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Resources

Summary of New Changes to the SBA's 8(a) Regulations

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The final rule is currently scheduled to go into effect on May 27, 2023

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On April 27th, the U.S. Small Business Administration ("SBA") published a final rule making changes to the regulations governing the 8(a) program. This final rule is SBA's implementation of the proposed rules issued by the SBA on September 9, 2022. The final rule largely implements the proposed rules, with some minor modifications. The final rule is currently scheduled to go into effect on May 27, 2023, and shall apply to all solicitation issued on or after that date.

The following is the SBA's opening summary:

> This final rule makes several changes to the ownership and control requirements for the 8(a) Business Development (BD) program, including recognizing a process for allowing a change of ownership for a former Participant that is still performing one or more 8(a) contracts and permitting an individual to own an applicant or Participant where the individual can demonstrate that financial obligations have been settled and discharged by the Federal Government. The rule also makes several changes relating to 8(a) contracts, including clarifying that a contracting officer cannot limit an 8(a) competition to Participants having more than one certification and clarifying the rules pertaining to issuing sole source 8(a) orders under an 8(a) multiple award contract. The rule also makes several other revisions to incorporate changes to SBA's other government contracting programs, including changes to implement a statutory amendment from the National Defense Authorization Act for Fiscal Year 2022, to include blanket purchase agreements in the list of contracting vehicles that are covered by the definitions of consolidation and bundling, and to more clearly specify the requirements relating to waivers of the nonmanufacturer rule.

The SBA's final rule, and revised regulations, largely follow the proposed rules published in September of 2022. The SBA, however, did make changes and clarifications to some of the proposed regulations and declined to

proceed with others.

The following discussion focuses on summarizing those new regulations that may be of interest to Alaska Native Corporations, Tribes, or Native-Hawaiian Organizations. Later updates will be provided focusing on the changes that are limited to individually-owned entities, as well as more in-depth discussions and analysis of particular amendments, including changes to the bona-fide place of business regulations, the ostensible subcontractor rule, joint ventures, and size determinations (and sole source awards) in the context of orders under multiple award contracts.

Community Benefits Plan (§ 124.604 and 124.108)

In its proposed rule, the SBA sought to add a requirement that each entity having one or more Participants in the 8(a) BD program establish a Community Benefits Plan that outlines the anticipated approach it expects to deliver to strengthen its Native or underserved community over the next three or five years. The ANC, Tribal, and NHO community strongly opposed this proposed new requirement at five different tribal consultations, and the SBA received 35 comments further opposing any changes to the benefits reporting requirements and imposing a new Community Benefits Plan requirement.

The SBA withdrew the proposed new rule, noting that "[d]uring the last tribal consultation in Washington, DC, SBA announced that it would not finalize anything new pertaining to benefits reporting. As such, this final rule does not adopt any new language to § 124.604 or any new language to § 124.108 dealing with benefits or benefits reporting."

Bona Fide Place of Business Requirements (§ 124.501(k))

The SBA refused to eliminate the bona fide place of business requirement, explaining that it believed it was required to maintain it under Section 8(a)(11) of the Small Business Act, which requires that, to the maximum extent practicable, 8(a) construction contracts "shall be awarded within the county or state where the work is to be performed."

The SBA also noted that it had issued a moratorium on enforcement of the bona fide place of business rule until September 30, 2023. The SBA did not commit to extending that moratorium, but stated that it would continue

> *"to examine the practicality of the rule considering economic realities. Once the conditions exist that demonstrate that it is no longer impracticable to require a bona fide place of business, SBA will again implement the statutory provision to do so with respect to all construction requirements offered to the 8(a) program.... Before the expiration of the moratorium, SBA will examine workplace realities. If telework policies and other economic conditions continue to make requiring a bona fide place of business impracticable, SBA will again extend the moratorium".*

The SBA did add several clarifications to the bona fide place of business requirements for 8(a) contracts:

- An 8(a) entity with a bona fide place of business anywhere in a particular state is eligible for a construction contract throughout that entire state (even if the state is serviced by more than one SBA district office).
- An 8(a) entity having an approved bona fide place of business in one state is eligible for work in a contiguous state. The SBA gave the following example, based on an 8(a) entity that has a bona fide office in Virginia, but does not have a bona fide office in North Carolina:

The language of the rule states that a firm will be eligible for work that will be performed in the geographical area serviced by a contiguous SBA district office to where the firm has a bona fide place of business (in addition to stating a firm will be eligible for work anywhere in a state in which the firm has a bona fide place of business). There are two SBA district offices servicing Virginia: the Washington Metropolitan Area District Office services northern Virginia and the Richmond District Office services the rest of Virginia. North Carolina has only one SBA district office, so any district office whose geographic area touches any part of North Carolina will be eligible for any 8(a) construction contract anywhere in the entire state. Only the geographic area serviced by the Richmond District Office touches North Carolina. As such, a firm having a bona fide place of business in the geographic area serviced by the Richmond District Office will be eligible for 8(a) construction contracts in North Carolina. Firms having a bona fide place of business in the geographic area serviced by the Washington Metropolitan Area District Office will be not eligible because the geographic area serviced by that office is not contiguous to that of the area serviced by the North Carolina District Office.

- An 8(a) entity currently performing a contract in a specific state qualifies as having a bona fide place of business in that state for one or more additional contracts. The SBA explained that "[t]his clarification is specifically intended to apply to the situation where a business concern is performing a construction contract in a specific location, the procuring activity like the work done by the business concern and seeks to award an 8(a) construction contract to the same business concern in the same location as the previous contract."

