

# Holland & Knight

## Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments Review of SBA's New Proposed Regulations

Topic	Current Regulation(s)	Proposed Changes	Notes/Comments
Combining the 8(a) BD and the Mentor-Protégé Programs	SBA currently has two separate mentor-protégé programs for small businesses – the 8(a) BD Mentor-Protégé Program (13 C.F.R. § 124.520) and the All Small Business Mentor-Protégé Program (13 C.F.R. § 125.9).	<p>SBA proposes to combine these two programs by eliminating the 8(a) BD Mentor-Protégé Program and continue to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program.</p> <p>The proposed rule would revise Section 124.520 to recognize an 8(a) Participant, as any small business, may participate in SBA's Small Business Mentor-Protégé Program under Section 125.9.</p>	<p>SBA's proposed regulations indicate that several existing regulations will be eliminated or amended, which make reference to the BD program, to facilitate these changes. These include the following:</p> <ul style="list-style-type: none"> <li>• Section 121.103(b)(6)</li> <li>• Section 125.8(b)</li> <li>• Section 126.616</li> <li>• Section 126.618</li> </ul>
Reducing the Application Documentation	SBA previously required applicants to submit specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual business bank statements. 13 C.F.R. § 124.203.	SBA is eliminating this requirement. The reasons that it always has the right to request any applicant to submit specific information that may be needed in connection with an application.	
Requiring Submission of IRS Forms	IRS Form 4506-T or 4506-C are not required.	SBA will add in the requirement that all applicants must submit IRS Form 4506-T or, when available, IRS Form 4506-C under Section 124.203. SBA believes this will act as a deterrent to firms that may think it is not necessary to fully disclose all requested financial information.	
Suspension of SBA Application Period When Responding to SBA Requests	<p>SBA may now continue to process an application even where it requests clarifying, revised or other information from the applicant. The regulations do not require SBA to cease any consideration of the application pending this information. The relevant regulations are below:</p> <p>The SBA's Associate Administrator for Business Development (AA/BD) is authorized to approve or decline applications for admission to the 8(a) BD program. The DPCE will receive, review and evaluate all 8(a) BD applications. SBA will advise each program applicant within 15 days</p>	The proposed regulations add a period of suspension for the 90-day processing period, should the agency elect to request additional information from an applicant. SBA would now be required to stay the application period to allow for an applicant to gather and submit the requested materials.	

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	<p>after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the DPCE. Incomplete packages will not be processed. 13 C.F.R. § 124.204(a).</p> <p>SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA. 13 C.F.R. § 124.204(b).</p>		
Time to Resubmit Application	A concern which has been declined for an 8(a) BD program admission may submit a new application for admission to the program 12 months after the date of the final Agency decision declining admission. 13 C.F.R § 124.207.	SBA proposes to reduce the waiting period for applicants to resubmit their 8(a) application from 12 months to 90 days.	
Amending Suspension of Benefits Prior to Submission of Comprehensive Business Plan	<p>SBA currently requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan, which must be submitted to the SBA. 13 C.F.R. § 124.402(b).</p> <p>This plan must be submitted as soon as possible after admission to the program and the Participant will not receive program benefits unless SBA approves the plan. <i>Id.</i></p>	<p>SBA proposes to remove the provision that a Participant cannot receive any 8(a) BD benefits until SBA approves the business plan.</p> <p>The proposed rule explains "SBA understands the adverse consequences that can ensue if a firm loses an opportunity that it has lined up because its business plan is not approved prior to the time that a procuring agency seeks to fulfill a particular procurement requirement."</p>	SBA will suspend the Participant's time within the program, without losing any days, if the submission of the business plan cannot feasibly occur within those 60 days under the proposed changes to Section 124.305(h).

