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May 5, 2015

VIA ELECTRONIC SUBMISSION THROUGH REGULATIONS.GOV

Ms. Brenda Fernandez
U.S. Small Business Administration
Office of Policy, Planning and Liaison
409 Third Street SW, 8th Floor
Washington, DC 20416

Re: *Comments on Proposed Rule Regarding Mentor-Protégé Program; Small Business Size Regulations; Government Contracting Programs; 8(a) Business Development/Small Disadvantaged Business Status Determinations; HUBZone Program; Women-Owned Small Business Federal Contract Program; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals*
RIN: 3245-AG24
Docket No. SBA-2015-0001

Dear Ms. Fernandez:

We are writing to submit comments regarding the U.S. Small Business Administration's ("SBA") proposed rule of February 5, 2015, 80 Fed. Reg. 6618. Our company represents small and medium-sized businesses that operate in the federal marketplace, including businesses owned by Native Hawaiian Organizations (NHOs). We commend SBA for its efforts to implement provisions of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for 2013, which would establish a Government-wide mentor-protégé program, among other changes to small business programs. In general, the proposed rule is beneficial and we agree with most of it. However, we do have some specific suggestions and comments, set forth in this letter, as to how the proposed rule can be improved and clarified.

Further, while not part of the proposed changes (but at the request of SBA in its discussion of changes being made to the 8(a) program in the proposed rule), we also include specific comments in this letter related to the way in which SBA determines whether a NHO is economically disadvantaged. We applaud SBA for seeking comments on this matter and hope that these comments will encourage SBA to make some much-needed changes to provide NHOs parity with other Native entities and ultimately ensure their success.

Mentor-Protégé Program For All Small Businesses

1. Two Mentor-Protégé Programs

Currently, there is a single mentor-protégé program which is only available to 8(a) small business concerns (SBCs). However, the 2013 NDAA authorized SBA to establish a mentor-protégé program for all SBCs. We agree with the proposed rule to the extent that it seeks to keep the current 8(a) mentor-protégé program and implement a single additional mentor-protégé specifically for SDVO SBCs, HUBZone SBCs, WOSB concerns, and all other small business concerns. As a result of the proposed rule, there will be two mentor-protégé programs, which we believe will be more manageable than having five (5) separate programs. It will also reduce confusion and duplicity with respect to regulations as well as program administration/implementation.

Notwithstanding, and while we understand that creation of an additional mentor-protégé program was authorized by the 2013 NDAA, we do have concerns regarding the administrative burden(s) that this new program will impose on the SBA without any indication that there will be additional resources provided to the SBA.

Joint Ventures

1. Joint Venture Certifications and Performance of Work Requirements

We commend the SBA for its efforts to address the issue of small businesses being used as a vehicle that allows other businesses to improperly benefit from SBA contracting programs. Thus, we support the proposed changes with respect to joint venture certifications and performance of work requirements. We agree that the proposed changes will assist with accountability. Furthermore, given the points at which certification would be required, we feel that the certifications required by the proposed rule are reasonable and are not overly burdensome for small businesses.

2. Past Performance of Joint Venture Partners

We support the proposed rule which would require procuring agencies to consider the past performance of each partner to the joint venture. We have heard of many instances where the procuring authority will only consider the past performance of the joint venture, ultimately resulting in the joint venture being eliminated from competition because the joint venture itself may not have had a significant amount of past performance. This would also assist in providing guidance to agencies and contracting officers that are not well-versed or familiar with joint ventures as to how joint ventures should be evaluated. In addition, this proposed change would allow businesses to better structure their teaming arrangements when pursuing different opportunities.

3. Tracking Joint Venture Awards

SBA is seeking comments on how it should track awards to joint ventures permitted by SBA's regulations. SBA set forth a number of suggestions, including: "requiring all joint ventures permitted by these regulations to include in their names 'small business joint venture,' and if a mentor protégé joint venture to include in their names 'mentor-protégé small business joint venture;' requiring contracting officers to identify awards as going to small business joint ventures or mentor-protégé joint ventures; requiring SBCs to amend their System for Award management (SAM) entries to specify that they have formed a joint venture; requiring each joint venture to get a separate DUNS number; or a combination of all of these actions."