This exemption, however, is limited to only the state where the 8(a) entity is currently performing a contract. An 8(a) entity could not use contract performance in one state to allow it to be eligible for an 8(a) contract in a contiguous state unless the 8(a) entity officially establishes a bona fide place of business in the location in which it is currently performing a contract (or in that contiguous state or another state touching that contiguous state).

- An 8(a) entity can establish a bona fide place of business through a full-time employee in a home office, defined as an employee working at least 20 hours a week in that location. The individual designated as the full-time employee of the 8(a) entity seeking to establish a bona fide place of business in a specific geographic location need not be a resident of the state where he/she is conducting. Nor is there a requirement that the individual permanently reside in that location. An 8(a) entity merely needs to demonstrate that one or more employees are operating in an office within the identified geographic location and can rotate employees in and out of a specific location as it sees fit, as long as one individual (but not necessarily the same individual) remains at that location.
- For a single award 8(a) construction contract requiring work in multiple locations, an 8(a) entity is eligible if it has a bona fide place of business where a majority of the work is to be performed. This will be determined by the dollar value (including anticipated dollar value for indefinite quantity contracts) of the work to be performed.
- For a multiple award 8(a) construction contract, an 8(a) entity must have a bona fide place of business in any location where work is to be performed.

Ostensible Subcontractor Rule (redesignated §121.103(h)(3))

The SBA adopted language clarifying that, for construction contracts, the primary and vital requirements of the contract, which must be performed by the small business prime contractor, are to supervise, oversee, manage, and schedule the work on a contract, including coordinating the work of various subcontractors, and not to the actual construction or specialty trade construction work.

The SBA also clarified the rule to make it clear that the limitations on contracting provisions do not override the ostensible subcontractor rule. The intent was to clarify that a small business cannot perform 15 percent of the contract but subcontract out all the supervision and oversight responsibilities to another business entity.

SBA also adopted new language addressing the factors the SBA will apply when considering the ostensible subcontractor rule. Specifically, SBA adopted two of the four factors considered in a test created by Office of Hearings and Appeals (OHA) in the case Size Appeal of Dover Staffing, Inc., SBA No. SIZ-5300 (2011). The four factors from that case are:

1. the proposed subcontractor is the incumbent contractor and ineligible to compete for the procurement,
2. the prime contractor plans to hire the large majority of its workforce from the subcontractor,
3. the prime contractor's proposed management previously served with the subcontractor on the incumbent contract, and
4. the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.

The two factors from this test that the SBA expressly adopted are: whether the prime contractor's proposed management previously served with the subcontractor on the incumbent contract, and whether the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.

The SBA also made it clear that these are only factors to consider, and that no single factor is determinative:

> SBA agrees that the ultimate determination in every case depends upon who is performing the primary and vital requirements of a contract or order and whether a prime contractor is unusually reliant on a subcontractor. SBA also agrees that no factor is determinative and that a prime contractor should be able to use the experience and past performance of its subcontractors to strengthen its offer, even where a subcontractor is the incumbent contractor. As with the existing rule, SBA intends to consider all aspects of the prime contractor's relationship with the subcontractor and would not limit its inquiry to any enumerated factors. SBA continues to believe that the SBA Area Offices should be given discretion to consider and weigh all factors in rendering a formal size determination, and that unique circumstances could lead to a result that does not fully align with the *Dover Staffing* analysis. That being said, SBA believes that identifying factors that can be considered is helpful to contractors. As such, the final rule retains factors that SBA may consider but adds a provision identifying that no single factor is determinative. The final rules also specifically clarifies that a prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. It also re-enforces that it is only where that subcontractor will perform primary and vital requirements of a contract or order, or where the prime contractor is unusually reliant on the subcontractor, that SBA will find the subcontractor to be an ostensible subcontractor.

Limitations on Subcontracting (§ 125.6)

The SBA adopted language providing that, on a multiagency set-aside contracts, where more than one agency can issue orders under the contract, compliance with the applicable limitations on subcontracting will be measured order by order by each ordering agency.

The SBA also added language providing that a contracting officer cannot give a satisfactory/positive past performance evaluation for the appropriate evaluation factor or subfactor to a contractor on any set-aside

contract (small business set-aside; 8(a); WOSB; HUBZone; or SDVOSB) that the contracting officer determined did not meet the applicable limitation on subcontracting requirement at the conclusion of contract performance. The final rule, however, also gives the small business contractor the opportunity to explain and demonstrate that the failure to meet the limitations on subcontracting requirements was outside of the contractor's control:

> Whenever a contracting officer determines at the conclusion of contract performance that a small business did not meet the applicable limitation on subcontracting on any set-aside contract, the final rule would first give the business concern the opportunity to explain contributing circumstances that negatively impacted its ability to do so. The final rule adds language authorizing a contracting officer to give a satisfactory or positive past performance evaluation for the appropriate evaluation factor or sub-factor to a contractor that did not meet the applicable limitation on subcontracting requirement where the contracting officer determines that the reason for noncompliance was outside of the firm's control and an individual at least one level above the contracting officer concurs with that determination. Examples of extenuating or mitigating circumstances that could lead to a satisfactory/positive rating include, but are not limited to, unforeseen labor shortages, modifications to the contract's scope of work which were requested or directed by the Government, emergency or rapid response requirements that demand immediate subcontracting actions by the prime small business concern, unexpected changes to a subcontractor's designation as a similarly situated entity (as defined in § 125.1), differing site or environmental conditions which arose during the course of performance, force majeure events, and the contractor's good faith reliance upon a similarly situated subcontractor's representation of size or relevant socioeconomic status. The contracting officer could not rely on any circumstances that were within the contractor's control, or those which could have been mitigated without imposing an undue cost or burden on the contractor. Without this discretionary authority, SBA agrees that long-term deleterious consequences could result to otherwise well-performing small business prime contractors.

