

SBA Opens the Floodgates: The New Government-Wide Mentor-Protégé Program

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August 4, 2016

Agenda

- Background of changes in 81 FR 48558
- New small business mentor-protégé program (MPP)
- MPP Joint Ventures
- Revisions to 8(a) MPP
- Other Agency MPPs
- Anticipated Impact and Practice Pointers

Background for Changes - Timeline

- 2010 Small Business Jobs Act and 2013 NDAA – complex changes and more time-consuming for SBA to develop new program
- SBA issued proposed regulation on 2/5/15 with numerous requests for comments
- 90-day comment period and multiple tribal consultations conducted; 113 comments received
- Effective August 24, 2016

Background for Changes

- Expand MPPs that serve important business development function for SBs; obtain prime contracts previously unreachable
 - SBA opted for one new program instead of 4
- Expanded MPP must mirror 8(a) MPP, with some nuances related to types of protégés
- Other federal agencies (except DOD) cannot have separate MPP unless SBA approved
- No changes to how SBA processes 8(a) mentor-protégé agreements (MPA) or JV agreements

New SB MPP

- 13 C.F.R. § 125.8 (JVs), 13 C.F.R. § 125.9 (MPP Program), and additional consistency changes to SDVOSB, WOSB, HUBZone sections
- Purpose: “Allow all small businesses to tap into the expertise and capital of larger firms, which in turn should help small business concerns become more knowledgeable, stable, and competitive in the Federal procurement arena”
- Key incentives: competitive benefits for mentors and protégés, affiliation exception, JV opportunities and access to set-asides, new potential for evaluation credit
- How to: planning, paperwork, compliance

SB MPP – Step-by-Step

- Find counterpart, screen eligibility, weigh strategic considerations
- Prepare and submit MPA and supporting documentation and obtain SBA approval (must be before submission of offer as JV)
- Prepare and submit JV agreement and, for 8(a) set-asides only, obtain approval (before contract award)
- Annual reporting (detailed items on assistance provided and success of assistance, contracts/subcontracts awarded, with focus on whether to continue MPA)
- End-of-relationship report (protégé)
- Any changes to MPA must be reviewed/approved by SBA in advance

SB MPP - Eligibility

Protégé:

- Qualify as small (self-certify) for:
 - Size standard corresponding to its primary NAICS code, or
 - Secondary NAICS code with respect to which it is seeking business development assistance
- Identify any other MP relationship that it has through another Federal agency or SBA and provide a copy of each MPA to the SBA
- Can (now) be mentor and protégé at same time

SB MPP - Eligibility

Mentor:

- For-profit (can be either a small or large business)
- Capable of carrying out its responsibilities to assist the protégé under proposed MPA
- Possesses good character
- Not on the federal list of debarred or suspended contractors
- Able to impart value to a protégé due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting

SB MPP – Relationship Limits

Mentors:

- Maximum of 3 protégés at any given time under 8(a) and SB MPPs
 - Mirrors historical limitation on the number of protégés in the 8(a) MPP
 - SBA did not want large businesses to benefit disproportionately
- Default for mentor is 1 protégé at a time
- SBA may authorize a mentor to have additional protégés where the mentor can demonstrate that the additional relationship will not adversely affect the development of either protégé firm (e.g., protégés may not be competitors)

SB MPP – Relationship Limits

Protégé:

- Maximum of 2 mentors where the two relationships do not compete or otherwise conflict with each other, and the protégé demonstrates that:
 - Second relationship pertains to an unrelated, secondary NAICS code, or
 - First mentor does not possess the specific expertise that is the subject of the MPA with the second mentor

SB MPP – Time Limits

- MPAs last for a period of 3 years
- MPA reviewed annually by SBA
 - Unless rescinded in writing, it automatically renews
- Final rule allows an MPA to be extended for a second three-year period if:
 - Protégé has received the agreed-upon business development assistance, and
 - Protégé will continue to receive additional assistance from mentor

MPA Requirements

- Written agreement setting forth:
 - Assessment of protégé's needs
 - Detailed description and timeline for delivery of assistance the mentor commits to provide to address those needs
- Address how the assistance to be provided will help protégé meet its goals as defined in its business plan
- Establish a single point of contact in the mentor who is responsible for managing and implementing the MPA
- Provide that the mentor will provide such assistance to protégé for at least one year
- If relevant, identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another MPA, either with same or different mentor
- Provide that either protégé or mentor may terminate the MPA with 30 days advance notice to the other party to MPA and to SBA
- SBA (AA/BD or designee) must approve MPA!!

MPA – Key Considerations

- Assistance identified is exempt from affiliation – including up to 40% equity interest in protégé, loans, JV opportunities
- Assistance – balance generic and too granular – what is achievable over 3 years?
- Timeline for assistance required – consider sequencing
- Mentor’s potential to develop long-term sub
- Protégé should be aware of its needs and prioritize
- Agencies may provide evaluation incentives for mentor providing significant subcontracting work to protégé

MPA Approval – Timing Considerations

- New, dedicated SBA unit within Office of Business Development for SB MPP applications/MPAs
- Anticipate 2,000 new SBs to use MPP and access possibly \$2B/year in federal contracts
- Unclear of volume or processing time
 - Get MPAs in ASAP
 - Long delays anticipated early on
 - SBA may resort to open and closed enrollment periods

MPA – Harsh Mentor Consequences

If SBA determines mentor's committed assistance not provided:

- SBA notifies mentor
- Mentor has 30 days to respond with explanation and plan going forward
 - Failure to respond or provide adequate reasons
 - Terminate MPA
 - Ineligible to serve as mentor for 2 years from termination
 - SBA may recommend stop work order for JV contracts and protégé may be substituted as prime
- May be grounds for suspension/debarment

