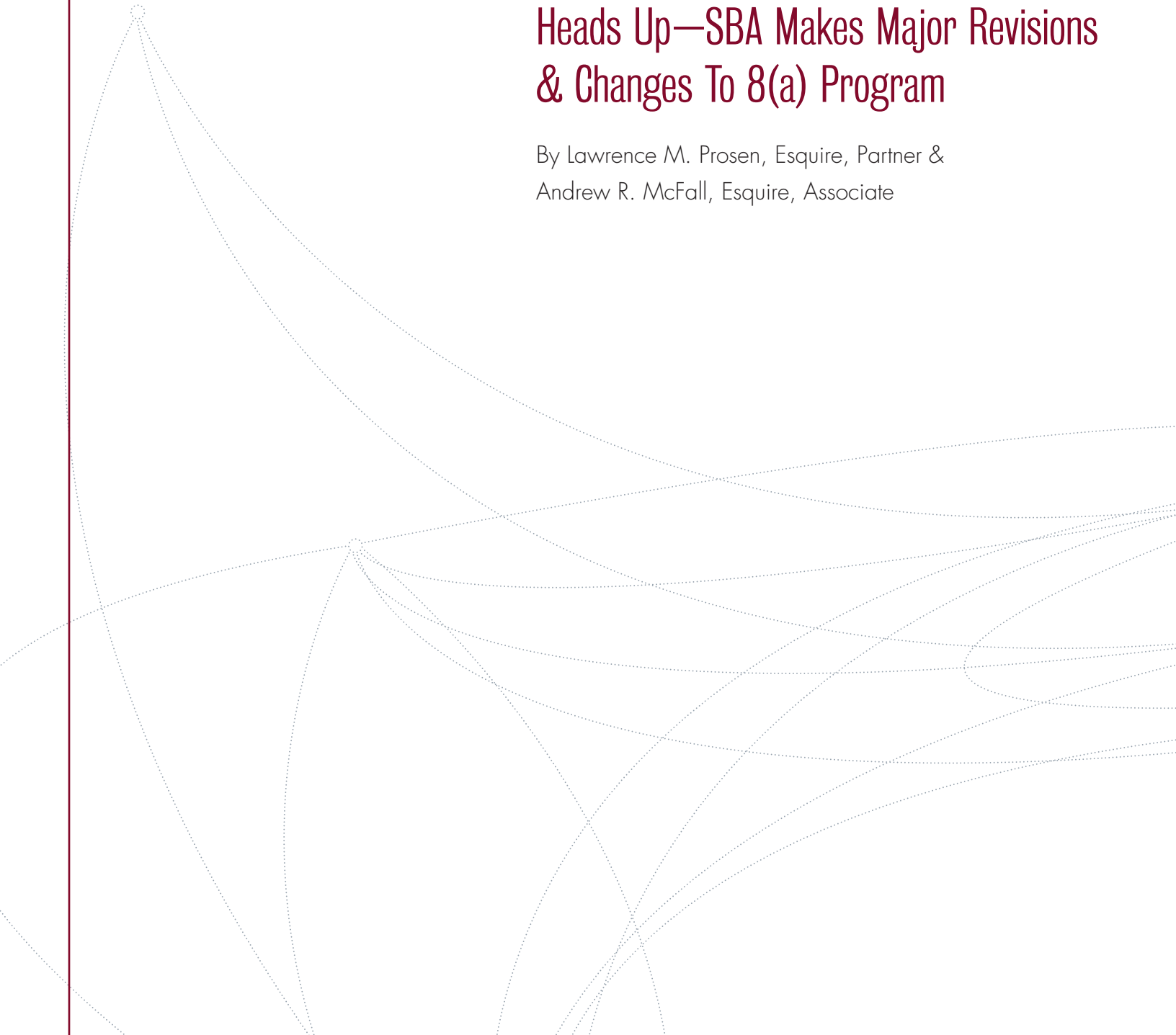


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Heads Up—SBA Makes Major Revisions & Changes To 8(a) Program

By Lawrence M. Prosen, Esquire, Partner &
Andrew R. McFall, Esquire, Associate



The United States Small Business Administration's ("SBA") 8(a) Small Business Development Program plays a significant role in federal procurement. The 8(a) program was developed by the SBA, from enabling legislation known as the Small Business Act, to assist small disadvantaged businesses ("SDBs") owned by socially and economically disadvantaged individuals. The 8(a) program is one of several SBA business development programs including the HUBZone, Service Disabled Veteran Owned, and Woman-Owned Small Business ("WOSB") programs. The WOSB program is brand new, and while not the focus of this article, is another program intended to provide business development opportunities and competitive advantages to certain classes of small business.