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		<p>SBA's proposed regulations will deter any suspension of benefits only if the Participant has not submitted its business plan to the servicing district office and received SBA approval within 60 days after program admission. According to the proposed rule, "SBA believes that firms coming into the 8(a) program possessing the potential for success required for program entry would most likely have business plans in place and should be able to have their business plans approved by SBA within 60 days of program admission."</p>	
<p>Permitting Agencies to Seek SBA Approval for 8(a) Set-Aside Awards</p>	<p>SBA regulations prohibit agencies from awarding 8(a) set-aside through competitions which have not been formally pre-approved by the SBA. 13 C.F.R. § 124.504(b).</p>	<p>SBA proposes to remove the requirement for agencies to seek pre-approval prior to conducting 8(a) competitions. SBA reasons "such an interpretation could seriously adversely affect an agency's procurement strategy by unduly delaying the award of a contract. That was never SBA's intent."</p> <p>SBA proposes that it will now accept the 8(a) set-aside regardless when the offering occurred so long as (1) a procuring agency clearly identified a requirement as a competitive 8(a) procurement and (2) the public fully understood it to be restricted only to eligible 8(a) Participants.</p>	
<p>Agencies Must Seek Approvals to Release Follow-On 8(a) Contracts</p>	<p>The requirement that a follow-on procurement must be released from the 8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply to orders offered to and accepted for the 8(a) BD program pursuant to Section 124.50(3)(h)(2). 13 C.F.R. § 124.504(d)(4).</p>	<p>SBA's proposed rule clarifies the agency's intent in releasing follow-on contracts from the 8(a) program. Here, SBA is not changing the policy; rather, it is solidifying its position in response to several size protests raising this issue. SBA's rule clarifies that that the request for and granting of a release of a follow-on procurement from the 8(a) BD program is required when the</p>	<p>Commenters have argued that, without this clarification, an 8(a) incumbent contractor may be seriously hurt by moving a procurement from a general 8(a) competitive procurement to an 8(a) multiple award contract (MAC) or government-wide acquisition contract (GWAC) to which the incumbent is not a contract holder.</p>

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		<p>procurement will be moved out of the program and onto a MAC or GWAC vehicle.</p> <p>In particular, SBA must agree to release any follow-on requirement where a procuring agency seeks to re-procure that requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., any multiple award or Government-wide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract).</p>	
<p>Amending the Requirements for Mentors</p>	<p>In order to qualify as a mentor, a concern must demonstrate that it:</p> <ul style="list-style-type: none"> <li>(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;</li> <li>(ii) Possesses good character;</li> <li>(iii) Does not appear on the federal list of debarred or suspended contractors; and</li> <li>(iv) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.</li> </ul> <p>13 C.F.R. § 125.9(1).</p>	<p>SBA's proposed rule revises the requirements to be a mentor to three elements:</p> <ul style="list-style-type: none"> <li>(1) Whether the proposed mentor is capable of carrying out its responsibilities to assist the protégé firm under the proposed agreement;</li> <li>(2) That the proposed mentor does not appear on the Federal list of debarred or suspended contractors; and</li> <li>(3) Can impart value to a protégé firm.</li> </ul> <p>SBA will no longer require that a mentor demonstrate that it possesses good character in every case.</p> <p>The proposed rule would amend this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character.</p>	