MPA – Changes During Relationship

- SBA must approve all changes to MPA in advance; changes must be in writing
- If change without prior SBA approval, SBA shall terminate MPA and may propose suspension/debarment for mentor and/or protégé
- Protégé must certify to the SBA whether there has been any change in the MPA terms
- If mentor change in control, approved MPA may continue if mentor in writing acknowledges MPA to SBA and certifies continuation to abide by terms

Key MPP Benefit - JVs

- Protégé may JV with its mentor and still qualify as a small business for any Federal government contract or subcontract, provided that the protégé qualifies as small for the size standard for NAICS code assigned to the procurement
- JV will qualify for a contract reserved or set-aside for specific programs, such as for SDVOSBs, WOSBs, HUBZone, if the protégé firm also meets the particular program-specific requirements
- Key exemption from affiliation
- Only opportunity for large business to share prime role on set-asides
- More competitive prime with resources, capabilities, and experience of mentor combined with protégé

MPP JVs - Requirements

- JV agreement must be in writing
- JV must do business in own name
- JV must be identified as such in SAM and have own CAGE and DUNS numbers
- Formal or informal JVs still permitted
- If separate legal entity, may not be populated with individuals to perform contract (admin personnel OK)

MPA JV Terms Requirements

- Purpose of the JV
- Protégé = managing venturer of the JV
- Employee of protégé = project manager responsible for performance of the contract
 - Can't be employee of mentor and hired by protégé to perform contract
- If separate legal entity – protégé must own at least 51% of JV
- Protégé must receive profits from JV commensurate (1) with % work performed or (2) for separate legal entity, with ownership interest
- Obligating JV members to ensure and complete performance of set-aside contract despite withdrawal of other member

MPA JV Terms Requirements

- Set-up of special bank account in name of JV
- Itemizing all major equipment, facilities, and other resources to be furnished by members
- Member responsibilities regarding contract negotiations, source of labor, and contract performance
- JV accounting and admin records kept in protégé office
- Records retained by protégé upon set-aside contract completion
- Quarterly financial statements submission
- Project-end profit and loss statement submission

MPA JV – Performance of Work

For set-asides:

- JV must comply with LOS, and protégé must perform $\geq 40\%$ of work performed by JV
- Protégé work must be more than admin or ministerial functions
- In calculating respective work performed by members, will consider mentor work at all tiers and include affiliate subcontractors
- Protégé must describe how meeting/has met performance of work requirements (annual and post-contract completion)

MPA JV – Performance/Evaluation

- Prior to performance of set-aside contract, mentor and protégé must certify to CO and SBA that:
 - JV agreement is compliant with regs
 - Performance will comply with JV agreement and regs
- Past performance evaluation of JV SHALL consider both JV and members
- JV members must allow SBA inspection of JV records during normal business hours

MPA JV – Compliance/Risks

- Grounds for suspension/debarment:
 - Failure to enter into compliant JV agreement
 - Failure to perform contract IAW JV agreement or performance of work requirements
 - Failure to submit required certification or allow inspection of records
- Whistleblowers: Anyone with information on JV compliance with performance of work requirements can report to SBA/SBA OIG

Harmonizing SB and 8(a) MPPs

- Revisions to 8(a) MPP largely for consistency
- MPA must identify how assistance from mentor differs from assistance from another MPA
- Instead of “favorable financial health,” mentor now must show capability of assisting protégé under MPA; tax return submission now optional
- No non-profit mentors going forward
- No JV populated with personnel performing contract
- Same upper limits on relationships from SB MPP

8(a) MPP Protégé Eligibility Relaxed

- Now, protégé qualifications broadened:
 - Small for the size standard for primary NAICS code or identifies it is seeking BD assistance for secondary NAICS code and small for code; and
 - Demonstrates how the BD assistance to be received through its MPA would advance goals and objectives in business plan
- Now can qualify simultaneously as mentor and protégé
- JVs no longer “protest-proof”

8(a) or SB MPP?

- 8(a) protégé can now transfer MPA to SB MPP if graduating or leaving 8(a), but still small – only requires notice to SBA
- 8(a) MPP JVs still have to be SBA-approved prior to award under 8(a) set-aside
- No changes in 8(a) MPA/JV procedures/POCs for approval – predictable timeline and audience....
- Will there be terminations of current 8(a) MPAs for greener pastures?
- Bottom line for mentors: which protégé and which type of set-asides present most opportunities?

Other Agency MPPs

- Any survivors other than DOD?
- No federal department/agency (note DOD exemption) may have MPP unless plan submitted/approved by SBA
- One-year window to submit existing MPP for approval
- Approval based on whether MPP assists protégé to compete and complies with SBA MPP requirements
- Annual reporting to SBA on SB participants, assistance provided to them, and protégé progress

SBA's Anticipated Impact

- Based on FY12 data
 - Estimate approx. 2,000 SBs as new MPP participants
 - Protégés (solo or JV) may obtain federal contracts approx. \$2B/year
- With more eligible competitors, more contracts may be set aside BUT more opportunities for large businesses on these procurements

Key Practice Pointers

- Strategic consideration in partner search – optimize benefits with relationship limitations
- Get MPAs in for approval ASAP – be at the front of the line
- Be prepared for uncertainty in approval times and relationship to bid opportunities
- Understand new requirements – avoid mistakes in submissions and agreements that could delay approvals – GET HELP!
- Floodgates open for size protests – ensure JVs meet the requirements
- Ability to compete on set-asides without a MPP JV?

QUESTIONS?

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