In recent years, the United States Congress and the United States Government Accountability Office ("GAO"), as well as various Offices of Inspector General and "watchdog groups," have increasingly monitored and investigated the 8(a) program, particularly with respect to Alaska Native Corporations ("ANCs"). As a result of these investigations and oversight, the GAO released a report on March 2010, which identified a number of contracts that had been awarded to businesses that were not eligible for the 8(a) program.¹ The GAO report further concluded that there were weaknesses in the SBA's fraud prevention program. Similar GAO reports have also dealt with, among other things, the HUBZone Program.² Concurrent with these various investigations, the SBA began the process of updating the regulations that govern the 8(a) program.³ On February 11, 2011, the SBA published its final revised 8(a) program regulations, which are the first significant changes to the program in a decade or longer.⁴ This article focuses on a few key provisions in the new 8(a) regulations that affect not only the SDBs themselves, but often large businesses as well. It is critical that all contractors be aware of these substantial changes.

I. Some Significant Changes to the 8(a) Program

The new regulations change numerous basic provisions of the 8(a) program. These include changes to the definition of the term "economically disadvantaged" and new provisions governing ownership and control, consultant fees, termination and graduation from the 8(a) program, and task and delivery orders. One key carry over is that in almost all cases, the SDB and any joint venture, mentor-protégé or the like must continue to be majority owned and controlled by the SDB and its owner.

A. The Basics - Qualification for 8(a) Program

Under the old regulations, a small business met the basic requirements of the 8(a) program if it was unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who were of good character and citizens of the United States, and demonstrated the potential for success. The

new regulations add the requirement that the owners not only be citizens of, but must also reside in, the United States.⁵

To remain eligible to participate in the 8(a) program, a business must remain small for its primary NAICS classification.⁶ While implicit in the prior regulations, the regulations now expressly state that the SBA can graduate an 8(a) participant early if the firm exceeds the applicable size standards for three consecutive years.⁷

Of some significance, and no doubt arising out of the GAO and Congressional findings, is the fact that now, instead of having to work through the agency, the SBA's Inspector General has the power to request a formal size determination with respect to businesses participating in certain SBA programs, including the 8(a) program.⁸

B. Determining Economic Disadvantage

Another vague requirement under the old regulations was whether an individual applicant was required to submit his or her spouse's financial information. That has now been addressed. Although a party claiming economic disadvantage must still submit separate financial information for his or her spouse, the SBA will not attribute the spouse's financial condition to the individual claiming 8(a) disadvantaged status in all cases. Instead, the SBA will consider a spouse's financial condition only when the spouse: (1) has a role in the business (e.g., acting as an officer, director, etc.); (2) has lent money to the business; (3) has provided credit support to the business; or (4) has guaranteed a loan of the business.⁹

The new regulations have added income limits that the SBA considers to determine and presume whether an individual is not economically disadvantaged.¹⁰ For initial 8(a) applicants, the SBA will now presume no economic disadvantage if the applicant's adjusted gross income, averaged over the three years preceding application, exceeds \$250,000. For continuing 8(a) participants, the SBA will presume no economic disadvantage if the applicant's adjusted gross income, averaged over the prior three years, exceeds \$350,000. It is important to note that, as before, these presumptions can be rebutted upon a showing that income is not indicative of lack of economic advantage (such as in cases where in one year the individual received a significant inheritance or had a single year of exceptional business profits/revenue).

The new regulations have also added limits on the fair market value of all assets of an 8(a) applicant/participant that the SBA considers to determine and presume whether an individual is not economically disadvantaged. An initial 8(a) applicant will not be considered economically disadvantaged if the fair market value of his or her assets exceeds \$4 million.¹¹ A continuing 8(a) participant will not be considered economically disadvantaged if the fair market value of his or her assets exceeds \$6 million.