8(a) Business Activity Targets (§ 124.509)

8(a) entities may not be eligible to receive sole source 8(a) awards if they are not meeting their applicable 8(a) business activity targets, unless the 8(a) entity is making good faith efforts to meet those targets The final rule adopted language clarifying what constitutes good faith efforts:

- Demonstrating that the 8(a) entity submitted offers for one or more non-8(a) procurements which, if awarded during its just completed program year, would have given the 8(a) entity sufficient revenues received during that year to achieve the applicable non-8(a) business activity target for its just completed program year, or
- Identify extenuating circumstances that adversely impacted its efforts to obtain non-8(a) revenues, such as (but not limited to) a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, or having one or more prime contractors award less work to the 8(a) entity than originally contemplated.

Additionally, the SBA determined that, instead of changing the regulations to require 8(a) entities to submit interim financial statements for purposes of evaluating the entity's compliance with business activity targets when a program year did not match the entity's fiscal year, the SBA will continue to allow 8(a) entities to estimate as best they can program year revenues for both 8(a) and non-8(a) activities. The SBA concluded that "it could be burdensome on some businesses to report sales estimates based on interim reporting periods spanning different fiscal years where they do not currently prepare interim quarterly statements." However, 8(a) entities are given the

option to provide program year sales reporting based on entity's interim financial statement figures, which may be prepared in-house.

8(a) Business Development Plans (§ 124.402; § 124.403)

The final language clarifies that the SBA must approve an 8(a) entity's business plan before the firm is eligible to receive 8(a) contracts. However, the new language also prioritized business plan approval for any firm that is offered a sole source 8(a) requirement or is the apparent successful offeror for a competitive 8(a) requirement. The SBA noted:

> Currently, SBA generally performs an eligibility determination (either for a sole source offering or a competitive award) within five days, unless SBA seeks and a procuring agency agrees to a longer period. SBA's intent is to review and approve business plans within that same five-day period. Thus, SBA does not envision any additional time being added to the normal eligibility review timeframe.

The SBA also clarified that 8(a) entities do not need to submit a business plan each year if nothing has changed in that plan. An 8(a) entity must submit a new or modified business plan only if its business plan has changed from the previous year.

Sole Source 8(a) Awards Under MACs and Business Activity Targets (§ 124.509)

The SBA adopted language providing that compliance with 8(a) business activity target requirements will be considered before SBA will accept a sole source 8(a) order on behalf of a specific 8(a) entity under a multiple award contract. Similarly, where an agency seeks to issue a sole source order to a joint venture, the SBA will review and determine whether the lead 8(a) partner to the joint venture is in compliance with any applicable competitive business mix target established or remedial measure. Therefore, 8(a) entities will have to be in compliance with their BAT targets to receive a sole source award under a MAC, at the time of award and including when they are members of a joint venture.

Determination of Size for 8(a) Sole Source Contracts Under Multiple Award Contracts (§ 121.404)

The SBA adopted language clarifying that an 8(a) entity must still be small when awarded a sole source 8(a) order under a MAC, even if the 8(a) was small when it initially received the MAC. Accordingly, firms that have graduated from or otherwise left the 8(a) program are not eligible for any 8(a) sole source orders under a MAC. The SBA explained that "[it] has always been SBA's interpretation of its statutory authority that a firm must be an eligible Participant on the date of any 8(a) sole source award. As noted, an eligibility determination includes size."

Determination of Size for Multiple Award Contracts (§ 121.404)

The SBA adopted language clarifying that for orders issued under any contract set aside for small business, size will be determined at the time of offer for the multiple award contract and not at the time of each individual order unless a contracting officer requests size recertification with respect to an individual order.

The SBA, however, rejected requests by commentators to apply the same rule to orders under unrestricted MACs that are set aside for small businesses, reasoning that the first time that the size of a concern is important in the context of unrestricted MACs is when an order under that MAC is set aside for small businesses:

> A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted multiple award contract. As such, competitors are very unlikely to protest the

size of a concern that self-certifies as small for an unrestricted multiple award contract. In SBA's view, when a contracting officer sets aside an order for small business under an unrestricted multiple award contract, the order is the first time that size status is important because competition is being limited under the contract. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. SBA never intended to allow a firm's self-certification for the underlying unrestricted multiple award contract to control whether a firm is small at the time of an order is set-aside for small business years after the multiple award contract was awarded. These few commenters believed that SBA attempted to retroactively change the rules pertaining to previously awarded unrestricted multiple award contracts. SBA disagrees. Small business set-aside orders under unrestricted vehicles are completely discretionary. When a contracting officer exercises this discretion, Federal Acquisition Regulation (FAR, Title 48 of the Code of Federal Regulations) Part 19 and SBA rules apply and change the eligibility requirements of the contract for that order. For example, the contractor must comply with the applicable limitations on subcontracting for that order (whereas the limitations on subcontracting do not generally apply to unrestricted contracts). When a procuring agency for the first time decides to set aside a specific order under an unrestricted multiple award contract for small business, the agency is making an exception to the fair opportunity regularly provided to all the contract holders to be considered for each order under the unrestricted contract. Thus, it follows that a business concern must qualify as small for an order set aside for small business under SBA's regulations in effect at the time of the order to ensure that the exception is applied appropriately at the order level because being a small business concern was not a requirement for any awardees under the unrestricted contract and verifying awardees' size status was not prerequisite to awarding the unrestricted contract. Moreover, the applicable size standard for any specific order set-aside for small business would be the one currently codified in SBA's regulations (not the one that was in effect at the time the underlying multiple award contract was awarded). All firms that self-certified as small for the underlying multiple award contract will continue to be considered to be small businesses for goaling purposes for all orders issued under the multiple award contract on an unrestricted basis.

