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November 8, 2022

VIA FEDERAL RULEMAKING PORTAL

Mr. Mark Hagedorn
Attorney Advisor
Office of General Counsel
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Re: Comments on Proposed Rule on Ownership and Control and Contractual Assistance Requirements for the 8(a) Business Development Program
RIN 3245-AH70

Dear Mr. Hagedorn:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule. See 87 Fed. Reg. 55642 (Sept. 9, 2022). Our firm represents small businesses operating across the government contracting arena that have great interest in the subjects covered in the proposed rule. We appreciate SBA's efforts on this important rulemaking and, as discussed below, we agree with many of SBA's proposals. We are also providing our suggestions on ways that SBA could improve its rules in the final regulation.

Ownership and Control

We believe SBA's proposed change to ownership restrictions for 8(a) firms codifies an important exception for protégés and mentors. Currently, SBA's 8(a) program maintains certain ownership restrictions, including that a non-participant concern may not own more than a 10% interest if the participant is in the developmental stage or a 20% interest if the participant is in transitional stage. We agree with SBA's proposal to codify an exception to this rule for SBA-approved mentor-protégé relationships, which permit the mentor to acquire up to a 40% equity interest in the protégé.

We also agree with SBA's proposal to clarify that a change of ownership could apply to both a current participant as well as a former participant that is performing on an 8(a) contract, which would provide that if an entity (tribe, ANC, NHO, or CDC) seeks to purchase a former 8(a) participant, and that former 8(a) participant is performing 8(a) contracts, then SBA may process the request as a change of ownership without the need to go through the waiver process. This will simplify what can be a lengthy process and could unfairly result in termination of the acquired company's 8(a) contracts for convenience. We believe this proposed rule change could benefit all individuals or firms that may acquire a former 8(a) participant, not simply acquirers that are entity-owned firms. Therefore, we urge SBA to expand the rule to state that any socially and economically disadvantaged individual or 8(a) firm that acquires a former 8(a) participant would only have to go through the change in ownership process with SBA and would not need to request a waiver to avoid termination of the former 8(a) participant's 8(a) contracts for convenience. In addition, SBA should clarify the process for how an asset sale should be processed, as opposed to a circumstance where a company performing on an 8(a) contract is acquired. At present, there is not a clear mechanism for how a substitution or waiver should be processed when there is an asset sale.

Regarding SBA's request for comments on where waivers under 13 C.F.R. § 124.515, we agree that there should be a more streamlined process. We agree with changing initiation of the waiver requests from the servicing district office to the AA/BD, and we also urge SBA to consider a timeline in which the waivers must be processed. Many transactions are left in uncertainty for months on end while the waivers are being processed, often with no response whatsoever. We urge SBA to impose a timeline of 60 days or less under which a decision must be rendered or approval can be deemed.

8(a) Contracts

SBA proposes to add a sentence to 13 C.F.R. § 124.501(b) to clarify that contracting officers cannot limit an 8(a) competition to participants having more than one certification. SBA also proposes to make similar clarifications to the socioeconomic set-asides, confirming that a set-aside within a set-aside is not permissible. We believe those revisions provide important clarification to for contracting agencies.

8(a) Construction Contracts Bona Fide Place of Business Requirements

Regarding SBA's proposed changes to the bona fide place of business requirement, we support the changes proposed. However, we urge SBA to consider additional changes to the requirements, such as being able to meet the requirement with a part-time employee or through a

temporary office location, such as a construction trailer. We recognize that SBA does not have the authority to eliminate this requirement altogether, but there are additional measures that may be taken to reduce the burden to already disadvantaged businesses.

Limitations on Subcontracting ("LOS")

We do not agree with SBA's proposal to treat compliance with the LOS differently for multi-agency set-aside multiple award contracts ("MACs"). The rules currently permit contracting officers from ordering agencies to require compliance with the LOS on an order-by-order basis. If the contracting officer does not include such a requirement, compliance with the LOS is judged annually throughout the life of the MAC. SBA's proposed change would effectively require compliance with the LOS on all orders under multi-agency MACs, but not on single-agency MACs. Given the wide variance in the size and frequency of orders under MACs, we do not think SBA should adopt an approach that requires LOS compliance on an order-by-order basis. As SBA points out, it is challenging enough as it is for agencies to monitor LOS compliance (this challenge also exists for small business contractors). There would be additional administrative burden for agencies, potentially decreasing the likelihood that agencies actually monitor LOS compliance, with the proposed rule. And there would be confusion for small business contractors, which would be subject to different LOS requirements depending on whether the MAC is a multi-agency contract or not. For these reasons, we believe SBA should maintain the current approach for all MACs, regardless of whether they are multi-agency, so that LOS compliance is judged annually on the MAC unless a particular contracting officer requires LOS compliance for an order.