C. Ownership

One basis for finding a SDB to be other than small is affiliation. Affiliation is a situation in which the SBA, in effect, considers the revenue and ownership not just of the SDB but also other affiliated businesses and combines them. Affiliation can be found based on a number of situations and is considered from the “totality of the circumstances.” This has not changed with the new regulations. Affiliation can occur from, among other things, common ownership, common control or management, common business lines, family relationships (called an identity of interest), joint ventures and other situations. These and other bases of affiliation remain. There have, however, been some significant changes.

For example, now an individual cannot use his or her disadvantaged status to qualify a business if that individual has an immediate family member who is already using his or her disadvantaged status to qualify a different concern.¹² This is not, however, an absolute bar. An applicant can seek waiver of this prohibition if the two concerns have no connections, in the form of ownership, control, or contractual relationships, and if the person seeking to qualify the second business has management and technical expertise in the particular trade or industry. If the two businesses are in the same line of business, there is a presumption against waiver. Similarly, if a waiver is granted and the two businesses subsequently enter the same business line, the SBA has the power to terminate the 8(a) certification of the second business.¹³ This is intended to prevent a “sham” scenario where two businesses enter the 8(a) program and then convert into two of the “same” type of business.

D. Control Requirements

Under the prior regulations, a disadvantaged full-time manager was required to hold the highest office of the 8(a) applicant/participant. The new regulations maintain this requirement but also add, as relates not just to ownership but also management, that the disadvantaged full-time manager must be physically located in the United States.¹⁴ It is also no longer enough that a United States citizen own and run the company (which always had to be located in the United States) but that individual must also be located in the United States. These requirements are intended to force the manager and owner to be physically present at the headquarters, which must be in the United States, and actually running the day-to-day operations of the business.

E. Small Business Consulting Issues

Over the past decade, a sizable niche has developed for “small business development consulting.” This was not really covered by the prior regulations. Under the new regulations, however, there are important and substantive changes that govern the compensation of these consultants. Consultants that act as an agent, packager, or representative of or for an 8(a) business can charge an 8(a)

applicant/participant for assisting in obtaining 8(a) certification or an 8(a) contract, or any other assistance to support 8(a) program participation.¹⁵ Any fee arising from those services, however, must be reasonable in light of the services performed by the packager, agent, or representative.¹⁶ Perhaps most important, and a key change from many prior consulting arrangements, is the fact that agents, packagers, and representatives are now expressly prohibited from receiving a fee that is a gross percentage of the total contract value.¹⁷ The new regulations also create a process by which consultants can actually lose their privilege to assist 8(a) applicants/participants by what appears to be almost a de facto debarment process performed by the SBA.¹⁸ These are significant new limitations on small business consultants that can have substantial, and what appear to be positive, impacts on small businesses. It is in effect the first time the SBA has really tried to police these consultants.

In addition to the foregoing limitations on fees, an 8(a) participant’s yearly report submission must include a list of any fees paid to agents or representatives that assisted in obtaining or seeking a Federal contract.¹⁹ The yearly submission must also contain a report for each 8(a) contract performed explaining how the performance of work requirements are being met for the contract.²⁰ This includes contracts performed as a joint venture.

F. Program Graduation and Termination

In the past, a firm which either made it through the entire nine-year 8(a) program term or graduated early was deemed to be a successful 8(a) graduate. This is no longer necessarily the case. Now, a firm will be deemed to be a “graduate” of the 8(a) program only where the SBA affirmatively determines that the participant has substantially achieved the targets, objectives and goals set forth in its business plan.²¹ Where those criteria are not substantially achieved, the participant will be deemed only to have completed, but not graduated, the 8(a) program. It is not clear how this name distinction affects contractors, but it nonetheless exists.

Another item that was presumed in the former regulations, but is now explicitly stated, is the fact that where a business graduates early or is terminated from the 8(a) program, that business generally will not qualify as a SDB for future procurements.²² This is not just limited to no longer being an 8(a) business but now presumes that the entity will no longer be deemed a SDB. It is not clear if the entity will still be considered simply “small,” as the new regulations are silent on this issue. Where, however, a business believes it still qualifies as a SDB after termination or early graduation, the entity must self-certify itself as such and also must notify the contracting officer of the early graduation or termination from the 8(a) program. The contracting officer has the discretion either to accept this SDB certification or protest the firm’s status. This is a new “formal” procedure not contained in the prior regulations.

