Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

By: Christine V. Williams
July 25, 2016

Preliminary Analysis of the SBA's New Mentor Protégé Programs and Other Regulations

I. Introduction

The SBA is amending its regulations to implement changes brought about by the Small Business Jobs Act of 2010 as well as the National Defense Authorization Act ("NDAA") for 2013. The regulations establish a Government-wide mentor protégé program for all small business concerns, consistent with the mentor protégé program for the SBA's Section 8(a) Program or 8(a) Program. To further this consistency, the SBA also made changes to the 8(a) Program, which eliminated what some would consider archaic requirements.

Additionally, the regulations amend the current joint venture provisions to clarify the conditions for creating and operating joint ventures partnerships, including the effect of those partnerships on mentor protégé arrangements.

The regulations also make changes to current size regulations (how size is determined), the 8(a) Office of Hearings and Appeals ("OHA"), as well as HUBZone regulations. These changes concern, among other things, ownership and control, changes in the primary industry, standards of review, and standing for interested party status in protests.

The effective date of the new regulations is August 24, 2016. Here is the link to the Federal Register for the full regulations on which this preliminary analysis was written. https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-16399.pdf

Recall, less than three months ago the SBA made other significant regulatory change. An analysis of those earlier changes can be found here: http://outlooklaw.com/wp-content/uploads/2016/05/SBA-Regulatory-Changes-Outlook-Law.pdf

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Table of Contents

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

II. Joint Venture Provisions

A. Populated, Unpopulated, Inspection of Records, and HUBZone

- The SBA recognizes that Joint Ventures ("JV") may be formal or informal but, regardless of the form, *must be in writing*.
- The SBA never intended that every JV must be a separate company, and this regulation is meant to clarify that provision.
- The SBA has amended its JV rule to ***no longer allow populated JVs*** if it exists as a separate legal entity. Populated meaning that is populated with personnel intended to perform the contracts awarded to the company.
- This is in contrast to JVs that are unpopulated or populated with administrative personnel only, which are still allowed.
- The SBA clarified that the access to JV documents shall be limited to records relating to the joint venture and not to unrelated documents of the JV partners.
- The SBA also clarified that there is no requirement that reasonable notice be given for inspection of the JV records because to do so might hamper an Office of Inspector General investigation.
- The SBA notes, however, that in its normal oversight responsibilities not related to any investigation or wrongdoing, the SBA will generally provide reasonable notice.
- *HUBZone* firms are allowed to JV with non-HUBZone firms in mentor protégé arrangements as a further business development tool that would bring economic development back to the HUBZone area as the HUBZone would likely need to hire additional personnel in that HUBZone to perform additional contracts.

B. *Joint Venture Certifications and Performance of Work Reports*

- The SBA believes that affirmative reporting by the joint venture to ***both*** the contracting officer and the SBA will provide the necessary information to track the performance of joint ventures.
- The SBA also believes that the certification and reporting requirements in this regulation will deter wrongdoing.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- This regulation and the regular reporting and monitoring of the limitation on subcontracting requirements will allow all parties to know there the JV stands with respect to those requirements and what, if anything is found to be off, is to be done to come into compliance with the requirements.
- As such, the regulation mandates the JV annually report compliance to the contracting officer and the SBA.

C. *Tracking Joint Venture Awards*

- The SBA believes that some sort of JV identification is required.
- The regulation requires:
  - JVs are separately identified in SAM;
  - With a separate DUNS number and CAGE number;
  - The Entity Type in SAM must be identified as Joint Venture; and
  - The Joint Venture partners should also be listed.

III. Implementation of Mentor Protégé Program for all Small Business Concerns

The SBA has established a new mentor protégé program similar to the 8(a) mentor protégé program. While this program is similar to the 8(a) mentor protégé program, the 8(a) program will continue to operate and be processed separately, addressing the concerns that are unique to 8(a). 8(a) firms may also transfer the mentor protégé relationship when it leaves the 8(a) Program as long as the firm notifies the SBA in writing and provided that the firm is still qualified for the program to which it is transferring.

A. *Processing Small Business Applications for the Mentor Protégé Program*

- The SBA intends to establish a separate unit within the Office of Business Development whose sole function would be to process mentor protégé applications and review mentor protégé agreements ("MPA") and the assistance provided under those agreements, once the agreement is approved.
- This new unit will process and make determination with respect to all small business MPAs, with the ultimate decision made by the Associate Administrator/BD or his/her designee.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- While the SBA would like to avoid the open and closed periods of processing, if the applications become overwhelming, open enrollment periods are still a possibility.
- If such a need arises for open or closed period, the SBA has stated that the will provide advance notice so that potential applicants can plan accordingly.