The SBA's rejection of the request to permit small businesses to qualify for small businesses set-asides under unrestricted MACs based on their size at the time of award of the MAC, as opposed to the order under the MAC, is a helpful reminder that, for small business set asides under an unrestricted MAC, the offeror must be small:

- at the time of offer in regards to the order, and
- under the size standard applicable at the time of the offer, and not the size standard applicable at the time of award of the MAC

Sole Source Awards Joint Ventures Under an 8(A) Multiple Award Contract (§ 121.513)

The SBA clarified that a the sole source order can be issued to an 8(a) joint venture under a 8(a) MAC more than two years after the date the joint venture received its first contract award. Nor will the SBA have to review and approve a joint venture where the joint venture had already been awarded a competitive 8(a) MAC and is seeking a sole source 8(a) order under that MAC at some point during the performance period of the contract.

8(a) Awards and Federal Supply Schedule

The SBA clarified that the GSA's procedures for issuing orders under the Federal Supply Schedule (FSS) should be used when an agency seeks to issue an 8(a) award under the FSS. The SBA also explained that, "An agency need not open the order up to competition among all FSS contract holders claiming 8(a) status. However, an agency

must consider the quote from any FSS contract holder claiming 8(a) status who submits one. As with 8(a) orders issued under unrestricted multiple award contracts, however, the apparent successful offeror for an 8(a) order under the FSS must be an eligible Participant as of the initial date specified for the receipt of offers contained in the request for quote, or at the date of award of the order if there is no solicitation."

Joint Ventures (§121.103(h))

The SBA reorganized the introductory paragraph and added a new § 121.103(h)(1) to make the introductory paragraph more understandable.

The SBA also adopted language clarifying that the award of contracts and orders to joint ventures by adding a sentence to section 121.103(h) stating that orders may be issued under previously awarded IDIQ/MAC contract in years 3, 4, 5, etc. of an IDIQ/MAC. This was added because the restriction on awarding contracts to joint ventures more than two years after the joint venture receives its first award only applies to "additional contracts, not continued performance on contracts already awarded." Therefore, a joint venture that receives an IDIQ/MAC can receive orders under that contract for the lifetime of that contract.

The SBA also updated section 121.103 to state that the restriction on populated joint ventures only applies to contracts set aside or reserved for small business—i.e., small business set-aside, 8(a), women-owned small business (WOSB), HUBZone, and service-disabled veteran-owned small business (SDVOSB) contracts.

The rule also added language stating that a *populated* joint venture can be awarded a contract set aside for small business where each of the partners to the joint venture are similarly situated (e.g., both partners to a joint venture seeking a HUBZone contract were certified HUBZone small business concerns). However, any time the size of a populated joint venture is questioned, the rule provides that the SBA will aggregate the revenues or employees of all partners to the joint venture and the joint venture will qualify as small only where the parties to the joint venture meet the applicable size standard in the aggregate. As such, populated joint ventures can qualify for small business set asides only if (1) both members of the populated joint venture are small or qualify for the set aside, and (2) the combined revenue or employees of both of the members of the populated joint venture are less than applicable size standard.

The SBA justified this approach by concluding that a populated joint venture is not a company formed for a limited purpose and duration, unlike unpopulated joint ventures:

> SBA has consistently stated its view that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. Where two or more parties form a separate business entity (e.g., a limited liability company or partnership) and populate that entity with employees intended to perform work on behalf of that entity, SBA similarly views that as an ongoing business entity and will aggregate the receipts/employees of the parties that formed the separate business entity in determining its size.

Guidance Regarding What Decisions Non-Managing Partners To A Joint Venture Can Participate In (§ 125.8)

The SBA adopted language specifically stating that a joint venture operating agreement or joint venture agreement may provide that the non-managing venturer's approval is required before beginning litigation on behalf of the joint venture. The SBA explained that "A joint venture is a mutual agreement between joint venture

partners to combine resources for a specific contract or contracts, and litigation is sometimes required to protect those resources. Litigation on behalf of the joint venture is a decision that carries significant risk for both partners and as a result, it is unreasonable and outside the bounds of customary commercial practices to limit that decision to only one partner."

The SBA also clarified that the decision over whether a joint venture should pursue a particular contract opportunity is also something that a joint venture operating agreement or joint venture agreement can require the consent of a non-managing venturer:

> Similarly, SBA believes that requiring the concurrence of a non-managing joint venture partner in deciding what contract opportunities the joint venture should seek is also something that would be commercially customary. The partners to a joint venture have formed a joint venture in order to seek contract opportunities. Since the parties will be jointly and severally liable for any contracts awarded to the joint venture, it makes sense that all parties to the joint venture should have a say in what opportunities the joint venture pursues. The final rule adds language specifying that a non-managing venturer's approval may be required in determining what contract opportunities the joint venture should seek and in initiating litigation on behalf of the joint venture.
>
> The SBA also stated in the final rule that this language is not intended to limit the decisions in which a non-managing partner may participate in, but rather is illustrative of the right of non-managing partners to engage in "corporate governance activities and decisions of the joint venture that SBA believes non-managing venturer participation is commercially customary."

Receipts/Employees Attributable To Populated Joint Venture Partners (Redesignated § 121.103(H)(4))

For populated joint ventures, SBA adopted language providing that revenues should be divided by ownership interest, regardless of the joint venture partners' actual share of the work

> Where a joint venture is populated, each individual partner to the joint venture does not perform any percentage of the contract – the joint venture entity itself performs the work. As such, revenues cannot be divided according to the same percentage as work performed because to do so would give each partner $0 corresponding to the 0% of the work performed by the individual partner. In such a case, SBA believes that revenues must be divided according to the same percentage as the joint venture partner's percentage ownership share in the joint venture.