G. Task & Delivery Order Contracts

Increasingly, many agencies are using various indefinite delivery/indefinite quantity (“IDIQ”) contracts. The use of these contracts (sometimes known as task and delivery order contracts) was not addressed by the prior SBA 8(a) and SDB regulations. The new regulations rectify certain of these omissions.²³ Most critical, under IDIQ contracts, the bidder/offeror must self-certify itself as small at the time of bid/proposal and again at award. There was no explicit requirement that the SDB re-certify as each task or job order was issued. Case law has held that the agency may in its discretion require a contractor to re-certify itself as small when a contract renewal option was to be exercised, and that if the contractor has not or could not certify itself as small, then the agency was barred from awarding the option.²⁴

The SBA has now expanded this scenario to hold that an 8(a) business may not receive, and agencies may not take 8(a), SDB or small business credit, for a task/job/delivery order where the small business contractor has been asked by the procuring agency to re-certify its size status and is unable to do so or where ownership or control of the business has changed and the SBA has granted a waiver to allow that business to continue as a small business. This is an area that likely will require some decisional law to allow contractors to interpret and understand the underlying language.

H. Miscellaneous Changes

An 8(a) SDB is still permitted to change its primary NAICS code. This is done by filing a request with the applicable SBA area office demonstrating that a majority of the business’s revenue during a three-year period has evolved from its former NAICS code to a different code.²⁵ While permitted previously, this codification is more explicit than the prior version.

II. Changes to the Mentor-Protégé Program

A significant component of the 8(a) program is its Mentor-Protégé program. Under this program, a non-8(a) contractor, which is typically a large business (the “mentor”), can enter into an agreement with an 8(a) contractor (the “protégé”) to help train the protégé to perform and succeed in business. This is one of the only mechanisms that non-8(a) contractors have to enter the 8(a) realm. It allows a mentor to gain a competitive advantage under certain, albeit heavily regulated, scenarios. This program generally has been highly successful. The new regulations provide detailed discussion of the program, as discussed below.²⁶

A. Mentor-Protégé Affiliation Exception

A key aspect of the Mentor-Protégé Program is that the mere existence of a mentor-protégé agreement does not create affiliation between the parties. This permits the mentor and protégé to bid work as a joint venture and remain “small.” The SBA continues

to recognize this exception for 8(a) participants holding an SBA-approved mentor-protégé agreement.²⁷ The fact that such an agreement exists, however, does not exempt the relationship from traditional affiliation tests. Accordingly, mentors and protégés must structure their activities to minimize the prospect of a finding of affiliation by other means, such as control, management, too much reliance on the mentor (called the ostensible subcontractor rule), or other similar concerns.

In addition, the new regulations clarify that a protégé firm is not affiliated with a mentor solely because the protégé firm receives assistance from the mentor under a different Federal Mentor-Protégé program (e.g., those programs offered by the General Services Administration and Department of Defense), so long as that program is specifically authorized by statute or approved by the SBA.²⁸ Again, despite this exception, affiliation between a mentor and protégé can be found for other reasons.

B. Mentor-Protégé Agreement and SBA Approval

As before, the mentor and protégé firms must enter a written agreement, which discusses the roles and obligations of each party. The agreement now must also set forth the protégé’s needs and provide a detailed description and timeline for the delivery of assistance the mentor commits to provide to the protégé.²⁹ The mentor-protégé agreement must: (i) address how the mentor’s assistance will help the protégé meet the goals established in the protégé’s SBA-approved business plan; (ii) establish a single contact in the mentor who is responsible for managing the agreement; and (iii) state that the mentor will provide assistance to the protégé for at least a year.³⁰ The SBA must approve the mentor-protégé agreement, but the SBA will not approve a mentor-protégé relationship for an 8(a) participant with less than six months remaining in its program term.³¹

