PATTON BOGGS, LLP
GOVERNMENT CONTRACTS ALERT
October 27, 2009

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Tomorrow, Wednesday October 28, 2009, the Small Business Administration (SBA) will be publishing long-awaited proposed changes to the regulations governing the 8(a) program and to the size standards. We have reviewed an advance copy of the proposed new rules and offer the following brief summary of the proposed changes and the process being used, which we address first.

About the Rule-Making Process

This proposed change to the rules has been in the works for some time and we have provided some previous guidance at our conferences and elsewhere about what we anticipated would be included based on our knowledge of SBA, its regulatory agenda, and recent Government Accountability Office (GAO) and Office of Inspector General (OIG) investigations and reports. The major issues addressed by the proposed rules are consistent with what we anticipated.

Are these rules now in effect? NO.

These are only "proposed" changes to the rules. Under the Federal Administrative Procedure Act a proposed rule has to be published in the Federal Register and the public must be given an opportunity to submit comments on those proposed changes. Tomorrow the SBA will publish its Notice of Proposed Rule-Making (NPRM).

However, it is noteworthy that many of the proposed changes are intended to conform the regulations to SBA's actual practice or its interpretations. One should also expect that wherever discretion permits, SBA will attempt to conform future practice to the announced proposed rules. For this reason alone, it is worth investing the time and resources now to understand these proposed changes.

What happens next?

First, the public will have 60 days to submit written comments to SBA. We strongly encourage interested parties to carefully review the proposed rules and consider how those rules might impact their operations and the goals of the 8(a) program. We further encourage interested parties to file comments with the SBA offering any concerns, support or suggested changes to the proposed rules.

Second, because these rules impact Tribes, NHOs and ANCs SBA engaged in a tribal consultation process as they did a few years ago at AFN in Fairbanks and Denver. SBA has not stated any intent to have further consultation, but they are a possibility. Again, we encourage participation in any such consultation if they occur.

Third, SBA will almost certainly receive some input from the Congress, through the formal comment process and on a direct basis. Interested parties should consider sharing their thoughts, concerns and suggestions with their Congressional delegation and members of Congress with jurisdiction over small business and/or Indian policy matters.

Ultimately, SBA will evaluate all of the comments, consider whether to make changes to the proposed rules based on the input it has received, and then will publish a final rule in the Federal Register. Only then will any changes to the rules become effective.

When will the Final Rules be out? It's hard to say.

In recent significant rule makings SBA has taken two or more years to issue final rules after the close of the comment period. In at least one significant case they terminated the rule making process and declined to issue a new, final rule because of the significant opposition and difference of opinion that was received through the public comment process. There's also likely to be further action in the Congress related to the 8(a) program, which may cause SBA to have to pullback the rule making process to conform to any changes Congress imposes on the program.

So what should we do?

Again, at this point, take a close look at the proposed rule and consider how it will impact your operations and the overall goals of the 8(a) program. The rules are technical and have a great deal of nuance. We are available to help you work through the proposed rules, consider the practical impacts of them and prepare comments for submission to SBA. Finally, even though the proposed rules are not effective, many of them reflect a modification of the rules to conform with SBA's current practices of and interpretations of existing regulations

Summary of the proposed rules.

The SBA is proposing dozens of changes to the rules. We are highlighting a few of them here. First, SBA has proposed a number of rules that apply to the 8(a) program generally, including the following:

1. Tightening of mentor-protégé requirements and narrowing the exceptions to affiliation to cover only those federal mentor-protégé whose statutes specifically authorize an exception to affiliation, such as the DOD mentor protégé program. SBA may approve other agencies' programs for an affiliation exception at its discretion, but SBA cautions that it will exercise this discretion very cautiously.

2. Changing joint venture requirements to clarify that in a two year period a joint venture can receive three contracts (as opposed to merely submitting three proposals) and clarifying the calculation of the two year period. The proposed rule also clarifies that this limitation applies to joint ventures between mentors and their protégés in the 8(a) program. The SBA also has invited comment on whether parties should be able to form multiple joint ventures together.
3. Making clear that joint ventures involving an 8(a) concern must meet the requirements of a joint venture agreement even for procurements outside the 8(a) program such as small business set-aside contracts. SBA is also considering further limiting 8(a) mentor-protégé to preclude joint venturing on small business contracts.
4. Providing for early graduation from the 8(a) program where a concern has exceeded the size standard for its primary NAICS code in two successive years.
5. Other general changes address appropriate NAICS code designations for procurements for supplies, clarification to the nonmanufacturer rule, refining the definition of economic disadvantage for individuals, explicitly permitting the SBA OIG to initiate size determinations, and clarifying a number of definitions.

The proposed rules also address a significant number of issues impacting ANCs, Tribes, NHOs and CDCs participation in the 8(a) program (referred to here collectively as "Native 8(a)s"), including the following:

1. Tightening the requirements for new 8(a)s to be in separate lines of business from sister 8(a)s. Specifically, SBA is seeking comments on whether to preclude new 8(a)'s from receiving any contracts in the primary NAICS code of a sister company for two years after program admission, or alternatively limiting contracts under such a NAICS code to 20-30%.
2. Removing language requiring a tribal member manager to establish their disadvantaged status on an individual basis.
3. Seeking input on a better definition of "economic disadvantage" for Tribes.
4. Expanding the waiver of the potential for success (two years in operation) requirement for tribally-owned concerns to permit a waiver where the tribe (or ANC) has made a written commitment to support the on-going operations of the concern and has the resources to do so.
5. Requiring Native 8(a)'s to report on benefits to shareholders/tribal members as part of the annual update/review process.
6. Placing additional limitations on Native 8(a)'s mentor's participation in contracts awarded to a joint venture between the mentor and protégé. Specifically, SBA proposes to require that the 8(a) perform at least 40% of the work of the joint venture, and that the mentor could not receive subcontracts from the joint venture. (Note: the 40% requirement would apply to all 8(a) joint ventures, not just Native 8(a)s).

Again, these are just some highlights of the proposed rules. In word format, the notice is more than 120 pages in length, and there is considerable nuance and detail in each of the proposed changes.

The SBA's summary of the proposed rule also includes a description of several potential proposed changes which SBA has rejected, including a potential change that would have precluded the use of Native 8(a) joint ventures on contracts exceeding the competitive thresholds.

Finally, the SBA described in some detail the feedback it received from the ANC and Tribal community through the tribal consultations, and acknowledged the importance of the 8(a) program for overall Native economic development.

Again, this rule-making process has been in development for several years, but in many ways it is just getting started. The proposed rules will significantly impact participation in the 8(a) program. They also will create opportunities for those interested parties who can plan and adapt to meet the new mandates once they become effective. It is vital for interested parties to focus on these proposed changes now, to strongly consider filing comments on them, and to begin to adapt their practices, structures, and strategies to take the new rules into account. We would be happy to discuss these proposed changes with you further and how Patton Boggs can assist you in this process.

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