Recertification of Size by Joint Ventures (§ 121.404g))

The SBA added language providing that a joint venture can recertify its status as a small business where all parties to the joint venture qualify as small at the time of recertification, or the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification. The new language also clarifies that recertification by a joint venture is not a new contract award, and thus can occur even if its timing is more than two years after the joint venture received its first contract.

Eligibility Determination For Joint Ventures in Competitive Procurements (§ 124.501(g))

The SBA clarified that where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement, SBA will determine whether the 8(a) partner to the joint venture is eligible for award but will not review the joint venture agreement to determine compliance with § 124.513 ("Under what circumstances can a

joint venture be awarded an 8(a) contract?") This lack of review of the joint venture agreement also applies where a joint venture is offered a sole source order under a previously awarded competitive 8(a) multiple award contract:

> SBA also proposed to clarify that where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement, SBA will determine whether the 8(a) partner to the joint venture is eligible for award but will not review the joint venture agreement to determine compliance with § 124.513. SBA believes that there was some confusion as to what an eligibility determination entailed in the context of a competitive 8(a) joint venture apparent successful offeror. The proposed rule sought to make clear that SBA's determination of eligibility relates solely to the 8(a) partner to the joint venture and does not represent a full review of the 8(a) joint venture under § 124.513. SBA received three comments supporting this clarification regarding the eligibility of a joint venture offeror, and no comments opposing it. One commenter also requested clarification as to whether a review of the joint venture agreement is required where a joint venture is offered a sole source order under a previously awarded competitive 8(a) multiple award contract. SBA does not believe that SBA should review the joint venture agreement itself in this context. The underlying contract is an 8(a) competitive award. SBA's regulations do not require review of joint venture agreements with respect to 8(a) competitive awards. Once awarded, SBA does not believe it should review joint venture agreements in connection with one or more individual sole source orders under the 8(a) multiple award contract.

Removal From Competition To Award To Entity-Owned 8(A) (§ 124.506(B)(3))

Section 124.506(b)(2) provides that a procurement may not be removed from competition to award it to a Tribally-owned, ANC-owned or NHO-owned concern on a sole source basis. The SBA explained that this provision was meant to apply only to a current procurement, not the predecessor to a current procurement, such that a follow-own requirement to an 8(a) contract can be awarded on a sole source basis to an entity-owned firm.

The final rule clarifies that:

> A procuring agency may not evidence its intent to fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant. A follow-on procurement is a new contracting action for the same underlying requirement, and if the procuring agency has not evidenced a public intent to fulfill it as a competitive 8(a) procurement it can be fulfilled on a sole source basis to an entity-owned Participant.

The SBA declined to adopt language requiring SBA to consider the effect that losing an opportunity to compete for a follow-on contract would have on an incumbent's business development where the follow-on procurement is offered to SBA as a sole to entity-owned 8(a). The SBA explained that "a specific regulatory change is not needed to capture SBA's role in ensuring that the business development purposes of the 8(a) BD program are served."

Performance of Work Requirements (§ 125.8(b)(2)(xii) and § 125.8(h)(2))

In response to commenter requests, SBA clarified the schedule for the submission of a performance-of-work reports: first, at the completion of the contract; and second, whenever requested to do so by SBA or the contracting officer prior to completion of the contract.

Release of Follow-Own Requirements From the 8(a) program

The SBA clarified that it will ***not*** always release a requirement from the 8(a) program if the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside. Instead, the SBA will have the discretion to do so. The SBA explained that while the fact that a "procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside is a positive factor for release, but SBA must still consider any adverse consequences to an incumbent 8(a) Participant."

The SBA also clarified that release may occur whenever a procuring agency identifies a procurement strategy that would emphasize or target small business participation, and explained that the SBA was rejecting "a strict reading of the rule would not allow release where an agency seeks to award a follow-on requirement as a set-aside order under a multiple award contract that is not itself a set-aside contract." The SBA stated that "[a]s long as an agency identifies a procurement strategy that would target small businesses for a follow-on procurement, release may occur."

Size Protests (§ 121.1001)

The SBA revised the regulations governing who can file a size protest so that it is consistent across all of the small business programs (i.e. 8(a), HUBZone, WOSB, and SDVOSB programs). The revised language adopts the language currently pertaining to small business set-asides and competitive 8(a) contracts to all of SBA's programs. Thus, any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason could initiate a size protest in each of those programs.

The adopted language also confirms that a firm determined to be ineligible for a competitive 8(a) award based on size to request a formal size determination.

In the case of sealed bids, the SBA also adopted language that, where an identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder would be deemed timely if received within five business days after the contracting officer has notified the protestor of the identity of that new low bidder. This addresses the situation where a low bidder is timely protested and found to be ineligible, the procuring agency identifies another low bidder, and an interested party seeks to challenge the size or socioeconomic status of the newly identified low bidder. In such a situation, the new low bidder is identified well beyond five days of bid opening, and, under the prior version of the regulations, an interested party could no longer file a timely protest (i.e., one within five days of bid opening).

The SBA also addressed size protests after agency corrective action. Under the new regulation, where an agency decides to reevaluate offers as a corrective action in response to a size protest that may result in a new apparent successful offeror, the SBA will dismiss any pending size protest. When offerors are made aware of the new or same apparent successful offeror after reevaluation, the revised language authorizes them to again have the opportunity to protest the size of the apparent successful offeror within five business days after such notification. This applies to an agency level protest, a protest at GAO or a case filed regarding the affected procurement at the Court of Federal Claims.

