

# **8(a) Proposed Rule Changes & Legislative Update**



**NAVFAC Atlantic Industry Forum**

**2010**



# Proposed Rule Change to 13 CFR 121 & 124 [SB Size & 8(a)]

Proposed October 9, 2009

- Comment Period Closed Jan 28, 2010
- Six Proposed Changes to Size Reg
  - 2 deal with Mentor Protégé Program
  - 1 - amends requirements for JV's
  - 1 clarifies how procurements are classified
  - 1 deals with non-manufacturer's rule
  - 1 dealing with who can request size determination



## First Change Deals with Affiliation 13 CFR §121

- Clarifies that affiliation is disregarded only for 8(a) BD program Mentor Protégé Program.
- Other agencies must request a waiver to the size regulation in order to have affiliation disregarded for their Mentor Protégé programs

## Changes with Joint Ventures

- JV's can be awarded up to three contracts (previously 3 opportunities)
- The first offer is considered to be submitted at the time of offer including price. That starts clock.
- Offers submitted before a JV is awarded a third contract CAN be awarded if successful

## JV Change Example\*

- JV ABC has received 2 contracts
  - April 2, ABC submits 1 offer
  - June 6, ABC submits offer 2
  - July 14 ABC submits offer 3
  - In September ABC is apparent successful offeror on all 3 offers
  - ABC could receive all contracts even though it would give JV 5 – because it had not yet received 3 contracts at time of submission of other offers

\*this exclusion is not all encompassing

## Joint Venture Change (continued)

- Clarifies that JV must exist with written document between partners and:
  - If a separate entity (LLC) is formed it must be populated (have own employees)
  - If the JV exists only through the written agreement, it need not be populated and each member can contribute employees to the venture



## Affiliation Exclusion for MP JV's

- Clarifies that SBA MP JV's may bid on other small business contracts with the 8(a) JV. Although SBA does not approve these JV's, the firms must still comply with 13 CFR 124.514
  - Clarifying language added to 13 CFR 121.103(h)(3)(iii)



## Clarification on Supply Procurements

- Current regs state that a supply buy must be made under MFG NAICS, not wholesale NAICS
- Change adds retail NAICS as not available for use on product buys

## Non-Manufacturers Rule

- Clarifies that small firms acting as nonmanufacturers must be engaged in wholesale or retail trade of the item being procured

**AND**

- take ownership of the item with its own personnel, equipment or facilities consistent with industry practice (cannot just buy and drop ship from large mfg, even if waiver is approved for that buy)



## Final Size Change

- Adds SBA Office of Inspector General to list of offices that can request formal Size determination [amends 13 CFR 121.1001(b)]

## 8(a) BD Changes under Proposed Rule

- Clarifies that a firm will be considered to have “graduated” from the 8(a) program only if it successfully completes its program by meeting business plan goals
  - This will not affect nine year term of program
- Adds the term NAICS code to 13 CFR 124 and changes all references to SIC to NAICS

## 8(a) Changes Continued

- Allows for changing Primary NAICS code over time
  - Primary NAICS code may be changed if firm can demonstrate the *majority* of revenue has been obtained in another NAICS code over a two year period.
- Clarifies what “regularly maintains an office” means for purposes of Bona Fide office requests

## 8(a) Changes (Continued)

- Amends 13 CFR 124.102 to require a firm to remain *small in its primary NAICS code* throughout its program term and allows SBA to graduate a firm that exceeds its size standard for its Primary NAICS for two successive years. (historically firms were allowed to stay in the program if small in secondary NAICS)

## 8(a) Changes (Continued)

- Amends 13 CFR 124 regarding who is Economically Disadvantaged by:
  - Disregards community property laws (so property that is legally one spouses will be considered that spouses regardless of community property laws)
  - SBA may consider a spouse's financial situation when considering access to credit and capital



## 8(a) Economic Disadvantage (cont)

- Exempts IRA and other retirement accounts from the calculation to determine net worth. (the retirement account must have a significant penalty for early withdrawal of funds-terms and conditions of the account must be provided at time of application)

## 8(a) Economic Disadvantage (cont)

- Amends para (c) (2) to exempt income from an “S” corporation in the income and net worth calculations if it is reinvested in the corporation or to pay taxes during the normal course of operation.
  - Income will be counted only if actually distributed to share holder (firm must show trail for income)

## 8(a) Economic Disadvantage (cont)

- NEW PARAGRAPH ADDED!
- An individual would NOT be considered economically disadvantaged if:
  - His/her gross income over the past 2 years exceeded \$200,000
- For purposes of continued eligibility the rule proposes a two year income average of \$250,000



## 8(a) Economic Disadvantage (cont)

- For purposes of total assets, a person will NOT be considered economically disadvantaged if their total assets exceed \$3 million at time of application and \$4 million for continued eligibility