SBA also proposes adding a rule indicating that if a contracting officer determines that a firm failed to comply with the LOS at the conclusion of contract performance, the contracting officer would not be permitted to give a satisfactory or higher (i.e., a positive) past performance rating to the contractor for the appropriate evaluation factor or subfactor. This rule would further elevate the important of LOS compliance, but in order for it to best serve the small business community, we believe it should be revised.

For one thing, the rule refers to LOS compliance at the end of contract performance, but it is unclear what period of performance this is referring to. Because LOS compliance is generally measured over the base and then during each subsequent option period, we believe the rule should make clear that it only applies to the period of performance currently being measured. We also do not believe a contractor should automatically receive a negative rating if their performance fell below the LOS during one performance period but was compliant during another. In addition, we think the rule could be improved by indicating that the contracting

officer, in their discretion, can still award a satisfactory or favorable rating where there was non-compliance with the LOS if they determine that extenuating circumstances warrant such a rating. In other words, we do not believe a mechanical process for a negative rating is the best approach.

In addition, we believe that if a rule is created whereby there are parameters for when a negative rating is warranted based on failure to comply with the LOS, there should also be parameters for when a favorable rating must be given in connection with LOS compliance. For example, if a contractor demonstrates that they complied with the LOS during a period of measurement, it would make sense to have a related rule saying that the contracting officer must provide a favorable past performance rating under the applicable factor or subfactor.

Affiliation Based on Subcontracting

SBA's affiliation rules provide that a prime contractor and its ostensible subcontractor are treated as a joint venture ("JV") and therefore affiliated for size purposes when the subcontractor is not similarly situated (i.e., does not have the same small business status that the prime needed to qualify for award) and either (1) performs the primary and vital requirements of the contract or (2) the prime contractor is unusually reliant on the subcontractor. The proposed rule would make the following five changes related to ostensible subcontractor affiliation.

First, the rule clarifies that so long as each concern is small under the applicable size standard (or the prime contractor is small if the subcontractor is its SBA-approved mentor), the ostensible subcontractor/JV arrangement will still qualify as a small business. We agree with this clarification.

Second, the rule explains that an ostensible subcontractor analysis would consider whether the subcontractor's incumbent managers will transfer to the prime contractor and whether the prime contractor relies on the subcontractor's experience because it lacks relevant experience of its own. That proposal would partially codify a four-factor test that SBA's Office of Hearings and Appeals created in the Size Appeal of DoverStaffing, Inc., SBA No. SIZ-5300 (2011), and has been using for several years to determine when a prime contractor's relationship with a subcontractor is suggestive of unusual reliance under the ostensible subcontractor rule. As with the existing rule, SBA would still consider all aspects of the prime contractor's relationship with the subcontractor and would not limit its inquiry to the factors outlined in DoverStaffing. We support this change to the extent it provides more clarity as to the factors SBA already uses when conducting an ostensible subcontractor affiliation analysis.

Third, the rule would clarify that in a general construction contract, the primary and vital requirements of the contract are the management and oversight of the project, not the actual construction or specialty trade construction work performed. SBA recognizes that on general construction contracts, subcontractors often perform most of the actual construction work, as the prime contractor must often engage multiple subcontractors specializing in different trades and disciplines. SBA believes the ostensible subcontractor rule for general construction contracts should be applied to the management and oversight of the project—and not to the actual construction or specialty trade construction performed. In other words, SBA's proposal would confirm that in a general construction contract, the prime contractor must retain management of the contract but can delegate a substantial portion of the actual construction work to its subcontractors without violating the ostensible subcontractor rule. While we agree with the sentiment that in general construction, subcontractors often perform most of the actual construction, we do not think the rules best serves the small business community.

There are likely many small construction companies that need certain help with project management/oversight when working on larger construction contracts. No doubt, some small construction companies also perform a mix of the actual work and the management/oversight. However, SBA's proposed rule would require these companies to perform all the management and oversight of the project. While management and oversight are important to successful performance, we believe the rules should allow for a small business to establish that it is performing the primary and vital requirements of a construction contract even when it subcontracts some of the management/oversight to a large business.

Fourth, the rule would clarify that when a Small Business Innovation Research ("SBIR") or Small Business Technology Transfer ("STTR") offeror is determined to be a joint venturer with its ostensible subcontractor, SBA will apply the ownership and control requirements for SBIR/STTR JVs to the arrangement. SBA's clarification is consistent with how SBA treats entities that are determined to be JVs with their ostensible subcontractor for other small business program set asides. As such, we agree with this proposal.