If the agency demonstrates to the SBA that the corrective action will not change the apparent successful offeror, the SBA will not dismiss the size protest and will proceed with resolving it.

Determination of Size After Sale or Acquisition (§ 121.404)

The SBA also clarified that, after the sale or purchase of an ownership interest in a small business, recertification of size is required only where the sale or acquisition results in a change in control or negative control of the concern. Recertification is not required where small sales or acquisitions of stock that do not appear to affect the control of the selling or acquiring firm occur.

Updates to Size Status in SAM.gov (§§ 121.1009(g)(5), 126.503(a)(2), 127.405(d), and 128.500(d))

Section 863 of the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY22), Pub. Law 117-81, requires small businesses to update their size status in SAM.gov no later than two days after a final determination by SBA that the concern does not meet the size or socioeconomic status requirements that it certified to be. The final rule adopts regulations implementing this requirement across all of the SBA's small business programs. The new regulations also clarified that "[i]f a participant or applicant has appealed SBA's determination, the two-day requirement does not apply until OHA issues a final decision finding the firm ineligible. If there is no appeal available, the two-day requirement applies immediately after the firm receives SBA's determination that the firm is ineligible. If an appeal is available but the firm ultimately chooses not to appeal the decision, the two-day requirement applies immediately after the right to appeal lapses."

In adopting this rule, the SBA also addressed what happens if an 8(a) participant fails to update their SAM.gov status to reflect that they have been determined to be other than small, or fails to notify agencies of that change in their size status, while a firm has a pending offer. The SBA explained that:

> Failure to do so in that instance could lead to protests or penalties. Initiating a debarment or suspension action depends on the facts. If the only thing a firm did was not change its status in SAM.gov within two days, SBA does not believe that would be sufficient cause for debarment or suspension. Failure to notify contracting officers on pending procurements of a firm's change in status could be if SBA believed there was an intent to misrepresent the firm's status in order to win an award. Submitting offers for new set-aside awards would be. Similarly, failure to take timely action to allow an SBA status change to be reflected on the firm's SAM.gov profile could also be grounds for government-wide debarment or suspension if SBA believed that the firm's failure to accept the change was an intent to conceal the status change or otherwise deceive procuring agencies of its current status. SBA does not believe that that needs to be addressed in this regulation as the debarment and suspension regulations provide authority to initiate actions where a firm intentionally misrepresents its size or status.

Supply Contracts and Waivers (§ 121.1203 and § 121.1204)

The Small Business Act provides that in a contract mainly for supplies a small business concern shall supply the product of a domestic small business manufacturer or processor unless a waiver is granted after SBA reviews a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including the period of performance) required by the contract. The final rule clarifies that a waiver need not be sought where at least 50% of the estimated contract value of the items to be procured are manufactured by small business concerns. The final rule also clarifies that a contracting officer need not seek a waiver for each item for which the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer, but rather must seek a waiver with respect to such items in an amount that would bring the total estimated value of items to be supplied by small business and items subject to a waiver to be at least 50% of the value of the contract.

The SBA's final rule also explains that a waiver request can state spare parts relating to a particular piece of equipment as an item for which a waiver is sought, as opposed to identifying individual small part:

> However, SBA also understands the concern that specifying every part of a multifaceted end item could be overly burdensome. For example, aircraft X has many thousands of parts that make up the aircraft. To specify every part of the aircraft that might need to be replaced as a separate item for which a waiver must be sought would be burdensome. SBA does not expect that. In such a case, the waiver request should state spare parts relating to aircraft X as the item for which a waiver is sought. However, a waiver request cannot be so broad as to have no real identification (e.g., all medical supplies).

The SBA also clarified that the waiver cannot exceed five years, and that the procuring agency would need to obtain a new waiver for any contract awarded after five years.

8(a) Applications and Eligibility for the 8(a) Program

SBA adopted language providing that if a firm is denied entry into the 8(a) program because of their size, that entity can request a formal size determination and, if that determination finds they are small, the Associate Administrator for Business Development can admit them to the 8(a) program without requiring the firm to reapply.

Identification Of Those Persons Who May Be Considered Economically Disadvantaged

SBA's final rule requires an individual to provide retirement account information only upon request by SBA and deletes a duplicative regulation that excluded income from an applicant or Participant that is an S corporation, a limited liability company, or a partnership where the income was reinvested in the firm or used to pay taxes that arose in the normal course of operations of the firm.

Ownership Of Protégé By Mentor In The Same Line Of Business Entity (§ 124.105)

The SBA adopted language clarifying that a mentor could own up to 40% of a protégé, even where the mentor and protégé are in the same line of business. Normally, a non-disadvantaged person or entity in the same or similar line of business or a principal of such concern may generally not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program.

Transfer Of Ownership From One Disadvantaged Individual To Another; No Waiver Required; Time Frame For SBA Approval Of Waivers (§ 124.105(I); § 124.515)

Under § 124.515, when ownership of an 8(a) entity is transferred to a new entity, any existing 8(a) contracts are terminated unless the SBA grants a waiver. The SBA adopted new regulations providing that any 8(a) entity, or former 8(a) entity that is performing one or more 8(a) contracts, may substitute one disadvantaged individual or entity for another disadvantaged individual or entity without requiring the termination of those contracts or a request for waiver under § 124.515, as long as it receives SBA's approval prior to the change.

The final rule provides that waiver requests will be processed within 90 days of receipt of a complete waiver package by the AA/BD.