## 8(a) Ownership Requirements

- Prohibit qualification of a disadvantaged individual if a family member is in the program. Allow waiver by AA/BD when:
  - No or negligible connections between the firms and individual seeking waiver has sufficient management and technical experience to operate the firm
    - If firm seeking waive is in same or similar line of business, presumption AGAINST granting the waiver



## Ownership by Others

- Change to prohibit a non-participant firm in the same of similar line of business, *or a principal of such firm*, from owning more than 10% of a firm in the developmental stage or more than 20% in transitional stage



## Changes to Control Requirements

- Disadvantaged manager must reside in the United States and must spend part of every month at the primary offices of the concern.
- Add new paragraph to allow Disadvantaged managers to suspend its program term while serving as a active duty reservist in the US Military.



## Tribally-Owned Firms

- Seek to better define/determine a Tribe's economic disadvantage
- Limit type of work/industries a tribally-owned concern can operate multiple businesses within.
- Allow **any** tribal member to participate in management of the concern (not just “disadvantaged” members)

## Tribally-Owned Concerns

- Clarify “potential for success” requirement. This would add a third waiver criteria of the two year rule specifically for tribally-owned concerns.
- Annual Reviews of ANCs, TOCs, NHOs and CDCs would include review of how the members have benefited from the program

## Excessive Withdrawals

- Current definition very restrictive.
- Exclude “officer’s salaries”
- Increase withdrawal levels:
  - Firms with sales of less than  
\$1mil: \$200,000
  - Sales \$1m – 2m - \$ 250,000
  - Sales Over \$2m - \$ 300,000



# Applications

- Emphasize preference for electronic application
- Wet signatures
- Change application submission location for ANCs
- New paragraph placing burden of proof on applicant

# Terminations

- Firms could be terminated if any of the disadvantaged individuals becomes other than economically disadvantaged, rather than “graduated”.



## Task & Delivery Order Contracts

- Amend 124.503(h) to allow agencies to take credit for 8(a) orders under contracts that were NOT set aside for 8(a) concerns, as long as the order is offered and accepted for the program and is competed among eligible 8(a) concerns, and the limitations on sub-contracting apply.



## Barriers to Acceptance & Release

- Limits ability of SBA to accept requirements that have been advertised as HUBZone, SDVOSB or Small Business Set-aside.
- Adds language to the practice of requesting “release” from 8(a). Rationale for release may be based on an agency’s goal achievement. Official release would be required.

## Competitive Threshold

- Officially increase to \$3.5 and \$5.5million
- Address JV sub-contracting: Non 8(a) venture partners cannot also be sub-contractors to the JV on 8(a) sole source contracts. Consider this restriction on competitive contracts as well.
- NHOs Sole Source over Threshold



## Bona Fide Office

- Outlines specific procedures and requirements for an 8(a) firm to establish a bona fide office in another geographic area – Primary construction related issue.

## Contract Administration

- Clarifies that procuring agency has responsibility for tracking work performance requirements
- Requires agencies to submit modifications and exercise of option actions to SBA ten days prior to issuance.



## Joint Venture Requirements

- 8(a) approved JV entities bidding non 8(a) contracts must utilize SBA format and requirements.
- Profit split commensurate with performance
- Define percentage of work to be performed by 8(a) partner – 40%



## Joint Venture Requirements

- 8(a) Firm must provide SBA a full report at conclusion of JV contract
- Possibly exclude the small status of JVs between mentors and proteges on non 8(a) contracts.



## Mentor-Protégé Program

- Developmental assistance tied to 8(a) firm's business plan
- Allow non-profits to be mentors
- Allow mentors to prove 2 year profitability with financial statements
- Remove allowance of JV small status from other than 8(a) contracts
- MPA benefits end when 8(a) exits program



## Mentor-Protégé Program

- Expands Mentors having only one protégé at a time rule
- Prohibits an 8(a) firm from serving as a protégé and a mentor at the same time.
- MPA not approved for firms with less than one year remaining
- Expand “small” definition for JVs to extend to sub-contracts
- Establishes reconsideration procedures for decline of MPA



# Submission of Financial Statements

- Audited statements requirement raised from \$5mil to \$10mil
- Reviewed statements required for firms with receipts between \$2mil and \$10mil
- Requested comments on hardships



## Small Disadvantaged Business

- Amend 124.1002 to exclude some eligibility requirements that only apply to 8(a) firms:
  - Devote fewer hours per week
  - Federal financial obligations
  - Good Character



# Legislative Updates

- 8(m) – WOSB Program
- Size regulations



## More Information

- Tammy Proffitt, Assistant District Director, Business Development
  - Website: <http://www.sba.gov>
  - E-mail: [tammy.proffitt@sba.gov](mailto:tammy.proffitt@sba.gov)
  - Phone: (804) 771-2400 ext. 116