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GENERAL MEMORANDUM 15-016

SBA Proposes Changes to the Tribal 8(a) Program and Mentor-Protégé Program Rules

On February 5, 2015, the Small Business Administration (SBA) issued a proposed rule which would make several changes to the tribal 8(a) regulations and the regulations regarding the 8(a) hearings and appeals process. The proposed rule would also implement the required expansion of its mentor-protégé program to all small businesses and would make changes to its joint venture regulations. 80 Fed. Reg. 6618 (Feb. 5, 2015). *Comments on the proposed rule must be submitted by April 6, 2015.* The text is available here: <http://www.gpo.gov/fdsys/pkg/FR-2015-02-05/pdf/2015-01548.pdf>

Tribal 8(a). The proposed rule would make changes relating to the tribal 8(a) program. These changes include:

- Clarifying how SBA determines if a tribally owned entity has a substantial unfair competitive advantage within an industry category;
- Providing definitions to assist in determining whether tribally owned entities are considered affiliated with other tribally owned entities;
- Specifying that individuals responsible for management and daily operations of a tribally owned concern cannot manage more than two program participants at once;
- Clarifying the control requirements applicable to Native Hawaiian Organization-owned firms for 8(a) program participation and requesting comment on the process for determining economic disadvantage of Native Hawaiian Organization-owned entities;
- Allowing SBA to change a participant's primary industry classification in the context of entity-owned participants, such as tribally owned participants, in the 8(a) program; and
- Amending the time frame for reporting benefits for entity-owned participants so that the information is conveyed as part of the participant's annual financial statements rather than as part of its annual review submission to make clear benefits reporting is not tied to continued eligibility.

Office of Hearings and Appeals. The proposed rule would also make changes to the SBA Office of Hearings and Appeals (OHA) procedures. With respect to the 8(a) program specifically, OHA hears appeals on matters such as businesses that have been denied admission to the program or that have had their participation terminated. The

proposed rule states that OHA has previously ruled that it will uphold an SBA decision of less than ideal clarity so long as SBA's path of reasoning may reasonably be discerned. The proposed rule would place this standard of review into the regulations. The agency states that including this standard in the regulations will more fully apprise the public of the standard of review.

Mentor-Protégé Program. The proposed rule would extend the SBA's mentor-protégé program to all small businesses, rather than just businesses in the 8(a) or status-preferred programs. The proposed rule envisions one mentor-protégé program for the 8(a) program and one for all other small businesses. As mandated by statute, the mentor-protégé program for all small businesses must be identical to the mentor-protégé program for 8(a) businesses.

Joint Ventures. Under the mentor-protégé program, all small businesses would be eligible to enter into joint ventures with mentors. The joint venture would then qualify as a small business for the purposes of eligibility for a federal contract or subcontract. Although the proposed joint venture regulations are largely consistent with existing 8(a) regulations, the proposed rule would make some changes. Because the expanded program must be identical to the 8(a) program, these changes are also reflected in the proposed rule's changes to the 8(a) regulations. These changes would include:

- Eliminating certain eligibility requirements for 8(a) protégés, including that a protégé be less than half the size standard corresponding to its primary North American Industry Classification System (NAICS) code, be in the developmental stage, or not have received an 8(a) contract;
- Requiring mentor-protégé agreements be in writing;
- Allowing SBA inspection of joint venture records;
- Limiting mentors to three protégés;
- Rules relating to protégés leaving the 8(a) program or growing in size; and
- Regulations relating to change in control of mentor businesses.

The proposed rule would also make other changes that are specific to 8(a) programs, such as clarifying requirements for protesting the size of an 8(a) joint venture and establishing social disadvantage. The SBA also invited comment on a number of specific issues related to the structure of joint ventures and parameters of the mentor-protégé program.

Please let us know if we may provide additional information regarding Small Business Administration's proposed rule.

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