The SBA also clarified that, when considering transfer of ownership of an 8(a) entity from on eligible participant to a second eligible participant, the only issue for the SBA to evaluate is whether the "acquiring firm is an eligible

Participant prior to the transfer. As such, the final rule deletes the last sentence of current § 124.515(d), which restricted the transfer of 8(a) contracts to another Participant that had not previously performed work similar to that being transferred."

Aggregating The Interests Of Immediate Family Members In Calculating Total Interest Of A Non-Disadvantaged Individual Involved In A Change Of Ownership (§ 124.105(l))

SBA regulations permit a change of ownership to occur without receiving prior SBA approval in certain specified circumstances, including where all non-disadvantaged individual owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction. To ensure that ownership interests are not divided up among two or more individuals to avoid SBA's immediate review of a change of ownership, the revised language provides that SBA will aggregate the interests of all "persons with an identity of interest" (as defined in § 121.103(f)) in determining whether a non-disadvantaged individual involved in a change of ownership has more than a 20 percent interest in the concern.

Potential For Success (§ 124.107)

The SBA clarified that when determining if an entity has reasonable prospects for success in competing in the private sector, a requirement for entry into the 8(a) program, there is no requirement that the entity has performed private sector work. They may rely on successful performance of state, local or federal government contracts.

Ineligibility To Participate In The 8(A) BD Program On The Basis Of Failure To Resolve Financial Obligations To The Federal Government; Clarifying Language To Permit Participation The 8(A) BD Program Upon Proof Of Settlement Or Discharge/Forgiveness Of Obligations By Federal Government (§ 124.108)

An applicant is ineligible for the 8(a) BD program where the firm or any of its principals has failed to pay significant financial obligations owed to the Federal Government. The SBA adopted language clarifying that if the Government has settled a debt (i.e., accepting less than the full amount owed to discharge the debt), the firm/individual would not be barred from participating in the 8(a) BD program on that basis alone.

Required Waivers Of Sovereign Immunity By Tribes (§ 124.109)

The SBA added language demonstrating that the requirement that Tribes waive sovereign immunity with respect to their 8(a) entity only applies to Federally-recognized Tribes, as state recognized Tribes do not need to waive sovereign immunity because they are already subject to suit.

The SBA also clarified the manner in which concerns that are organized under tribal law may waive their sovereign immunity, provided that such entities waive sovereign immunity in any documents authorized under tribal law that are similar to articles of incorporation, partnership agreements or limited liability company articles of organization.

Finally, as Tribes may not have tax returns (and the SBA requests the past two years of tax returns from applicants in evaluating their potential for success), the final rule added a provision allowing a tribally-owned applicant to submit financial statements demonstrating that it has been in business for at least two years with operating revenues in the primary industry in which it seeks 8(a) certification.

Elimination Of The Requirement That A Concern Compare Its Financial Condition To Non-8(A) BD Business Concerns The Same Or Similar Line Of Business In Order To Determine If The Firm Is Economically

Disadvantaged For Purposes Of Graduation (§ 124.302)

The SBA had removed the requirement that a concern's financial condition be compared to non-8(a) business concerns in the same or similar line of business when determining if the concern is economically disadvantaged. The same requirement, however, remained in § 124.302(b), when addressing graduation from the 8(a) program. The final rule removes language requiring a comparison of an 8(a) entity to non-8(a) businesses.

Immediate Termination From The 8(A) Program After Ceasing Of Business Operations (§ 124.304)

The SBA adopted language clarifying that where SBA obtains evidence that an 8(a) entity has ceased its operations, the SBA may immediately terminate a concern's participation in the 8(a) BD program by notifying the concern of its termination and right to appeal that decision to OHA. The SBA would not have to follow the normal 30 day notice period for termination.

Limiting Competition to Small Business Programs Entities (§§124.501, 126.609, 127.503(e), and 128.404(d))

The SBA adopted language clarifying and the SBA will not accept a contract into the 8(a), HUBZone, WOSB, or SDVO programs that seeks to limit competition only to entities that are participants in two or more small business programs (i.e. limiting competition to just 8(a) entities that are also HUBZone eligible), rather than allowing competition among all eligible entities (i.e. all 8(a) entities, HUBZone or not). The SBA also adopted language prohibiting procurement agencies from awarding extra evaluation points or any evaluation preference to firms having one or more additional certifications.

The SBA also to clarified § 124.501(b) to provide that an agency may award an 8(a) sole source order against a multiple award contract that was not set aside for competition only among 8(a) entities.

Moving Work Previously Performed Under An 8(A) Contract To An 8(A) MAC (§ 124.503(I))

The SBA expressed concern that when moving a procurement from an 8(a) sole source or competitive procurement to an 8(a) multiple award contract to which the incumbent is not a contract holder could hurt the incumbent by preventing them from competing for the follow-on work. The SBA clarified § 124.503 to state that an agency must notify SBA where it seeks to issue an order under an 8(a) multiple award contract that contains work that was previously performed through another 8(a) contract and that, where that work is critical to the business development of a current 8(a) entity that previously performed the work through an 8(a) contract and that entity is not a contract holder of the 8(a) multiple award contract, SBA may request that the procuring agency fulfill the requirement through a competition available to all 8(a) entities.

Restriction on Being a Member of More Than One Joint Venture Submitting A Proposal (§§ 124.513(a), 126.616(a)(2), 127.506(a)(3), and 128.402(a)(3))

The SBA adopted regulations barring an entity from being a joint venture partner on more than one joint venture that submits an offer for a specific small business contract. The restriction on being a member of more than one joint venture applies to all contracts or orders set-aside or reserved for the 8(a), HUBZone, WOSB, or SDVO programs.