B. ***Mentors***

- Mentors for all programs must be for-profits. This is a change for the 8(a) Program, which previously allowed non-profits to be mentors.
- The change comes about because of the language of the statute and the need for consistency between the mentor protégé programs.

C. ***Demonstrating good financial health by the mentor***

- The SBA believes the key issue in considering good financial health of a mentor is whether a mentor can meet its obligations under its MPA.
- If the mentor can meet its obligations under the MPA, the SBA should not "otherwise care" about the proposed mentor's financial condition, as the SBA wants to ensure the protégé firm receives the required assistance through the relationship.
- As such, the final regulation changes the requirement from a mentor having good financial health to one requiring that the mentor must demonstrate that it can fulfill its obligations under the MPA.
- This change was brought about because of some inconsistent evaluations of large business's financial health through financial analysis.

D. ***Number of firms one company can mentor***

- The final regulation falls in line with the regulations in the 8(a) Program in that any one mentor can have up to three protégé firms at any one time- regardless of the SBA program.
- The same regulations would likely apply that in order to fulfill the obligations under the MPA, there would have to be a demonstration that the additional mentor protégé relationship would not adversely affect the development of the protégé firm (any of them), by being a competitor, etc.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

E. ***A firm can be a mentor and a protégé at the same time***

- The proposed rule would not have allowed a firm to be a mentor and a protégé at the same time.
- After comments and review, the SBA believed that there were benefits to be provided to small firms to act as mentors and protégés at the same time.
- The final regulation allows a firm to be both a mentor and protégé at the same time where it can demonstrate that the second relationship will not compete with the first.

F. ***Protégés***

- In order to qualify as a protégé in all programs, the protégé must qualify as small for the size standard corresponding to its primary NAICS Code ***OR***
- Identify that it is seeking business development assistance with respect to a secondary code and identify provided that the secondary code development is consistent with its business plan and a logical progression for the firm to development current capabilities.
- While this eliminates some threshold requirements for 8(a) protégé participants, it brings consistency between the 8(a) requirements and requirements for other programs.
- A protégé may have two mentors where the two relationships will not compete or otherwise conflict with each other and the protégé demonstrates that the second relationship pertains to an unrelated, secondary NAICS Code, or the first mentor does not possess the specific expertise of the second mentor.
- The SBA will accept self-certification for protégé firms because any size protest would protect the integrity of the program

G. ***Benefits of the Mentor Protégé Relationship***

- As with the 8(a) Program, a protégé may JV with its SBA approved mentor and qualify as a *small business* for any Federal government contract or subcontract, provided that the protégé qualifies as small for the size standard corresponding to the NAICS Code assigned to that procurement.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- This DOES NOT mean that such a JV affirmatively qualifies for any other small business program unless it qualifies and is approved for the other programs (HUBZone, 8(a), WOSBs, etc.) as well.

H. ***Program Managers of MPA/JV and Ownership Interests***

- The SBA clarified that the designated project manager for the JV under a contract does NOT have to be an employee of the protégé. However, there must be a signed letter of intent that the employee will become an employee of the protégé firm if the contract is awarded to the JV.
- This still does not allow the transference of employment for this position between the mentor and protégé firms.
- During the mentor protégé relationship, the mentor is shielded, generally, from affiliation when it owns up to 40% of the protégé.
- Once the mentor protégé relationship ends, so does the protection from affiliation for the 40% interest.
- As such, if it does not divest that 40% interest, the former protégé will be found to be ineligible for any contract as a small business where the 40% causes affiliation under the size rules.

I. ***Written Mentor Protégé Agreements***

- The SBA believes the benefits identified in the MPAs should be clearly and specifically identified.
- This identification and measurement includes a timeline for the assistance delivered.
- The regulation also clarifies that a subcontract from a mentor to a protégé or a protégé to a mentor can be developmental assistance authorized by the MPA.
- The SBA is also requiring that if a firm is receiving benefits from another MPA from another agency, those benefits cannot be duplicated through the SBA's MPA.
- The final regulation 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 continue to receive assistance.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- Although an 8(a) firm can transfer its mentor protégé relationship to a small business mentor protégé relationship after it leaves the 8(a) Program, it may enter into only one additional mentor protégé relationship. It cannot enter into two additional small business mentor protégé relationships.
- For 8(a) mentor protégé relationships, the regulations allow the relationship to continue when the control or ownership of the mentor changes when the new mentor expresses in writing to the SBA that it acknowledges the MPA and that it continues with the commitments and obligations in that agreement.

