SBA's New Mentor-Protégé Program

For All Small Businesses Presents New Opportunities And Challenges

Robert K. Tompkins
Sarah M. Curtis
Holland & Knight, LLP

In 2010 and again in 2013, Congress directed SBA to adopt a mentor-protégé program for all categories of small business that mirrors SBA's existing 8(a) Business Development mentor-protégé program. This includes small business concerns (SBCs), as well as Women-owned, HUBZone, and potentially Service-Disabled Veteran Owned SBCs. This past summer, SBA issued a final rule setting the framework for this expansive mentor protégé program. In the fall of 2016, SBA began to implement the apparatus to receive, review and approve mentor-protégé applications for this new program. This new program is a game-changer and will have a substantial impact on the federal procurement market for all categories of small business set-asides, including the 8(a) program.

Key Elements of the Program

Like the 8(a) program, this new program permits an SBA-approved mentor and protégé to establish joint ventures (JVs) to pursue and perform set-aside contracts. When they do, the JV carries the size and socio-economic characteristics of the protégé. Absent this new SBA program, large and small businesses cannot joint venture without creating an "affiliation" which would destroy the small businesses size and socio-economic status. While other federal agencies have mentor-protégé programs, only the SBA programs permit mentors-and protégés to form a JV for set-aside contracts without creating affiliation.

This is an important incentive. As a JV partner, a mentor can have greater economic and management participation in the performance of the JV contract than it otherwise could as a subcontractor. In exchange for this substantial benefit, the mentor is expected to provide the protégé with a number of different forms of assistance. The areas of assistance which may be provided fall into six broad categories: Technical, Business Development, Trade, Administrative, Financial, and Contracting Assistance.

As with the existing 8(a) mentor-protégé program, a mentor and protégé must apply to SBA for approval to participate in this new program. The eligibility requirements are substantial and exceed the space limitations of this article. Among other things the mentor and protégé must enter into an SBA-approved mentor-protégé agreement. Parties to these agreements should exercise great care in developing the terms of these agreements. Not only must SBA approve the agreement for them to be eligible to participate in the program, but the agreement is legally binding – parties must be prepared to live by its terms or face potential legal and compliance consequences. In addition, assistance provided under an SBA-approved mentor-protégé relationship will not trigger a finding of affiliation, but only so long as that assistance is called out in the mentor-protégé agreement.

What Does this Mean for 8(a) Companies and the Overall Procurement Marketplace?

Providing large businesses access to JVs that can compete for set-aside contracts will have a substantial change on the federal procurement market in several ways.

First, it will increase competition in the set-aside programs. With the assistance of a large mentor/JV partner, small businesses will be better equipped to bid on and win larger and more complex contracts. Second, these added capabilities are likely to drive larger and more complex procurements into the set-aside programs as more-qualified JV offerors emerge. Third, these same factors will increase competition among the various set-aside programs, particularly the 8(a) program. With the capabilities of large mentors becoming available in other set-aside contexts, larger and more complex opportunities that might once have only been candidates for the 8(a) program may now find a home in other set-aside contexts.

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All of this will put pressure on the 8(a) program. However, there are some significant potential benefits to 8(a) concerns. 8(a)s could receive assistance from a mentor and JV in the context of other forms of set-asides provided the 8(a) is eligible. In addition, 8(a) companies may be able to be mentors themselves. This opens the possibility that an 8(a) might be able to form joint ventures with its SBA-approved protégé to pursue set-aside contracts in new programs for which the protégé, but not the 8(a), is eligible. This may be particularly important for 8(a) concerns which are nearing graduation or which may be poised to outgrow the small business programs.

The Requirements for both the 8(a) and "All-small" Mentor-Protégé Programs are Complex

As noted above, the requirements for both are complex and go beyond the scope of this article. Adherence to these requirements and the processes prescribed by the program is essential. In particular the elements of timing are very important. For example, a prospective mentor and protégé cannot form their JV until SBA has first approved the mentor-protégé agreement. Further, they cannot submit a JV bid in response to an RFP until that mentor-protégé agreement is approved.

With respect to the JVs, SBA prescribes very specific requirements for how those JVs are structured and managed. Among other things, the protégé must be the managing venturer, and must control certain aspects of the management and administration of the JV and any contracts it is awarded. In addition, the SBA's final rule holds that JVs under either mentor-protégé program cannot be "populated" with employees used to perform any set-aside contract awarded – instead each party must in effect become a subcontractor to the JV and perform its share of the work with its own employees. For this and other reasons, structuring of JVs and their governing documents is very important.

There are also some subtle differences between the 8(a) and "all-small" program. Chief among them is that SBA must approve JVs entered to pursue 8(a) contracts (which has long been a requirement); however SBA approval is not required for JVs outside the 8(a) program.

Conclusion

SBA's new mentor-protégé program is going to have a substantial impact on the federal procurement market and all the various set-aside programs. It will create exciting opportunities, but those opportunities will come with business, legal and compliance challenges.