

LAPSED SBA MENTOR-PROTÉGÉ AGREEMENT MAKES JOINT VENTURE FIRMS AFFILIATED AND NO LONGER “SMALL”

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In *North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715, Feb. 17, 2016, the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) considered a size protest of a joint venture consisting of a large business and a small business that, at one time, had an SBA mentor-protégé agreement. Because the agreement had lapsed, OHA held that the joint venture was “not small” and not eligible for the procurement.

Generally, when two firms form a joint venture to perform a contract, the two firms will be considered affiliates for purposes of that contract, even though one firm may be small and in the 8(a) program. 13 C.F.R. §121.103(h). (Usually, joint ventures are examined only with respect to the particular procurement they bid on). When SBA calculates the size of a business to determine if it is a small business, it includes the annual receipts and the employees of *all* affiliates. 13 CFR §§121.104 & 121.106.

However, the SBA’s mentor-protégé program is unique in that the SBA rules make an exception for joint ventures formed by 8(a) mentor and protégé firms, as follows:

Two firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.519 of these regulations. If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513.

13 CFR §121.103(h)(3)(iii). The regulations, however, are clear that the SBA must approve the mentor-protégé agreement before the joint venture’s offer is submitted, to receive the above exclusion from affiliation. 13 C.F.R. § 124.520(d)(i).

In *North Star*, two firms, North Star Construction and Engineering (an 8(a) participant) and Magnus Pacific Corp. entered into a mentor-protégé agreement, which the SBA approved on July 5, 2014. However, the SBA’s approval letter stated that the “agreement shall expire after one year, unless SBA approves an extension.” On July 15, 2015, before SBA approved an extension that had been requested, the two firms bid as a joint venture on an Army Corps of Engineers flood management program. The Area Office of SBA found the joint venture “not small” because Magnus Pacific was not small under the size regulations. Also, the joint venture agreement had lapsed and its extension had not been approved by the SBA as of the bid date, so the affiliation exclusion discussed above was not available. The Office of Hearings and Appeals held that the Area Office was correct in determining that the joint venture was not an eligible small business for the instant procurement.

Mentor-protéges in the SBA program should be rigorous in seeking and obtaining SBA approval for any extensions of their joint venture *before* they make an offer as a joint venture. Otherwise they will suffer the same fate as North Star.

Mentor-Protégé Programs in the Federal Government

There are 13 different mentor-protégé programs in the major federal agencies. They pair small businesses with experienced businesses for the benefit of both parties. Proteges may receive financial, technical, or management assistance from mentors, and mentors may receive credit toward subcontract goals, reimbursement of certain expenses or other incentives.

The SBA 8(a) mentor-protégé program is government-wide, and contains the unique “exclusion from affiliation” discussed above. Other agencies have agency-specific mentor-protégé programs designed to assist various types of small businesses. A complete list of the 13 programs and the location of their applicable regulations follows, given in the order in which the agency appears in the Federal Acquisition Regulation (Title 48 of the CFR), except for SBA which is listed first because of its special characteristics, and FAA (not in the CFR).

<u>AGENCY</u>	<u>REGULATIONS</u>	<u>PROTEGES</u>
Small Business Administration	13 CFR §124.520	8(a)
Dept. of Defense	48 CFR Subpart 219.71 & 48 CFR Chap 2, App I	8(a), WOSB, SDVOSB, HUBZone Employers of severely disabled
Dept of Health & Hum. Svcs.	48 CFR §352.219-70	All small businesses
General Services Admin.	48 CFR Subpart 519.70	All small businesses.
Dept. of State	48 CFR §619.202-70	All small businesses
US Agency for Int’l Development	48 CFR Subpart 719.273	All small businesses
Dept of Veterans Affairs	48 CFR Subpart 819.71	VOSB, SDVOSB
Dept of Energy	48 CFR Subpart 919.70	8(a), SDB, WOSB, SDVOSB, HUBZone HBCU and Minority Institutions
Dept of the Treasury	48 CFR Subpart 1019.2	All small businesses
Environmental Protection Agency	48 CFR § 1552.219-70	SDB, WOSB, HBCU and Minority Instns.
Nat’l Aero. & Space Admin	4 CFR Subpart 1819.72	SDB, WOSB, VOSB, SDVOSB, HubZone HBCU, Minority Instns, Nonprofits Employing blind or severely disabled
Dept of Homeland Security	48 CFR § 3052.219-71	All small businesses
Federal Aviation Admin.	Not in CFR, available at http://www.sbo.faa.gov/ MentorProtege.cfm	All small businesses, HBCU, and Minority institutions