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		<p>The proposed rule would also clarify that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate JV agreements.</p>	
Cap/Limit on Mentors	<p>Currently, any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor. This includes large businesses of any size. Whether a mentor is \$1,000 over the size standard corresponding to its primary NAICS code or many millions of dollars over has not been a concern to SBA. 13 C.F.R. § 125.9.</p>	<p>SBA is considering whether to limit mentors only to those firms having average annual revenues of less than \$100 million.</p> <p>SBA's focus in the mentor-protégé program is the protégé firm; what business development assistance a proposed mentor can provide to a protégé to enable that firm to more effectively compete on its own in the future.</p>	<p>SBA seeks a program that will provide the most effective business development assistance to small business protégé firms. SBA requests comments on whether the size of a mentor should be restricted in the regulations, and whether small businesses would be better or worse served by such a restriction.</p> <p>SBA has received several suggestions from "mid-size" companies (i.e., those that no longer qualify as small under their primary NAICS codes, but believe that they cannot adequately compete against the much larger companies) that a mentor-protégé program that excluded very large businesses would be beneficial to the mid-size firms and allow them to compete more effectively.</p>
Amending Mentor-Protégé Program to Benefit Puerto Rican Small Businesses	<p>Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by Sections 124.520 and 125.9. 13 C.F.R. § 125.9(4).</p>	<p>SBA's proposed rule implements Section 861 of the 2019 National Defense Authorization Act to expand the number of protégées a mentor can have to benefit Puerto Rican Small Businesses.</p> <p>Under the proposed rule, the restriction would be lifted for two mentor-protégé relationships if the protégée's principal offices are located in the Commonwealth of Puerto Rico.</p> <p>Additionally, the proposed rule authorizes contracting incentives to mentors that</p>	<p>SBA requests comments as to whether the term "positive consideration" can be better defined. Section 861 specifically authorizes these two incentives, but suggests that other incentives may also be appropriate.</p> <p>SBA also seeks comments as to whether any other contracting incentives could be feasible.</p>

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		<p>subcontract to protégé firms that are Puerto Rican businesses.</p> <p>A mentor that provides a subcontract to a protégé that has its principal office located in Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation; and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor.</p>	
Amending the Number Limitation for Joint Ventures	<p>SBA's current regulations provide that a joint venture is something that can be formed for no more than three contracts over a two-year period.</p> <p>If the parties intend to jointly seek work beyond three contracts or beyond two years from the date of the first award, they must form a new joint venture entity. That new entity would then be able to perform an additional three contracts over two years from the date of its first award. 13 C.F.R. § 121.103(h).</p>	SBA intends to eliminate the three-contract limit but will continue to impose the time limitation.	Several firms have commented to SBA that the three-contract limit unduly restricts small business and can disrupt normal business operations. SBA does not seek to impose unnecessary burdens on small businesses but continues to believe that a joint venture should be a limited duration vehicle.
Application of NAICS Codes to Task Orders	A contracting officer must flow down a service NAICS code to the task order if assigned to the underlying MAC. 13 C.F.R. § 121.402.	A contracting officer would be required to assign a single NAICS code for each task order against a MAC. The NAICS code must be included in the underlying MAC and represent the principal purpose of the order.	SBA is attempting to clarify the regulations to remove requirements to apply unnecessary or unrelated NAICS codes to task orders.
Size Status for MACS	Small business set-aside contracts are restricted only to firms that qualify as a small business per the date of the award. For MACs and Federal Supply Schedule contracts, contractors must recertify their size status every five years.	SBA is considering imposing a recertification requirement at the task order level for unrestricted MACs. This would prevent contracting officers from awarding 8(a) task orders to companies who, when first awarding the MAC, had small business status, but have since graduated.	

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Expansion of Size Status Determination	Size status for the non-manufacturer rule is determined as of the date of the final proposal revision for negotiated acquisition and final bid for sealed bidding.	SBA will expand this determination for the purposes of the ostensible subcontractor rule and joint venture agreement requirements.	
Revision of Size Recertification	<p>Under the current regulations, recertification is required:</p> <p>(A) When a concern, or an affiliate of the concern, acquires or is acquired by another concern;</p> <p>(B) From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and</p> <p>(C) From a joint venture when an acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business;</p> <p>(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.</p> <p>13 C.F.R. § 121.404(g).</p>	<p>The proposed rule clarifies that only the partner to the joint venture that has been acquired, is acquiring or has merged with another business entity must recertify its size status in order for the joint venture to recertify its size.</p> <p>The proposed rule further clarifies that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation.</p> <p>Under this proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award.</p>	SBA believes that the intent of the regulation was to require size recertification only for the affected partner. To do otherwise could unfairly prejudice the joint venture and the procuring activity.
Imposing General Size Requirements on Small Business	The current regulations do not require joint ventures formed under the SBIR program to meet the small business size standards required under mentor-protégée programs. 13 C.F.R. § 121.702.	SBA's proposed rule would require joint ventures to the SBIR program to demonstrate that each partner, including its affiliates, meets the applicable size standard.	

