



## Subcontracting to mentors: a growing risk?

by Antonio R. Franco and Alex O. Levine

The mentor-protégé programs separately administered by the Small Business Administration (SBA) and the Department of Defense (DoD) are unique in the government contracting world in that SBA and DoD protégés enjoy broad exemptions from findings of affiliation that might otherwise be based on the assistance provided by mentors.

Firms that participate in other programs cannot claim similar exemptions from the affiliation rules.

Although the SBA and DOD programs offer broad exemptions from affiliation, even these programs have limitations such that some forms of assistance provided by mentors to their protégés can still expose small firms to findings of affiliation and threaten their statuses as small business concerns.

With the SBA working on regulations for a mentor protégé program for all small businesses, it is important that the small business community understands the breadth and scope of the affiliation exemption as applied under the DOD and SBA's programs, as these may parallel the regulations currently being considered.

### New mentor-protege program

The SBA, as required by the National Defense Authorization Act of 2013, is currently in the process of creating rules that would eliminate the differential treatment of mentors and protégés in disparate federal programs by establishing a single program for all small businesses. The new, government-wide program will likely be based on the one currently in place for participants in the 8(a) program. The new program should extend to all small businesses many of the same benefits that 8(a) protégés and their mentors now enjoy, including exemptions from affiliation.

However, the SBA's proposed rule concerning a government-wide mentor-protégé program will not be released for another six-to-nine months, which places a final rulemaking at an even greater distance.

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But are those exemptions as broad as many would like to assume? As it turns out, a recent decision by the SBA's Office of Hearings and Appeals (OHA), along with the position adopted by the SBA in that case, may have significantly altered, if not undermined, that assumption.

### Recent cases

In InGenesis, Inc., SBA No. SIZ-5436 (2013), OHA considered whether an adverse size determination should be overturned where the SBA's Area Office had determined that InGenesis, Inc. ("InGenesis"), a prime contractor for a federal procurement, was unusually reliant on its subcontractor (and mentor through the SBA's Mentor-Protégé Program), STG International, Inc. (STG). However, before it could determine whether InGenesis was unusually reliant on STG, OHA had to decide whether an ostensible subcontractor analysis could even be utilized given the fact that the subcontractor in question was InGenesis' mentor under the SBA's mentor-protégé program. In this regard, InGenesis argued that its subcontract to STG fell within the broad definition of assistance appearing in the SBA's regulations and therefore was exempt, under such regulations, from affiliation analysis.

### SBA weighs in

Significantly, during the course of the proceeding, the SBA intervened to weigh in on this question. In its response, the SBA took the position that a subcontract awarded

to a mentor under the SBA's mentor-protégé program did not qualify as the type of "assistance" that is exempt from the SBA's affiliation analysis. In deciding this question, OHA found the SBA's analysis persuasive, finding that the regulations were not designed to immunize subcontract awards by small firms to their large mentors against findings of affiliation. In fact, OHA stated that awarding a subcontract to a mentor does not constitute assistance at all, let alone the kind of assistance that would ordinarily be exempt from affiliation.

### Mentor-protege not a shield

OHA's decision in InGenesis is not unprecedented, and, in fact, is similar to other OHA decisions considering analogous questions under the DOD's Mentor-Protégé Program. In American Eagle Industries, Inc., SBA No. 3709 (1992), for instance, OHA held that a mentor-protégé relationship did not shield a prime contractor from affiliation analysis where its mentor was providing assistance as the subcontractor on the awarded contract. Instead, OHA held that such subcontracting is "beyond the scope of those activities" protected by the DOD's mentor-protégé program and instead would "pervert the purposes of the Small Business Act" by allowing the subcontractor to appropriate the benefits of the mentor-protégé program for its own use.

Similarly, in TKTM Corp., SBA No. SIZ-4885 (2008), OHA held that the DOD mentor-protégé program did not act as a bar to a finding of affiliation based on the ostensible subcontractor rule, because the DOD program is not designed to allow a large concern to perform as its protégé's subcontractor.

Any firm weighing the potential benefits of a mentor-protégé relationship should not, and cannot, take for granted that "mentor-protégé" equates to "exempt from affiliation." With the SBA working on proposed regulations that would

# Defense Contracts Awarded

## NAVY

**Chesapeake Technology International Corp.**, California, MD, is being awarded a \$9,849,647 indefinite-delivery/indefinite-quantity Small Business Innovation Research (SBIR) Phase III contract under Topic N101-019, entitled "Algorithms for Dynamic 4D (3D space with time) Volumetric Calculations and Analysis." This effort is in support of training and simulation products. This contract was not competitively procured pursuant to FAR 6.302-5(a)(2)(i). The Naval Air Warfare Center Weapons Division, China Lake, CA, is the contracting activity (N68936-13-D-0006).

