



The Mentor-Protégé Dilemma

By Isaias "Cy" Alba, Esq.

First started by the Department of Defense in the 1980s, mentor-protégé programs have grown and spread to fourteen federal agencies, and others are in development. Each of these programs has different requirements and corresponding benefits, so companies interested in participating in a mentor-protégé arrangement must weigh the pros and cons of each to find the most advantageous program to fit their needs. (See the chart enclosed with this issue.)

Each program has unique benefits as well as specific eligibility requirements for protégés. Some programs permit all small businesses to serve as protégés while others restrict their programs to some combination of HUBZone companies or small businesses owned by women, socially and economically disadvantaged individuals or service-disabled veterans.

Likewise, the definition of an eligible mentor varies with each program and the incentives for large firms to mentor are different. For example, under some programs like the Department of Energy's, major prime contractors may award subcontracts directly to their protégés without competition.

(Editor's note: Legislation is pending in Congress to give SBA authority to adopt identical rules for all agency mentor-protégé programs except DOD.)

The agencies have structured these programs to encourage large firms to provide various types of technical, administrative, financial and other assistance to help develop small businesses into more robust, competitively viable companies. Whether a particular mentor-protégé relationship is successful, of course, depends on the agreement between the parties, whether the mentor provides the agreed assistance and whether the protégé cooperates in the commitments it has made to its mentor.

Most small businesses are very protective of their status as small and take measures to understand

what it means to be a small business under SBA regulations. Most small business owners know how to calculate the size of their company and understand that factors such as common ownership, common control, shared employees or facilities, shared contractual relationships or reliance on another company for financial assistance can create an affiliation between the small business and the company sharing the relationship. If affiliation exists, the revenues or employees of both firms are aggregated for size purposes and the small business could lose its status.

So, on the one hand, agency mentor-protégé programs encourage large firms to provide small businesses with technical, financial, contractual and administrative assistance. On the other hand, SBA regulations say that such a relationship could create an affiliation.

Do mentors and protégés participating in these programs enjoy an exemption from SBA's affiliation rules? Since the granddaddy of mentor-protégé programs, the Department of Defense, has always enjoyed the exemption, many in the industry assumed the exemption would be applied to all agency programs. However, we now have some guidance from SBA.

In 2011 SBA promulgated a regulation that limited the affiliation exemption to those programs where the exemption is "specifically authorized by statute or by the SBA...." See 13 C.F.R. 121.1103(b)(6). DOD's program is statutorily authorized and SBA's Section 8(a) mentor-protégé program was developed by SBA. To date, we are unaware of any other program that has been reviewed and approved by SBA. Therefore, unless SBA has approved additional programs recently, only the SBA and DOD programs currently enjoy the exemption from affiliation.

Given this guidance from SBA, it is important for mentors and protégés in non-approved programs

to carefully review the affiliation rules (without exemptions) to avoid inadvertently running afoul of those rules because of the amount or type of assistance being provided. If a size protest is filed by a competitor or an agency, SBA will review the totality of the circumstances to determine whether a firm is small and, without the exemption, SBA may look at all assistance provided by a mentor. Mentors and protégés should continue to take advantage of the various programs but with a view toward SBA's guidance.

As a result of the 2010 Jobs Act, SBA is currently preparing three new mentor-protégé programs which are statutorily authorized. Specifically, SBA is preparing a mentor-protégé program for HUBZone firms, service-disabled veteran-owned small businesses and woman-owned small businesses. Congress authorized SBA to model these programs after the current 8(a) mentor-protégé program.

If that happens, firms eligible to participate in those programs may enjoy the same exemptions that allow them to joint venture with their mentor. Mentors are also allowed to make equity investments in 8(a) protégés and receive up to a 40% ownership interest in the protégé. The new programs could create tremendous opportunities for firms participating in those programs. The SBA proposed rule is currently in review and could be released sometime this summer.

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