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Innovation Research (SBIR) Joint Ventures			
Definition of a Follow-On Contract	<p>The current regulations provide that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) program unless SBA agrees to release it for non-8(a) competition. 13 C.F.R. § 124.504(d)(1).</p> <p>SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) program. However, an adverse impact analysis is not required for follow-on 8(a) acquisitions or new requirements. 13 C.F.R. § 124.504(c).</p> <p>Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, NHO, or CDC. See 13 C.F.R. §§ 124.109(c)(3)(ii), 124.110(e) &amp; 124.111(d).</p>	<p>To properly assess what each of these regulations requires, the rule proposes to define the term "follow-on requirement or contract." The definition provides the considerations for determining whether a particular procurement is a follow-on requirement or contract: (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. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement.</p>	
SDVOSB Requirements	<p>Under the current regulations, a Service-Disabled Veteran-Owned (SDVO) small business concern (SBO) must submit the following representations with its initial offer:</p> <ul style="list-style-type: none"> <li>(1) It is an SDVO SBC;</li> <li>(2) It is small under the NAICS code assigned to the procurement;</li> </ul>	<p>The proposed regulations seek to amend Section 125.18 and revise the representations and certifications a SDVO small business concern must submit as part of its initial offer. Under the proposed revisions, SDVO small business concerns would be required to make the following (non-exhaustive) representations and</p>	

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	<p>(3) It will comply with the limitations on subcontracting requirements set forth in § 125.6;</p> <p>(4) If applicable, it is an eligible joint venture; and</p> <p>(5) If applicable, it is an eligible non-manufacturer.</p> <p>13 C.F.R. § 125.18(a).</p>	<p>certifications at the time it submits its initial offer:</p> <p>(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;</p> <p>(2) It is an SDVO SBC; and</p> <p>(3) There has been no material change in any of its circumstances affecting its SDVO SBC eligibility.</p>	
<p>Amendment to the Dollar Limit on the Amount of 8(a) contracts that a Participant May Receive</p>	<p>Under the existing regulations, an 8(a) Participant (other than one owned by an Indian Tribe, ANC or NHO) may not receive a sole source 8(a) award if it has received "a combined total of competitive and sole source 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program." 13 C.F.R. § 124.519.</p> <p>The regulations further provide that for firms "having a receipts-based primary NAICS code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code which is determined as of the date of SBA's acceptance of the requirement for the 8(a) BD program or \$100,000,000, whichever is less." <i>Id.</i></p>	<p>SBA wishes to simplify this requirement. It proposes to change the language to provide that a Participant may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of \$100,000,000 during its participation in the 8(a) program, regardless of its primary NAICS code.</p> <p>SBA further clarifies that it will review the 8(a) revenues a Participant actually received, as opposed to those it projected, to determine the total limit. Further, it would exclude 8(a) contracts that are awarded, with values under the SAT, from consideration in accounting for this limit.</p>	
<p>Amending Procedures to Process Sole Source 8(a) Contract Waivers</p>	<p>The AA/BD, or his or her designee, may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship</p>	<p>SBA's proposed rule substitutes the AA/BD to allow SBA's district offices to process such requests for waiver at some level – say below the SAT. Further, the proposed rule also changes the requirement that the SBA Administrator must</p>	