J. ***Mentor Protégé Programs of Other Departments and Agencies***

- The NDAA 2013 specifically excluded the Department of Defense's mentor protégé program, so that will not be dealt with here.
- Under the provisions of the NDAA, the other agencies or departments that are currently operating a mentor protégé program may continue to operate that program for one year and then go through the SBA's approval process in order to receive the mentor protégé benefits of the SBA, including affiliation.
- The SBA has incorporated in its rule that the individual procuring agencies may take into account the subcontracting benefits of that agency that it may wish to provide for consistency with its previous program if the agency does not continue its own mentor protégé program.

IV. Size of an 8(a) Joint Venture-Protests-Awards and Timing of Size Determinations

- The size of a SBA JV may be protested by unsuccessful offerors on a competitive 8(a) set-aside contract.
- In the preamble, the SBA makes clear that such a protest should only make sure the agreement complies with the terms of the regulations (size), but in no way should that office seek or have the authority to invalidate certain terms of the joint venture agreement.
- As long as the approval for the 8(a) joint venture occurs any time before award, that should be sufficient under the regulations.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

V. Agency Consideration of the Past Performance and Capabilities of JV Team Members

- The regulation clarifies that an agency should consider the past performance of the individual JV team members, not just the JV itself.
- Commentators recommended that this be expanded into other SBA programs, such as SDVO, HUBZone, and WOSB, and SBA did so.

VI. Recertification When an Affiliate Acquires Another Concern

- The regulation requires that recertification is required when an affiliate of an entity acquires another concern.
- This acquisition would add to the overall size since one has already been found to be an affiliate.
- In this way, the SBA believes the size rules will not be circumvented by acquiring companies through an affiliate.

VII. Establishing Social Disadvantage for the 8(a) Program

- The SBA requires a nexus between the claimed social disadvantaged for an 8(a) applicant and how it affected that individual.
- The SBA intends to rely on narrative and *how* of the effect of the disadvantage must be part of the narrative.
- This will require additional facts in the narrative that flesh out how an event or series of events resulted in a social disadvantage, such as the loss of a promotion by a female to a male when the applicant was more experienced, etc.
- In short, the applicant, through the narrative, must demonstrate that he/she was negatively impacted in the business world through an event or series of events by drawing a nexus between those events and the impact.

VIII. Control of 8(a) Applicant or Participant

- One or more disadvantaged individuals must control the daily business operations of an 8(a) applicant or participant.
- In determining whether the experience of one or more disadvantaged individuals claiming to manage the applicant or participant is sufficient for the SBA to determine control exists, the SBA regulations specify that the individuals must have managerial experience.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- This was not intended to mean in the same or similar line of business in that an executive with day to day responsibilities may manage well from having experience from an unrelated field.
- The final regulations add clarifying language to effectuate this intent.

IX. 8(a) Documentation for Application

- Not every applicant is required to submit IRS Form 4506T in every case, but the SBA reserves the right to request additional documentation as needed.
- The regulation also clarifies that certain information may be filed electronically, while other information may be requested by the SBA in hard document form.
- The SBA allows for electronic signature of information for social disadvantage as long as the person signing is responsible for the information and can be identified by the agency.
- SBA agreed that mandatory referrals to the Office of the Inspector General are not necessary in every instance of where minor infractions come to the attention of the SBA during the application process.
- Rather, the final rule gives the SBA discretion on referrals and the preamble gives some guidance on when such referrals should occur.

X. Unfair Competitive Advantages and Entity Owned Firms

- In making an assessment of whether a firm has obtained a substantial unfair competitive advantage within an industry, the SBA will consider:
  - The firm's percentage share of the national market and other relevant factors, and
  - Dominant as applied to the national share of the 6 digit NAICS Code with a particular size standard and will review the FPDS data for comparison of the firm's share.

XI. Management of Tribally-Owned 8(a) Program Participants

- The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two 8(a) participants at the same time.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

XII. Native Hawaiian Organizations ("NHO")

A. *Management and Daily Operations*

- Members or directors of a NHO need not have the technical expertise or possess a required license to be found in control of an applicant or participant in the 8(a) Program.
- The NHO must have, through its members and directors, the managerial experience of the extent and complexity need to run the concern.
- As with individually owned 8(a) applicants or participants, individual NHO member may be required to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day to day operations of the firm.