C. The SBA’s Power to Terminate a Mentor-Protégé Relationship & Ban The Mentor

A significant change to the mentor-protégé program is that now the mentor, in addition to the 8(a) participant, can be held accountable. Where SBA determines that a mentor has not provided to the protégé the business development assistance as set forth in the mentor-protégé agreement, the SBA will notify the mentor of the allegation and require that the mentor show cause why the SBA should not terminate the mentor-protégé arrangement and exclude the mentor from participating in other mentor-protégé agreements.³² The mentor’s response must explain why the assistance was not provided and provide a plan for when assistance will be provided to the protégé. If the mentor fails to respond or responds inadequately, the SBA may: (1) terminate the mentor-protégé agreement; (2) deem the mentor firm ineligible to serve as an 8(a) mentor for two years from the date of termination; and, perhaps most importantly, (3) SBA has now given itself discretion to

recommend a stop work order to the relevant procuring agency.³³ Note that the order by SBA is actually a recommendation to the contracting agency, which in turn has some discretion as to whether or not to issue the actual stop work order. Once a stop work order is issued, if the protégé can complete the work by itself, the SBA can substitute the protégé for the joint venture to complete performance. In addition to being prevented from participating in the program for two years, a mentor's failure to comply with a mentor-protégé agreement can also serve as a basis for debarment of the mentor.³⁴ Given recent trends, the threat of this two-year "suspension" or debarment is real and needs to be avoided by complying with the terms of the mentor-protégé agreement.

D. Miscellaneous Mentor-Protégé Changes

The new regulations continue the general presumption that a mentor can only have one protégé at a time. The old regulations allowed a mentor to request SBA's approval to have more than one protégé. The new regulations now permit the SBA to authorize a mentor to have up to three protégés under certain circumstances (where the mentor can show financial and administrative capability to support more than one protégé).³⁵ It also bears noting that the new regulations permit non-profit entities to be mentors to protégé firms.³⁶

In addition, a protégé generally can have only one mentor at a time. Under the new regulations, however, a protégé may have a second mentor where it demonstrates to the SBA that: (1) the second relationship pertains to an unrelated secondary NAICS code; (2) the first mentor does not possess the specific expertise that is the subject of the second protégé-mentor agreement; and (3) the two relationships will not compete or otherwise conflict.³⁷

Under the old regulations, a mentor had to submit income tax returns to the SBA to show favorable financial health. Under the new regulations, a mentor can show favorable financial health by submitting tax returns, audited financial statements, or SEC filings for the past three years.³⁸

The new regulations prohibit an 8(a) participant from being a mentor and protégé at the same time.³⁹ If a firm becomes a mentor, it must relinquish its protégé status.

III. Changes to the Joint Venture Requirements

The SBA's joint venture regulations, particularly with respect to the 8(a) program, have also changed significantly as a result of the new regulations.

A. Affiliation Based on Joint Venture

Under the old regulations, a joint venture could submit no more than three offers over a two-year period. Under the new regulations, a joint venture generally cannot be awarded more than three contracts

over a two-year period.⁴⁰ Despite this language, the regulation recognizes that under certain circumstances a joint venture might be awarded more than three contracts within two years because the SBA will determine compliance with the rule as of the date an offer is submitted.⁴¹ In other words, if a joint venture submits more than three offers, and is then awarded more than three contracts, that is, with some limitation, generally acceptable.

In addition, and key to this issue, the prior regulations were silent on whether two partners/co-venturers could have more than one joint venture. In other words, if a joint venture had submitted three offers within two years, that joint venture was "maxed out" and could not make any more offers. Often, a new joint venture would be established to make another three offers in two years. The old regulations were silent on whether this was permissible, although some size protest decisions have permitted this practice. The regulations are now clear. Preexisting joint venture partners can create additional joint ventures and each additional joint venture can be awarded up to three contracts.⁴² The regulations recognize, however, what was always implicit in the prior regulations; at some point, the joint venture partners may become so involved that they will be deemed affiliated.

As discussed above, the new regulations continue to provide an exception from affiliation for an 8(a) mentor and protégé that create a joint venture as a small business. This mentor-protégé venture now can be considered small for any Federal government contract or subcontract, not just SBA programs, as long as the protégé complies with the applicable size standard corresponding to the NAICS code assigned to that procurement.⁴³

An additional key clarification is that now the SBA must approve the mentor-protégé agreement before the two businesses submit an offer as a joint venture in order to receive the exclusion from affiliation.⁴⁴ To receive this exception, the joint venture must comply with the control and work performance requirements of 13 C.F.R. §§ 124.513(c) and (d).⁴⁵ Another new requirement is that upon completing a contract, the 8(a) participant to the joint venture must submit a report to the SBA explaining how the § 124.513(d) performance of work requirements were met for the contract.