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	<p>on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.</p> <p>The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government. 13 C.F.R. § 124.509(e)(1)-(2).</p>	<p>approve waivers requested by the procuring agency.</p> <p>Here, SBA is trying to reduce the length of time it takes for procuring agencies to obtain such waivers.</p>	
<p>Limitations for Approvals of 8(a) Joint Ventures</p>	<p>SBA currently reviews and approves every joint venture agreement prior to the award of an 8(a) contract on behalf of a joint venture. This requirement is unique because it is the only regulation that requires SBA approval for a joint venture. 13 C.F.R. § 124.513(e).</p>	<p>SBA proposes that this requirement be removed for competitive 8(a) contracts. The requirement would still apply for 8(a) sole source awards. Removing the joint venture approval requirement for competitive 8(a) procurements will eliminate the need for additional paperwork and time in seeking SBA approval.</p>	<p>SBA's reasoning is that because "size protests from other Participants are not permitted with respect to sole source 8(a) procurements, there would be no way to ensure that a joint venture for an 8(a) sole source contract between an 8(a) Participant and its large business mentor is controlled by the 8(a) Participant and otherwise meets SBA's joint venture requirements if SBA did not continue to look at joint ventures in that context. SBA believes that it is important to ensure that the joint venture rules would continue to be followed, and without any other enforcement mechanism."</p>
<p>Impact of AA/BD Decision to Early Termination</p>	<p>An entity, who has been terminated or graduated early from the 8(a) program has 45 days in which to appeal this decision to OHA. The current regulations are unclear whether the suspension from the program is immediate or</p>	<p>The proposed rule clarifies that the suspension from the 8(a) program is immediate upon the decision of the AA/BD to the Participant. SBA would treat the firm as suspended and it would no longer receive benefits under the program.</p>	

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	<p>must wait until after the appeal is processed. 13 C.F.R. § 124.304.</p>		
<p>Ownership of Small Business Participants – Affiliation of Family Members</p>	<p>Section 124.105(g) prohibits an individual from using his or her disadvantaged status from qualifying for the 8(a) program if that individual has a family member who is using or has used his or her disadvantaged status to qualify for the 8(a) program. The regulations provide for a waiver if two concerns have "no connection." There is a presumption against waiver if the two concerns are in the same or similar line of business.</p> <p>Section 124.105(i) provides that an 8(a) Participant "may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change." The regulations also provide that where the previous owner held less than a 10 percent interest, prior approval by the SBA is not required.</p>	<p>SBA's proposed regulations provide clarity regarding situations in which an 8(a) applicant has an immediate family member that has used his or her disadvantaged status to qualify for the 8(a) program.</p> <p>SBA explained that the purpose of "the immediate family member restriction is to ensure that one individual does not unduly benefit from the 8(a) BD program by participating in the program beyond nine years, albeit through a second firm." SBA now views the "no connection exists" standard as "extreme."</p> <p>Under the proposed revisions, "an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the concerns have a contractual relationship that was not conducted at arm's length."</p> <p>Further changes to Section 124.105(i) propose to lessen the burden on 8(a) Participants seeking minor changes in ownership. The proposed regulations provide that SBA approval is not needed where "a previous owner held less than a 20 percent interest in the concern both before</p>	

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		and after the transaction." The change from 10 percent to 20 percent will allow 8(a) Participants to make minor changes in ownership without the delay of seeking SBA approval.	
NAICS Code Appeals Revisions	Under Section 134.318, if OHA grants the NAICS code appeal, and the contracting officer receives OHA's decision by the date offers are due, the contracting officer must amend the solicitation to reflect the new NAICS code. If received after, OHA's decision will apply to future solicitations for the same supplies or services.	SBA's proposed regulations amend Section 134.318 to make it consistent with SBA's size regulations. The new rule simply proposes to require that the contracting officer amend the solicitation to reflect the new NAICS code whenever OHA changes a NAICS code in response to an appeal.  For clarity, the revised regulation provides that the contracting officer must stay the date of the closing of the receipt of offers instead of requiring that he or she stay the solicitation.	
Size Protest of MACs	The current rules authorize a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. 13 C.F.R. §§ 121.1004, 125.28, 126.801, and 127.603.	SBA proposes to add clarifying language regarding size or socioeconomic status protests in connection with orders issued against a MAC.  Specifically, the revised rule authorizes a size protest relating to an order issued against a MAC where the order is set-aside for small business and the underlying MAC was issued on an unrestricted basis except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract.  Also, the revised rule specifically authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.	

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