**Gravois Aluminum Boats LLC**, Jeanerette, LA, is being awarded a \$9,634,577 firm-fixed-price, indefinite-delivery/indefinite-quantity contract for the construction of command force protection medium harbor security boats, technical data and spare parts. This contract includes options which, if exercised, would bring the cumulative value of this contract to \$34,385,181. This contract was competitively solicited as a small business set aside via the Navy Electronic Commerce Online website, with six offers received. The Naval Sea Systems Command, Washington, DC, is the contracting activity (N00024-13-D-2253).

**Marine Hydraulics International**, Norfolk, VA, is being awarded a \$9,175,804 modification to previously awarded contract (N00024-10-C-4405) to exercise options for the accomplishment of the USS McFaul (DDG 74) fiscal 2013 selected restricted availability. The Norfolk Ship Support Activity, Norfolk, VA, is the contracting activity.

## DEFENSE LOGISTICS AGENCY

**Fannon Petroleum Services**, Gainesville, VA, has been awarded a maximum \$43,347,362 fixed price with economic-price-adjustment contract. This contract is for fuel. The contracting activity is the De-

fense Logistics Agency Energy, Fort Belvoir, VA; (SP0600-13-D-4016).

**Bominflot Atlantic**, Houston, TX, has been awarded a maximum \$41,850,000 fixed price with economic-price-adjustment contract. This contract is for fuel. The contracting activity is the Defense Logistics Agency Energy, Fort Belvoir, VA, (SP0600-13-D-4008).

**Ports Petroleum**, Wooster, OH, has been awarded a maximum \$23,297,575 fixed price with economic-price-adjustment contract. This contract is for fuel. The contracting activity is the Defense Logistics Agency Energy, Fort Belvoir, VA, (SP0600-13-D-4027).

**Apex Petroleum Corp.**, Largo, MD, has been awarded a maximum \$21,355,328 fixed price with economic-price-adjustment contract. This contract is for fuel. The contracting activity is the Defense Logistics Agency Energy, Fort Belvoir, VA, (SP0600-13-D-4006).

**James River Solutions**, Ashland, VA, has been awarded a maximum \$12,661,620 fixed price with economic-price-adjustment contract. This contract is for fuel. The contracting activity is the Defense Logistics Agency Energy, Fort Belvoir, VA, (SP0600-13-D-4021).

**MinXray Inc.**, Northbrook, IL, has been awarded a maximum \$103,079,866 modification (P00011) exercising the fourth option year of a one year base contract (SPM2D1-09-D-8335) with seven one-year option periods and covers radiology systems, subsystems, and components. The contracting activity is the Defense Logistics Agency Troop Support, Philadelphia, PA.

**Truman Arnold Companies**, Texarkana, TX, has been awarded a maximum \$7,103,070 fixed-price with economic-price-adjustment contract. This contract is to provide Texas with low emission ultra low sulfur diesel in Waco, TX. The contracting activity is the Defense

Logistics Agency Energy, Fort Belvoir, VA, (SP0600-12-D-4512).

**Switlik Parachute Co. Inc.**, Trenton, NJ, has been awarded a maximum \$6,500,000 modification (P00001) on a one-year base contract (SPE8EG-13-D-0021) with four one-year option periods for life preserver vests. The contracting activity is the Defense Logistics Agency Troop Support, Philadelphia, PA.

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extend its mentor-protégé program to cover all small businesses, the SBA's position in, and OHA's holding in, *InGenesis* offers a good glimpse of what these programs may look like. Firms participating in this program should not automatically assume mentors are not subject to a size affiliation.

In light of the SBA and OHA's positions, protégés that find themselves heavily reliant on their mentors for contract performance should seriously consider the benefits of joint venturing rather than entering into a subcontract. And lastly, when the proposed rules are issued by the SBA, small businesses should submit comments expressing their views as to whether the breadth and scope of the affiliation exemption are broad enough or have been too narrowly circumscribed by recent SBA and OHA positions.

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For a side-by-side comparison of federal mentor-protégé programs, please visit our website at <http://www.pilieromazza.com/includes/content/downloads/download.php?id=699>