B. SBA Joint Venture Approval

As with the prior regulations, SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.⁴⁶ A key positive change from the prior regulations is that now, after a joint venture receives one 8(a) contract, the joint venture may be awarded up to two more 8(a) contracts and all that the joint venture must do is enter into addenda to the joint venture agreement setting forth the performance requirements of the additional contracts. These addenda will be all that are reviewed, and they must be provided to, and approved by, the SBA prior to

contract award.⁴⁷ The SBA will review the work to be done under the addenda, but the SBA will not re-review the structure of the joint venture.⁴⁸

C. Joint Venture Ownership and Control

As set forth in the prior regulations, a joint venture must be evidenced by an agreement in writing, must do business under its own name, and may, but need not, be in the form of a separate legal entity (such as a corporation or LLC).⁴⁹ Moreover, the new regulations make a distinction between “populated” and “unpopulated” joint ventures. A populated joint venture is one in which the joint venture possesses its own employees; an unpopulated joint venture has no separate employees and utilizes the employees of the co-venturers.

For both unpopulated joint ventures and joint ventures populated only with administrative personnel, the project manager must be an employee of the 8(a).⁵⁰ If a joint venture is populated with employees who will do the actual work, the joint venture must otherwise demonstrate that performance of the contract is controlled by the 8(a) managing venturer.⁵¹ If the joint venture is structured as a separate legal entity, the 8(a) participant must own at least 51% of the joint venture.⁵²

If the joint venture is structured as a separate legal entity, the 8(a) participant must receive profits commensurate with its ownership interests in the joint venture.⁵³ In all other joint ventures, the 8(a) participants to an 8(a) joint venture must receive profits from the joint venture commensurate with the work performed by the 8(a) participants.⁵⁴ This leaves open to some interpretation whether a 51% 8(a) participant/co-venturer must also receive 51% of the profits/losses, as was required under the old regulations. Out of an abundance of caution, at least for the time being, it is recommended that this “old” practice be followed.

D. Joint Venture Performance Requirements

The new regulations continue the traditional requirement that the joint venture as a whole is required to self-perform a certain amount of the contract work.⁵⁵ The new regulations add the additional requirement that, for joint ventures that are either unpopulated or populated only with administrative staff, the 8(a) participant must self-perform at least 40% of the total work performed by the joint venture.⁵⁶

If a joint venture is populated with employees that will actually perform on the contract, the 8(a) business must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development.⁵⁷ Although the exact meaning of this provision is unclear, the comments to the new regulations indicate that 8(a) participants must substantially benefit from performance of the contract.

E. Subcontracting to Non-8(a) Joint Venture Partner

The new regulations permit subcontracting to the non-8(a) partner in an unpopulated joint venture because both the 8(a) partner and non-8(a) partner are technically “subcontractors” to the joint venture. The extent of the non-8(a) partner’s work is limited, however, by the fact that the total amount of work done by the joint venture partners will be aggregated, and the 8(a) partner is required to perform 40% of the total amount of work.⁵⁸ As important, to calculate the total amount done by the non-8(a) partner, the work done by the non-8(a) partner plus any of its affiliates that perform under the contract, regardless of subcontracting tier, will be counted.⁵⁹ Therefore, the more work the non-8(a) partner performs, the more the 8(a) partner must perform.

In contrast to the unpopulated joint venture, in a populated joint venture, a non-8(a) partner and its affiliates may not act as a subcontractor to the joint venture unless it is first determined that no other potential subcontractors are available or where the joint venture is populated only with administrative personnel.⁶⁰ If the non-8(a) partner wishes to do more work, it must be done directly through the joint venture, which will, in turn, require the 8(a) partner to do more work.⁶¹

F. Constructive Joint Venture

If during the performance of a contract, a subcontractor performs primary and vital requirements of a contract, the contractor and subcontractor will be treated as a joint venture.⁶² If this causes the constructive joint venture to exceed the applicable size limits, the contractor is not allowed to continue to certify as small for that contract or any task orders under that contract.⁶³