We appreciate the need to better track awards to joint ventures permitted by SBA's regulations; with that said, we support a method which would create the least amount of confusion and would require the least amount of administrative burden on the parties involved. As such, we oppose any requirement which would impose a naming requirement on relevant joint ventures – this option would create confusion and would not be feasible in all situations. To a lesser degree, we oppose the suggestion that the joint venture obtain a separate DUNS number. The DUNS numbering system is a means of identifying a business entity on a location-specific basis. Requiring a joint venture to obtain a DUNS number would be impractical given that the joint venture may not itself have a separate location.

We do however, support requiring disclosure of awards to joint ventures through SAM, as this would be utilizing an already existing government database meant to track and provide information on government contractors. In fact, given that SAM is supposed to be a consolidated federal procurement system, it would be appropriate to track joint venture awards in this database. In conjunction with disclosure through SAM, we agree that contracting officers should also be identifying awards as going to small business joint ventures.

8(a) Business Development Program

1. Establishing Social Disadvantage for the 8(a) BD Program

The proposed rule would amend 13 CFR 124.103(c) to require an individual claiming social disadvantage to present a combination of facts and evidence which establish that the individual has suffered the requisite social disadvantage. This change is meant to address SBA OHA cases that allowed individuals to establish social disadvantage despite the record lacking sufficient evidence supporting a discriminatory basis for the alleged misconduct. While we appreciate the need for applicants to sufficiently establish the requisite social disadvantage, and the need for SBA to in effect shield itself from situations where an applicant has not provided evidence as to why he/she did not receive a promotion that went to an individual of the opposite gender, we disagree with the proposed changes to address this issue.

Given that corroborating evidence is incredibly difficult (if not impossible) to provide, this requirement will likely result in applications being denied in situations where the individual has actually faced social disadvantage which negatively impacted his/her entry into or advancement in the business world simply because he/she cannot provide an email saying that he/she did not get the promotion due to his/her gender. In addition, the proposed changes will certainly make it more difficult for individuals that are not members of pre-designated groups (presumed to be socially disadvantaged due to their race) to gain access to the program.

As to what the SBA means by "corroborating evidence," those items seem very reasonable. However, allowing SBA to disregard a claim of social disadvantage because the individual "has not presented evidence that would render his/her claim any more likely than the alternative ground" provides SBA reviewers with much subjective discretion in approving/denying these applications. The proposed rule will in effect allow SBA reviewers to potentially impose their own judgment of an applicant (including the social narrative, documents and facts provided by the applicant) and the application process. In crafting the Final Rule, we request that SBA remove the subjective element(s) and insert more objectivity into the process.

2. Substantial Unfair Competitive Advantage Within an Industry Category

We agree with the proposed rule to the extent it clarifies [for purposes of 8(a) BD program entry and 8(a) BD contract award] that "substantial unfair competitive advantage within an industry category" with respect to entity-owned firms refers to a national scale and not a local scale. This change merely seeks to put in regulation the interpretation that SBA has been utilizing to date.

3. 8(a) BD Program Suspensions

We agree with the proposed rule in this regard, which allows for a participant to suspend its program participation in one of two circumstances: (1) if its principal office is located in an area declared a major disaster; or, (2) where there is a lapse in Federal appropriations. We believe this change takes into account factors which are out of the control of the 8(a) BD program participant and allows for the participant not to be penalized or otherwise suffer adverse consequences as a result of those factors. As written, the proposed rule allows this suspension if the participant firm *elects to suspend its participation*. We urge the SBA to keep this language in there to give the participant the choice as to whether they want to suspend participation. We oppose any changes which would impose a mandatory suspension on the participant.

4. Native Hawaiian Organizations (NHOs)

a. Directors

We support SBA's intent to amend §124.110(d) to clarify that members or directors of a NHO need not have the technical expertise necessary to operate its for-profit firms. Due to the structure of the NHO model and regulations that prohibit NHO-owned 8(a) applicants

and/or participants from operating under the same primary NAICS, it would be impractical and, moreover, an impediment for NHO members or directors to have the technical expertise to run its for-profit firms. We encourage SBA to ensure this interpretation is consistent at all levels and offices in the agency, particularly those involved with reviewing 8(a) applications. Further, we strongly urge the SBA to not include any provision in regulation that would require NHO members to demonstrate specific industry-related experience in "appropriate circumstances." As we have experienced first-hand during the 8(a) application process, NHOs are routinely required to demonstrate that its members/directors have the technical experience to manage its for-profit firm. We fear that by including this provision related to "appropriate circumstances", it will further this standard practice rather than make it an exception.