And fifth, the proposed rule would add a paragraph to each of the SDVOSB, HUBZone, and WOSB/EDWOSB status protest provisions to clarify that any protests relating to ostensible subcontractor affiliation claims will be reviewed by the SBA Government Contracting Area Office serving the geographic area in which the principal office of the protested concern is located. SBA's Government Contracting Area Offices decide size protests and render formal size determinations. We believe this bifurcated review process would be time consuming, costly, and an unreasonable use of resources. As such, we urge SBA to not implement this rule.

Subcontracting Plans

The rule clarifies that a prime contractor cannot count an award to a JV—within which it is a partner—towards its subcontracting goals. We do not agree with this proposal, as it fails to recognize that even if the large business prime is performing some of the work awarded to the JV, to the extent the JV is a small business mentor-protégé JV, there is a small business that is likely performing some of that work. We believe that rather than discount the entirety of such an award, SBA should allow such an award to count towards the prime's subcontracting goals in the amount and to the extent it is being performed by a small business.

The rule deletes bank fees from the list of costs excludable from the subcontracting base when a contractor seeks to comply with its subcontracting plan. SBA believes that such an exclusion gives large contractors little incentive to work with small banks, of which there are over 900 registered in the Dynamic Small Business Search ("DSBS"). SBA estimates that after subtracting the amount already spent with small-business banks, the new spending with small business subcontractors under the rule would be $228,000 annually. We agree with this proposal.

The rule requires large businesses to include indirect costs in their subcontracting plans. Currently, large businesses have the option of including or excluding indirect costs in their individual subcontracting plans. According to SBA, many large businesses opt to exclude indirect costs and, as a result, small businesses that provide services considered to be indirect costs—such as legal services, accounting services, investment banking, and asset management—are often overlooked by large contractors. SBA believes that by requiring indirect costs to be included in individual subcontracting plans, large businesses will have an incentive to give work to small businesses that provide those services. We agree with SBA that this rule encourages large business to work with small business for these services. However, we think that in implementing this rule there should be a change made in the subcontracting plans themselves to account for this, such as different or higher goals, that way prime contractors are not keeping the same goals, but now providing even less direct work to small businesses.

Standing to Bring Size and Status Protests

SBA's current regulations do not contemplate if size or status protests can be brought under sealed bid procurements against the next lowest bidder after the original, apparent awardee is deemed eligible due to size or status protests. We agree that because a size protest can be filed against the low bidder, it makes sense to allow the remaining bidders to file a size protest against the next lowest bidder if the lowest bidder is deemed ineligible. We also agree with SBA

proposals to clarify who can initiate a size or status protest across SBA's small business program.

Impact on Size Protests of Pending Decisions at the U.S. Government Accountability Office ("GAO")

We believe SBA's proposed rule makes necessary changes and clarifications regarding size protests against firms who have related, pending bid protests against their contract awards at GAO. However, we believe SBA should expand these proposed rules in two critical ways. First, SBA should it expand its policy of suspending size protests proceedings when it receives notice of a related GAO protest to include notice of bid protests pending at the Court of Federal Claims. Since size protests are suspended when bid protests have the potential to alter the outcome of the source selection, the proposed regulation should not say just "GAO" but rather "bid protests" in general, as COFC bid protests have the potential to alter the outcome of source selection and thus, the rule should clarify that and not be narrowly written to apply only to GAO protests. Second, we believe the rule regarding suspension could be expanded to apply when any type of SBA protest is filed (i.e, a size or status protest).

Furthermore, SBA should revise its regulations concerning the dismissal of a size protest when the contracting officer has indicated that the protestor has no standing to protest because it was deemed technically unacceptable. The SBA should not take at face value a contracting officer's contention that a protestor was eliminated from a competition without confirming with the protestor whether it intends to file a bid protest. The SBA's regulations and the Federal Acquisition Regulation require disappointed bidders to file size protests within five days of receipt of the notice of award. However, it may take several weeks for the agency to give a disappointed offeror a required debriefing which triggers the bid protest clock to challenge an improper finding of technical unacceptability. By dismissing a size protest strictly based upon a contracting officer's assertion that the protestor was eliminated from the competition because its proposal was technically unacceptable, the SBA is giving the procuring agency a final say on who can file a size protest. We submit that this result is unfair to many small businesses who file meritorious size protests which further the integrity of the procurement process.

