generally

Past Performance

- For set-asides, agencies must consider the capabilities, past performance, and experience of first-tier subcontractors as well as the small business prime contractor

Small Business Rules Generally

Certification: Recertification

- Expressly states that a required recertification changes a firm's status for future options and orders
- Clarifies that if a party to a joint venture is acquired or merges, only that partner (and not the non-affected partner) must recertify to qualify the joint venture to recertify

Small Business Rules Generally

Certification: Recertification

- Requires a firm that experiences a merger, sale, or acquisition (including agreements in principle) between proposal submission and award to recertify its size status prior to award
 - If, as a result of the transaction, the concern is no longer small, and the transaction occurs within 180 days of proposal submission, the concern is ineligible for award
 - However, if, as a result of the transaction, the concern is no longer small, but the transaction occurs more than 180 days after proposal submission, award can be made, but it will not count as an award to small business

Small Business Rules Generally

Certification: Recertification

- Adopts a rule change whereby tribal entities are not required to recertify where ownership changes but the firm is owned to the same extent (i.e., 51%) by the ultimate entity
- Allows a contracting officer to request size recertification at any time prior to the 120-day point in the fifth year of a long-term MAC

Small Business Rules Generally

Multiple-Award Contracts (MAC)

- Contracting officers must assign the most appropriate NAICS code to each task order under a MAC
- If that NAICS code is not included in the underlying MAC, that vehicle can not be used. Purpose is to ensure compliance with the nonmanufacturing rule
 - If the NAICS code corresponding to the principle purpose of the order is not contained in the underlying MAC, the contracting officer may not use the MAC to issue that order
- When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited:
 - Allows SBA to clarify, complete, or supply a NAICS code designation or size standard in connection with a formal size determination or size appeal

Small Business Rules Generally

Multiple-Award Contracts (MAC)

- Requires an offeror to certify as to size and status at the time it submits its initial offer, including price, for an order under an UNRESTRICTED MAC, except for orders or BPAs issued under an FSS contract
 - Exception: If certification is required on an unrestricted MAC (i.e., for a pool of small-business awards), then an offeror doesn't need to recertify when it submits its task order proposal
- Requires that, where socio-economic status is first required at the order level, firms must qualify at that time
- Permits size and status protests where the underlying MAC was unrestricted, except for BPAs and orders issued under an FSS

8(a) Program: Immediate Family Member Eligibility

- Applies immediate family member restriction in instances:
 - Where there is common ownership or management, regardless of amount or position, or
 - Where the companies share facilities or have a contractual relationship that was not conducted at arm's length
- Allows individuals applying to the 8(a) Program in the same primary NAICS code to have gained the required management or technical experience in that primary NAICS code by working for an immediate family member's current or former 8(a) Participant and removes the presumption against granting an application when the NAICS codes are the same for the new applicant and the family member
- Clarifies that SBA will continue to determine whether ownership, management, and facilities remain separate as part of the 8(a) annual review and that SBA would not initiate termination proceedings if the firms enter into fair market value contracts after the second firm is admitted to the 8(a) Program

8(a) Program: Ownership Changes

- SBA approval is not needed:
 - When a previous owner held less than a 20% interest in the company both before and after the transaction, or
 - When the disadvantaged individual or entity in control will increase the percentage of its ownership interest

8(a) Program: Applications and Benefits

- If an 8(a) application is denied, the applicant may no longer seek reconsideration
- Instead, the applicant may reapply within 90 days of the agency decision (versus waiting 12 months)
 - However, if an applicant is denied 3 times within 18 months, it cannot reapply for 12 months

8(a) Program: Applications and Benefits

- Allows a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified (5 working days of a site visit or within 15 working days of receipt of request from servicing district office)
 - And, in order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not acted prior to the time that a Participant is identified as the apparent successful offeror, SBA will make such a determination within 5 days of receiving a procuring activity's request for an eligibility determination unless the procuring activity grants additional time for review
- Defines “bona fide place of business” as the geographic area serviced by the SBA district office, a Metropolitan Statistical Area, or a contiguous county to (whether in the same or different state) where the work will be performed

8(a) Program: Business Activity Targets

- Adjusts the non-8(a) business activity targets to be more in line with the Congressional intent (transitional years 3, 4, and 5 were revised to 30%, 40%, and 50%, respectively)
- SBA has amended its BAT rule so that sole source restrictions are not automatically applied if a firm fails to meet its applicable non-8(a) business activity target. The final rule recognizes that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Where a Participant has not met its applicable non-8(a) business activity target, however, SBA will condition the eligibility for new sole source 8(a) contracts on the Participant taking one or more specific actions, which may include obtaining business development assistance from an SBA resource partner such as a Small Business Development Center

Question?



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