Sole Source Awards To Individually-Owned 8(A)S

The SBA adopted language providing that the SBA can accept sole source awards to individual-owned 8(a) entities in amounts that exceed:

- the $4.5M and $7M competitive threshold amounts set forth in § 124.506(a)(2) where a procuring agency has determined that one of the exceptions to full and open competition set forth in FAR 6.302 exists; and
- $25M, or $100M for a Department of Defense (DoD) agency, the proposed rule also clarified that the agency would be required to justify the use of a sole source contract under FAR 19.808-1 or Defense Federal Acquisition Regulation Supplement (DFARS) 219.808-1(a)

The SBA explained that "[a]lthough those justifications and approvals generally apply to sole source 8(a) contracts offered to SBA on behalf of entity-owned Program Participants, the FAR and DFARS justification and approval provisions are not restricted to entity-owned Participants. Instead, those provisions apply to any 8(a) sole source contract that exceeds the $25M or $100M threshold. As such the proposed rule merely added language to clarify what SBA believes the current requirement is and does so in order to avoid any confusion."

Inclusion of BPAs in Definition of Bundling (§ 125.1)

The SBA adopted new language specifically including blanket purchase agreements (BPAs) in the list of contracting vehicles that are covered by the definitions of consolidation and bundling.

The SBA explained that:

> SBA routinely sees consolidation in BPAs. Bundling on a BPA has the same detrimental effect on small-business incumbents as bundling on other vehicles, such as contracts or orders. Regardless of whether the resulting requirement is a BPA, the bundled action will convert multiple small business contracting actions into a single action to be awarded to a large business. If agencies are not required to follow SBA regulations regarding notification and a written determination for bundled BPAs, the small business incumbents may not know that work that they are currently performing has been bundled and moved to a single award to a large business and may not have the opportunity to challenge such action. Awarding a requirement as a BPA does not lessen the negative impact of bundling on small businesses, and, therefore, SBA proposes to incorporate into the regulations its current belief that the bundling and consolidation rules should apply with equal force where the resulting award will be a BPA.

The SBA also adopted language clarifying that the analysis, determination, and notification requirements for consolidation or bundling apply when existing requirements are combined with new requirements:

> Additionally, several procuring agencies have asserted that the analysis, determination, and notification requirements for consolidation or bundling do not apply when existing requirements are combined with new requirements. SBA disagrees. There is no basis in statute, regulation, or case law for agencies to interpret "requirement" as excluding a combination of existing and new work. The statutory language speaks solely to the value of existing work. As long as the combined existing work is greater than $2 million, the statute defines it to be consolidation. New work is not relevant to that determination. To eliminate any confusion, the proposed rule clarified SBA's current position that agencies are required to comply with the Small Business Act and all SBA regulations regarding consolidation or bundling regardless of whether the requirement at issue combines both existing and new requirements into one larger procurement that is considered to be "new." Commenters agreed that "consolidation" and "bundling" can occur regardless of whether an agency adds additional new requirements to a procurement or whether the overall requirement can be considered "new" due to its increase in scope, value or magnitude. SBA adopts that language in this final rule.

As such, an analysis comparing the cumulative total value of all separate smaller contracts with the estimated cumulative total value of the bundled procurement is required as part of the analysis of whether bundling is necessary and justified.

Inclusion of Indirect Costs In Subcontracting Plans (§ 125.3)

The SBA adopted new language stating that:

- prime contractors are required to include indirect costs in the individual subcontracting plans and reports; other contractors may continue to choose whether or not to continue to include them;
- including indirect costs in individual subcontracting plans and reports is required only for contracts valued at $7.5 million or more; and
- prime contractors may rely on a pro-rata formula to allocate indirect costs to covered individual contracts, to the extent that the indirect costs are not already allocable to specific contracts.

The SBA explained that:

> Currently, large businesses have the option of including or excluding indirect costs in their individual subcontracting plans. Many large businesses opt to exclude indirect costs. As a result, small businesses that provide services generally considered to be indirect costs – such as legal services, accounting services, investment banking, and asset management – are often overlooked by large contractors. SBA stated that by requiring indirect costs to be included in their individual subcontracting plans, large businesses will have an incentive to give work to small businesses that provide those services.

Mentor-Protégé Program (§ 125.9)

The SBA adopted language providing that when a mentor purchases another business entity that is also an SBA-approved mentor of one or more protégé small business concerns and the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement(s), that entity may have more than three protégés. In such a case, the entity could not add another protégé until it fell below three in total.

The SBA also adopted new language permitting a small business to enter into a mentor-protégé agreement with a larger entity that has multiple subsidiaries, and to provide in that agreement that any one (or all) of those subsidiaries of the mentor may provide assistance with, and joint venture with, the small business. The SBA explained that:

> In most cases, the parent mentor has experience in the primary industry of the protégé business concern. The protégé expects to joint venture with and gain experience from that parent mentor in that industry. However, if a subsidiary of the mentor has experience in a different industry in which the protégé seeks to enter, that subsidiary should be able to assist the protégé firm to gain experience in that distinct industry as well.

Finally, the SBA adopted language specifically permitting a second six-year mentor-protégé relationship with the same mentor.

HUBZone Ostensible Subcontractor Rule (§ 126.601(d))

The SBA clarified that where a subcontractor that is not a certified HUBZone small business will perform the primary and vital requirements of a HUBZone contract, or where a HUBZone prime contractor is unduly reliant on

one or more small businesses that are not HUBZone-certified to perform the HUBZone contract, the prime contractor would not be eligible for award of that HUBZone contract.

This article summarizes aspects of the law and does not constitute legal advice. For legal advice for your situation, you should contact an attorney.

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