

SBA Mentor Protégé Program and Joint Ventures: A Legal Perspective

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General Overview-SBA All Small Mentor-Protégé Program

- In 2016, SBA established an expanded mentor-protégé program, under which all types of small businesses can participate
- Mentor-protégé teams can compete for set-asides for which the protégé firm is qualified
- The program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts

General Overview, continued

- Based on the 8(a) program, but constitutes a distinct program.
 - While there are some similarities with the 8(a) program, there are also some key differences
 - Proposed consolidation of All Small and Mentor Protégé Program and 8(a) Business Development Mentor Protégé Program
- What the mentor-protégé program is NOT

Benefits

- A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement.
 - Such a joint venture may seek any type of small business contract (i.e., small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies
 - Example: A protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor
- Exclusion from affiliation provided that requirements are met

Types of Assistance

- Types of mentor → protégé assistance include:
 - Technical or management assistance in the form of equity investments or loans
 - Mentor ownership in protégé limited to 40%
 - Subcontracts
 - Can be from mentor to protégé or protégé to mentor
 - Trade education
 - Assistance in performing prime contracts with the Government through joint ventures

Mentors

- Any concern that meets the requisite qualifications and demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive the benefits of the mentor-protégé program. This includes other than small businesses.
- Must be a for-profit business (difference from the 8(a) mentor protégé program).

Mentors (continued)

- To qualify as a mentor, a concern must demonstrate that it:
 - Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement
 - Possesses good character
 - Does not appear on the federal list of debarred or suspended contractors
 - 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

Mentors (continued)

- To demonstrate its capability of fulfilling its responsibilities under the mentor protégé agreement a prospective mentor must submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, or SEC filings (if publicly traded entity)
- Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position
- Generally, a mentor will have only one protégé at a time, but SBA can authorize a concern to mentor more than 1 protégé at a time (up to 3 maximum) provided the mentor can demonstrate that doing so will not adversely affect any of the preexisting mentor-protégé relationships

Protégés

- In order to qualify as a protégé firm, a concern 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 NAICS code and qualify as small for the size standard corresponding to that NAICS code
- Protégés need not obtain a size status determination before participating in the small business mentor-protégé program; changes to a protégé's size status will generally not impact contracts that were already awarded to a mentor-protégé joint venture

Written Agreement

- The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégés needs and providing a detailed description and timeline for the delivery of assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor).
- SBA must approve the mentor-protégé agreement BEFORE the two firms may submit an offer as a joint venture on a particular government prime contractor subcontract in order for the joint venture to receive the exclusion from affiliation.

Written Agreement (Continued)

- The written agreement must also:
 - Address how the assistance will be provided through the agreement and how it will help the protégé firm meet its goals as defined in its business plan
 - Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement and
 - Provide that the mentor will provide such assistance to the protégé firm for at least one year

Written Agreement (Continued)

- A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such agreement to SBA
 - The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor
 - A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the small business mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the small business mentor-protégé relationship.

Written Agreement (Continued)

- The written agreement must be approved by the Associate Administrator for Business Development (AA/BD) or his/her designee.
- The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.
- The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA

Written Agreement (Continued)

- SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing.
- If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA will terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both firms, if appropriate.

Term of Mentor-Protégé Relationship

- SBA will review the mentor-protégé relationship annually to determine whether to approve its continuation for another year.
- Unless rescinded in writing as a result of the review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.
- The term of the mentor protégé agreement may not exceed three years, but may be extended for a second three years.
 - A protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance thorough the extended mentor-protégé agreement.

Reporting Requirements

- Annual report:
 - Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:
 - All technical and/or management assistance provided by the mentor to the protégé;
 - All loans to and/or equity investments made by the mentor in the protégé
 - All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract

Reporting Requirements (Continued)

- All federal contracts awarded to the mentor-protégé relationship as a joint venture (designated each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture;
- A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered

Reporting Requirements (Continued)

- The protégé must report the mentoring services it receives by category and hours
- The protégé must annually certify to SBA whether there has been any change in the terms of the agreement
- SBA will review the protégé's report on the mentor-protégé relationship, and may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement or that the assistance has not resulted in any material benefits or developmental gains of the protégé

Reporting Requirements (Continued)

- In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé
- Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship under the small business or 8(a) program.

Consequences of Noncompliance

- Where SBA determines that a mentor has not provided the protégé firm with the assistance set forth in its mentor-protégé agreement, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond.
- The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance.

Consequences of Noncompliance

(Continued)

- If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:
 - SBA will terminate the mentor-protégé agreement;
 - The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement; and
 - SBA may recommend the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture
 - SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor protégé agreement as a basis for debarment

Additional Considerations

- Affiliation and joint venturing
 - Approved mentor protégé-relationship is an exception to affiliation
 - But keep in mind that the existence of a mentor-protégé relationship will not preclude a finding of affiliation on other grounds
- Size Requirements

QUESTIONS?