Status Protests of Small Disadvantaged Businesses ("SDBs")

After the SDB Program was effectively eliminated, firms have been unable to protest an awardee's SDB status. The SBA Office of Inspector General believes the general authority to protest a firm's SDB status should exist. As such, the SBA is proposing to codify its ability to review the SDB status of any firm that has represented itself to be an SDB on a prime contract, or subcontract to a Federal prime contractor whenever it receives credible information calling

into question the SDB's status. We do not agree with this rule as proposed, because it lacks certainty as to a who can file an SDB protest, when they can file, and how these determinations will be made. Indeed, there is no time limit set for requesting that SBA review the SDB status of a firm. Moreover, the rule seems to allow any firm to submit information regarding an entity's SDB status at any time. We believe that if SDB status is to become a protestable issue, it should have parameters similar to those for size and status protests.

WOSB Program

We agree with SBA that the current requirement that the qualifying woman for a WOSB must operate the company during normal working hours of a concern in the same or similar line of business is overly restrictive. We agree with SBA's proposed change and also urge SBA to implement a similar revision for other socio-economic programs, as operating a company outside of normal business hours or even full-time does not mean that a company is not owned or controlled by the qualifying individual(s).

Furthermore, SBA proposes a change to the certification and annual attestation requirement also imposed on WOSBs. Currently, SBA requires WOSBs and EDWOSBs undergo an annual attestation and a full program examination every three years. SBA plans to eliminate the annual attestation requirement, and we support this change.

SBA also proposes revising the regulation to require EDWOSB applicants simply demonstrate that they qualify as small under any NAICS code in which they currently conduct business. We agree with this change because, in pursuing work with the EDWOSB designation, a EDWOSB is permitted to pursue any contract for which it is a small business under the designated NAICS code. We also believe SBA should similarly clarify that entities may be eligible for other socio-economic certifications so long as they are small under any NAICS code, not just their primary code.

HUBZone Program

We understand SBA's clarification regarding HUBZone JVs and that the JV itself need not be a certified HUBZone concern. However, our clients often run into issues as it relates to 8(a) JVs, because there is no way to designate an 8(a) JV as such in SAM. We urge SBA to clarify in its regulations that an 8(a) JV is eligible for award based on the status of its 8(a) managing venturer. We are aware of a number of instances where an agency refused to send an offering letter or even eliminated an 8(a) JV from the competition because the JV's SAM profile did not show the 8(a) JV as a participant. It needs to be clear in SBA's regulations that an 8(a) JV need not be designated as an 8(a) JV in SAM in order to be eligible for award.

JVs and Mentor-Protégé Relationships

SBA's regulations currently provide that a JV may not bid on any new contracts after two years from the date of the first award to the JV without the partners to the JV being deemed affiliated for the JV. We agree with SBA's proposed clarification that orders under previously awarded contracts are permitted, as orders are not separate contracts. Further, we agree with the clarification that for JVs that are awarded long term contracts and must recertify at the five-year mark, that recertification is not a new contract.

We agree with SBA's proposed clarifying regarding the use of populated JVs. We have seen a fair amount of confusion about whether populated JVs are allowed at all based on the current rule and case law. Some small businesses would like to utilize populated JVs for set-aside contracts and we do not believe it would make sense to declare that populated JVs are not eligible for set-aside contracts at all. SBA should finalize the proposed rule to make clear that populated JVs are permitted for set-aside contracts as long as each party in the JV is small for the contract the JV pursues and has any socioeconomic designation that may be required for the contract.

For 8(a) JVs, SBA's regulations currently provide that SBA will not review or approve the JV for 8(a) competitive contracts, but review and approval is still needed for 8(a) sole source contracts. There remains confusion over what documents will be reviewed in the event of a sole source award under a competitively awarded 8(a) multiple award contract. We agree with the proposed revision, that SBA is not required to review a JV in connection with a sole source award in this instance. In addition, we urge SBA to adopt a uniform set of policies and procedures when reviewing a JV in connection with a sole source award. In addition to a timeframe of how long SBA has to review/approve, we also urge SBA to utilize a clear checklist, as in our experience, a number of requested changes are unnecessary and are not required by the regulations. This leads to undue delay and often times procuring agencies move on to another contractor.

Similarly, we urge SBA to provide further guidance on what the requirement to be a managing venturer of a JV means. It is entirely unclear to companies what level of involvement or input a non-managing venturer is permitted to have in a JV. This puts companies at risk of losing significant and valuable contract awards. The industry needs clarification as to what control a non-managing venturer is permitted to have in a JV.

We believe clarification is needed as it pertains to what submitting competing offers means in the context of mentor-protégé JVs. We respectfully submit that submitting offers for a multiple-award contract vehicle, including a schedule contract, are not competing offers.