IV. Indian Tribes, Alaska Native Corporations, and Hawaiian Native Organizations

Under the old regulations, ANCs automatically qualified as economically disadvantaged entities, whereas Indian Tribes⁶⁴ had to establish that they were economically disadvantaged. While the new regulations did not change these requirements, the regulations clarify that an Indian Tribe must only demonstrate its economically disadvantaged status in its first 8(a) application and need not reestablish this status with every new contract bid.⁶⁵

For any Tribally-owned business seeking 8(a) certification, an Indian Tribe or ANC must own at least 51% of the business.⁶⁶ The new regulations also place restrictions on an Indian Tribe or ANC’s ability to own 51% or more of another firm operating in the 8(a) program under the same primary industry code.⁶⁷ A business owned by an Indian Tribe or ANC may not receive a sole source 8(a)

contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another participant or former participant owned by the same Indian Tribe or ANC.⁶⁸ In other words, Native American-owned businesses cannot set up successor entities to continue performing their contracts. This is a substantial change from the prior regulations.

Under the new regulations, a Native Hawaiian Organization (“NHO”) will be considered economically disadvantaged only if a majority of its members qualify as economically disadvantaged under the standards that apply to individuals.⁶⁹

Under the new regulations, 8(a) participants owned by Indian Tribes, ANCs, NHOs, or Community Development Corporations must submit information showing how they have provided benefits to their members due to their participation in the 8(a) program.⁷⁰ These submissions should include information on funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services to the communities. This information is to be provided as part of the annual review submission.

V. Women-Owned Small Business Federal Contract Program

On October 7, 2010, the SBA published regulations that govern the WOSB program.⁷¹ The WOSB program seeks to level the playing field on which women-owned small businesses compete for federal contracts. The details of these regulations exceed the scope of this article, but contractors should be aware of the existence of this program. Contractors have time to familiarize themselves with the WOSB program, as SBA has announced that contracts are not likely to be awarded under the WOSB program until at least the fourth quarter of 2011.

VI. Conclusion

While the foregoing article only touches on some of the more significant changes, the SBA’s February 11 changes to its 8(a) and related regulations are substantial and complex in scope. These significant changes take effect on March 14, 2011, and their impact will soon be felt in the small business community. It is critical that contractors participating in these programs gain an immediate and detailed understanding and knowledge of these changes