B. *Economic Disadvantage NHO*

- NHOs must be a community service organization that benefits Native Hawaiians.
- NHOs serve the economically disadvantaged but the language of the statute does not mandate that the NHOs must be controlled by economically disadvantaged Native Hawaiians.
- The SBA believes that in order to maximize the potential advantage given to the economically disadvantaged community, economic disadvantage should not be determined on an individual level of the managers.
- Rather, the SBA requires a NHO to present information relating to the economic disadvantaged status of Native Hawaiians, including the unemployment rate of Native Hawaiians and the per capita income of Native Hawaiians.
- Unlike tribes, which serve and benefit one specific group or tribe, NHOs may be established to serve and benefit the same group of people.
- Like tribes, however, once a NHO establishes that it is economically disadvantaged in connection with the application of one firmed owned and controlled by the NHO because the beneficiaries are economically disadvantaged, it need not establish its economic disadvantage for another firm owned by the NHO.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- In addition, unless a second NHO intends to serve and benefit a different population than that of the first NHO that established its economic disadvantage status, the second NHO also need not submit information to establish its economic disadvantage.
- The AA/BD may request any NHO to reestablish/establish its economic disadvantage status where the AA/BD believes that the circumstances of the Native Hawaiian community may have changed.

XIII. Sole Source 8(a) Awards

- The Small Business Act required that 8(a) procurements exceeding $7.0 million manufacturing NAICS and $4.0 million for all others must generally be competed among eligible 8(a) participants except for 8(a) participants owned by Indian tribes and Alaska Native Corporations ("ANC").
- Accordingly, 8(a) firms owned by Indian tribes and ANCs may receive a sole source award ***of any amount***.
- Section 811 of NDAA 2010 imposed justification and approval requirements on any 8(a) sole source contract that exceeds $20 million ($22 million now due to inflation)
- In this final regulation, if an award does exceed $22 million, the SBA ***will inquire*** of the agency if the justification and approval memorandum has been done but the SBA ***will not review*** the procuring agency's analysis or need to obtain a copy of the memorandum.

XIV. Changes in the Primary NAICS Code of an Entity Owned Firm

- The SBA can change the primary NAICS Code of an entity owned firm.
- This lines up with the SBA's prohibition on an entity owning two firms with the same primary NAICS Code at the same time or two years thereafter (retired NAICS Code for 2 years).
- The SBA will determine under which NAICS Code the firm receives the majority of revenue (***hint: track revenue by NAICS Code if not doing so already)***.
- SBA agreed with commenters that this change should not occur without some back and forth between the firm and the SBA.
- That is, the SBA would notify a firm that it believes the revenue in a secondary code exceed that in its primary NAICS for the ***past three***

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

completed fiscal years, and then seek input and a reasonable explanation as to why that firm's current primary NAICS Code should remain so. Information could include:

- All non-federal work that it has performed in its primary NAICS Code;
- All contracts that it was awarded that it believes could have been classified under its primary NAICS Code, but which a contracting officer assigned to another reasonable NAICS Code;
- Efforts made to obtain work in its primary NAICS Code; and
- Any other information bearing on why its primary NAICS Code should not be changed.

- If two firms owned by the same entity are found to have the same primary NAICS Code, then the second firm admitted to the 8(a) Program will no longer be eligible to receive any contracts in that six digit NAICS Code.

XV. 8(a) Program Elected Suspensions

- A firm may elect to suspend from the 8(a) Program where the principal office is located in an area declared a major disaster area.
- A firm may also elect to suspend from the 8(a) Program where there has been a lapse in appropriations for one or more Federal agencies without a continuing resolution or other measure in place to provide funding.

XVI. Benefits Reporting Requirement

- Rather than submit the benefits reporting requirement for entity owned firms when the firm submits it annual review, the SBA believes it is more appropriate to submit the benefits report when a firm submits its financial statements.
- In this way, the firm may have more compatible data to submit and the benefits report ***is not tied to eligibility*** of a firm.

XVII. Reconsideration of the SBA's Office of Hearings and Appeals

- This regulation clarifies that the SBA is a party to the Office of Hearing and Appeals ("OHA") proceedings in which it has not previously participated.
- As such, the SBA may request reconsideration of a decision where the SBA did not appear because it is axiomatic that the SBA is always an interested party.

Outlook Law LLC
A Full Service Government Contracting Law Firm
www.outlooklaw.com

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

XVIII. Affiliation and Common Administrative Services for Entity Owned Firms

- Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.
- Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm.
- Contract administration services include both services that could be considered ‘‘common administrative services’’ under the exception to affiliation and those that could not.
- Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.
- Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (*e.g.,* employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.
- Business development may include both services that could be considered ‘‘common administrative services’’ under the exception to affiliation and

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered ‘‘common administrative services’’ under the exception to affiliation.

- However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity.
- At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer.
- This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.

XIX. Conclusion

These regulatory changes, coupled with the ones less than three months ago, represent significant and distinct alterations in several SBA programs. As the regulations are applied to operations, clarifications will likely be needed as questions arise during that time. Accordingly, while this initial draft memorandum may prove useful as an introduction, it should not be considered legal advice.