Obtaining a large GWAC, schedule or similar contract simply provides offerors with an ability to compete for orders in the future. There is no competition established at the master contract level. Accordingly, there should be no restrictions on the ability for a mentor or partner venturer to be a participant in multiple offers at the master contract level.

In addressing its mentor-protégé rules, we recommend that SBA revise the current limit on the number of mentors a small business may have. Unlike mentors, which may have an unlimited amount of protégés, SBA's rules currently limit a protégé to have no more than two mentors in its entire existence. This is unduly burdensome and has led SBA to implement additional rules and processes around "annulling" a mentor-protégé relationship within the first 18 months, a process that would be unnecessary if the protégé was not restricted in the total number of mentors it may have. Furthermore, the 18-month period does not account for significant issues that could arise and undermine a mentoring relationship after 18 months. A mentoring relationship that goes bad or is ineffective as of the 19th month is no more helpful to a protege than a mentoring relationship that goes bad or was ineffective during the first 18 months.

We also do not see the policy justification for limiting the number of protégés a mentor may have. One mentoring relationship can last for a maximum of six years, so protégés are only allowed to have mentoring for a maximum of 12 years of their corporate existence. And that assumes both relationships last for the full terms. But if each of the first two mentors decides to end their mentoring relationships after 19 months, that means the protégé would only get roughly 3.5 years of mentoring and would never again be allowed to have a mentor. Even if the business continues for 25 years and changes ownership several times.

We have seen first-hand the many ways that SBA's ASMPP benefits protégés and we do not believe they should be limited to only two mentors and a relatively brief period of mentoring. SBA will retain the discretion to determine if the protégé needs the mentoring, which would allow SBA to decline a mentoring relationship if SBA decided that the protégé had already had sufficient mentoring and did not truly need an additional mentor. Absent such a finding, we submit that SBA should not limit the number of mentoring relationships a protégé may have.

Finally, SBA should clarify in the rules that a protégé may "renew" its first mentor-protégé relationship to continue with the same mentor for a second 6-year term.

Non Manufacturer Rule Waivers (NMR)

We understand why SBA is proposing to require contracting officers to specifically identify each item in the multi-item procurement for which a contract-specific waiver is sought. However, we are concerned that this will increase the administrative burden and make

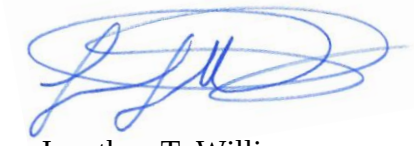
contracting officers less likely to request contract-specific waivers. We request that SBA consider ways to streamline the process for contracting officers to request contract-specific waivers. One way to address this would be to permit contractors to submit contract-specific waivers. This could be treated similarly to an objection by the contractor to the terms of the solicitation – if the solicitation is for products that are not made by a small business, but does not contain a waiver, the contractor would be permitted to submit a request to the SBA, with a copy to the contracting officer, explaining why a contract-specific waiver should be granted. We have heard from many clients who have declined to pursue a contract opportunity because the contracting officer did not seek a contract-specific waiver of the NMR. In many cases, contractors may be more willing to put in the effort to pursue the contract-specific waiver, which would benefit the government and the small business community by promoting small business participation on more contracts.

Another benefit of permitting contractors to pursue contract-specific waivers is that this would impact the market research and set-aside determination. Case law indicates that, because a contracting officer is not required to seek a contract-specific waiver, the absence of the waiver can effectively determine the outcome of the market research. In other words, the contracting officer can decide not to set aside a procurement for items that would clearly qualify for a contract-specific waiver of the NMR simply because the contracting officer chooses not to pursue a contract-specific waiver. When a procurement is for items that are made by large businesses, a contract-specific waiver should be granted to permit small business participation. Allowing contractors to pursue contract-specific waivers, and requiring contracting officers to consider the likelihood of obtaining a waiver as part of their market research, would result in more set-asides and more small business participation on federal contracts.

SBA also proposes prohibiting contract specific NMR waivers for contracts longer than five years including the associated options. We disagree that contract-specific NMR waivers should not be allowed for long-term contracts. Alternatively, SBA is considering limiting the duration of contract specific waivers to five years. In this alternative, a contracting officer could obtain a contract specific NMR waiver for a contract beyond the first five years, but the waiver would only cover the first five years of the contract. If the contracting officer wants to extend the waiver beyond the first five years, they must submit a new request to SBA. We agree with SBA's alternative, which more appropriately balances SBA's concern and the interests of small businesses that benefit from contract-specific waivers on long-term contracts. Therefore, we urge SBA to adopt the alternative approach.

We thank the SBA for its efforts, and we appreciate the opportunity to submit these comments. Please do not hesitate to contact the undersigned at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



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