Endnotes

- ¹ U.S. Gov't Accountability Office, GAO-10-425, 8(a) Program: Fourteen Ineligible Firms Received \$325 Million in Sole-Source and Set-Aside Contracts (2010).
- ² U.S. Government Accountability Office, GAO-09-440, HUBZone Program: Fraud and Abuse Identified in Four Metropolitan Areas (2009); U.S. Government Accountability Office, GAO-08-964T, HUBZone Program: SBA's Control Weaknesses Exposed the Government to Fraud and Abuse (2008).
- ³ Small Business Administration, 75 Fed. Reg. 55694 (Oct. 28, 2009).
- ⁴ Small Business Administration, 76 Fed. Reg. 8222 (Feb. 11, 2011) (to be codified at 13 C.F.R. Parts 121 & 124).
- ⁵ 13 C.F.R. § 124.101.
- ⁶ 13 C.F.R. § 124.102. "NAICS" stands for the North American Industry Classification System, which identifies certain represented business-types by industry. SBA utilizes the NAICS system to identify the size standard applicable to a given small business.
- ⁷ *Id.*
- ⁸ 13 C.F.R. § 121.1001(b)(10).
- ⁹ 13 C.F.R. § 124.104(b)(2).
- ¹⁰ 13 C.F.R. § 124.104(c)(3). Certain exemptions from income are discussed in the regulation.
- ¹¹ 13 C.F.R. § 124.104(c)(4). The only assets excluded from this calculation are certain qualified IRA or "Individual Roth Account" retirement funds.
- ¹² 13 C.F.R. § 124.105(g)(1).
- ¹³ 13 C.F.R. § 124.105(g)(2).
- ¹⁴ 13 C.F.R. § 124.106.
- ¹⁵ 13 C.F.R. § 124.4(a).
- ¹⁶ *Id.*
- ¹⁷ 13 C.F.R. § 124.4(b). The comments to the final regulations also note that compensation that is a percentage of profits may be found unreasonable.
- ¹⁸ 13 C.F.R. § 124.4(c).
- ¹⁹ 13 C.F.R. § 124.112(b)(7).
- ²⁰ 13 C.F.R. §§ 124.112(b)(8) & 124.513(i).
- ²¹ 13 C.F.R. § 124.112(f).
- ²² 13 C.F.R. § 124.304(f).
- ²³ 13 C.F.R. § 124.503(h).
- ²⁴ See *IB & B Assocs. Inc. v. United States*, 68 Fed. Cl. 765, 772-73 (Fed. Cl. 2005).
- ²⁵ 13 C.F.R. § 124.112(e).
- ²⁶ Mentor-Protégé joint ventures are addressed in Section III below.
- ²⁷ 13 C.F.R. § 121.103(b)(6).
- ²⁸ The SBA approval procedures can be found at 13 C.F.R. § 121.903.
- ²⁹ 13 C.F.R. § 124.520(e)(1).
- ³⁰ *Id.*
- ³¹ 13 C.F.R. § 124.520(c)(5).
- ³² 13 C.F.R. § 124.520(h)(1).
- ³³ *Id.*
- ³⁴ 13 C.F.R. § 124.520(h)(2).
- ³⁵ 13 C.F.R. § 124.520(b)(2).
- ³⁶ 13 C.F.R. § 124.520(b).
- ³⁷ 13 C.F.R. § 124.520(c)(3).
- ³⁸ 13 C.F.R. § 124.520(b)(3).
- ³⁹ 13 C.F.R. § 124.520(c)(4).
- ⁴⁰ 13 C.F.R. § 121.103(h).
- ⁴¹ *Id.*
- ⁴² *Id.* The comments to the final rule indicate that up to three joint ventures might be possible.
- ⁴³ 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(1).
- ⁴⁴ 13 C.F.R. § 124.520(d)(1)(i).
- ⁴⁵ The 124.513(d) performance of work requirements, which address how much work must be self-performed by the 8(a) partner to the joint venture, are discussed in detail below at Section III.D.
- ⁴⁶ 13 C.F.R. § 124.513(e)(1).
- ⁴⁷ 13 C.F.R. § 124.513(e)(2).
- ⁴⁸ 13 C.F.R. § 124.513(e)(2)(i).
- ⁴⁹ 13 C.F.R. § 121.103(h).
- ⁵⁰ 13 C.F.R. § 124.513(c)(2).
- ⁵¹ 13 C.F.R. § 124.513(c)(2).
- ⁵² 13 C.F.R. § 124.513(c)(3).
- ⁵³ 13 C.F.R. § 124.513(c)(4).
- ⁵⁴ *Id.*
- ⁵⁵ 13 C.F.R. § 124.510.
- ⁵⁶ 13 C.F.R. § 124.513(d)(1).
- ⁵⁷ *Id.*
- ⁵⁸ 13 C.F.R. § 124.513(d)(2)(i).
- ⁵⁹ *Id.*
- ⁶⁰ 13 C.F.R. § 124.513(d)(2)(ii). The subcontracting regulations for joint ventures populated with only administrative staff are essentially the same as those for unpopulated joint ventures.
- ⁶¹ 13 C.F.R. § 124.513(d)(2)(ii)(A).
- ⁶² 13 C.F.R. § 121.404(g)(4).
- ⁶³ *Id.*
- ⁶⁴ The term "Indian Tribe" is a defined term used in the SBA regulations. See 13 C.F.R. § 121.3.
- ⁶⁵ 13 C.F.R. § 124.109(b).
- ⁶⁶ 13 C.F.R. § 124.109(c)(3)(i).
- ⁶⁷ 13 C.F.R. § 124.109(c)(3)(ii).
- ⁶⁸ *Id.*
- ⁶⁹ 13 C.F.R. § 124.110(c)(1).
- ⁷⁰ 13 C.F.R. § 124.604.
- ⁷¹ Small Business Administration, 75 Fed. Reg. 62258 (Oct. 7, 2010) (to be codified at 13 C.F.R. Parts 121, 124, 125, 126, 127 and 134).



For more information, please contact:

Lawrence M. Prosen, Partner
Washington D.C.
202.778.9213
lawrence.prosen@klgates.com

Andrew R. McFall, Associate
Washington D.C.
202.778.9855
andrew.mcfall@klgates.com

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