Additionally, we support the inclusion of §124.110(g) to clarify that a NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the eligibility of individual members, directors or managers. While we recognize that current regulation could be interpreted as such, this provision provides clarity and prevents any misinterpretation that an individual who previously used his or her eligibility for 8(a) participation could not also use his or her disadvantaged status to help qualify a NHO as economically disadvantaged.

b. Economic Disadvantage

Finally, we applaud SBA for seeking comments regarding how to determine whether a NHO is economically disadvantaged. NHOs are currently at a disadvantage compared to other Native entities, including Alaska Native Corporations (ANCs) and Indian Tribes, although the intent of the program for all of these entities is the same – to provide business development assistance to firms owned by Native entities that in turn serve their Native community. While ANCs are deemed economically disadvantaged and Tribes establish economic disadvantage of its tribal population once, NHOs must establish economic disadvantage of individual NHO members or directors each and every time one of its for-profit firms seeks 8(a) participation. This requirement is unnecessarily time consuming and burdensome for both NHOs and the SBA. Further, it undoubtedly impacts NHO participation in the 8(a) program and ultimately a NHO's ability to serve Native Hawaiians.

We encourage SBA to provide parity among all Native entities with regard to how they establish economic disadvantage. As such, the preferred approach is that NHOs and Tribes are deemed economically disadvantaged, as is the case with ANCs. Nonetheless, we understand this would require a statutory change, and thus, is an issue that the Native Hawaiian community will continue to advocate for with members of Congress. As an alternative, we encourage SBA to require that NHOs only establish economic disadvantage once, and that it is based on Native Hawaiians in the State of Hawaii. At a minimum, NHO members or directors should only be required to establish economic disadvantage once and again in the event that the NHO structure changes.

- Native Hawaiians in the State of Hawaii: By definition, a NHO is "any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians" (13 CFR §124.3). Based on this definition, the "community for an NHO" is defined as Native Hawaiians (as defined in 13 CFR §124.3) in the State of Hawaii. Accordingly, a NHO should provide socio-economic data related to Native Hawaiians in the State of Hawaii to determine a NHO's economic disadvantage. This is very similar to a Tribal entity that provides services to its specific tribe, and provides data on its tribal population to establish economic disadvantage.

  Within the framework of Federal law, there is precedence for defining Native Hawaiians. As highlighted in the U.S. Senate Conference Report to S. 675 (U.S. Senate, Conference Report 112-251, 2012), "American Indians, Alaska Natives, and Native Hawaiians are indigenous, Native peoples that are cited in the Constitution as 'Indians' or 'Indian Tribes'." While communities of common ancestry is one factor used by Congress to define the nation's indigenous peoples, the "unique constitutional significance of such entities derives from their separate existence as independent political communities." Despite the lack of a federally recognized Native Hawaiian governing entity or specific land base, Congress has enacted over 150 statutes recognizing Native Hawaiians as an indigenous people and seeking to assist specific needs or conditions of the Native Hawaiian people. As noted in *From Mauka To Makai: The River of Justice Must Flow Freely* (The Department of the Interior and The Department of Justice, 2000), Congress has enacted "legislation treating Native Hawaiians in the same manner as American Indians and Alaska Natives, and, importantly, in 1974, began using a very broad definition of Native Hawaiian: anyone descended from the aboriginal people who occupied Hawaii before 1778." Similarly, in 2011, the State of Hawaii enacted Act 195, which officially acknowledged Native Hawaiians as the only indigenous, aboriginal population of Hawaii.

  In applying this approach of defining the community for a NHO as Native Hawaiians (as defined in§124.3) in the State of Hawaii, socio-economic data pertaining to this population can be submitted by each NHO to demonstrate economic disadvantage. Data can be compiled through various sources, including the U.S. Census Bureau, State of Hawaii, and/or the Office of Hawaiian Affairs. This data for Native Hawaiian consistently demonstrates economic deprivation, poor health, below average educational attainment, and high incarceration rates, among other socio-economic and health indicators, which will certainly demonstrate economic disadvantage of Native Hawaiians. More importantly, it will demonstrate the need for NHOs to serve Native Hawaiians throughout the State of Hawaii.

In addition to providing parity among Native entities, allowing NHOs to establish disadvantage based on the Native Hawaiian people will enable NHOs to seek qualified member/directors to operate and control its non-profit and for-profit firms. Although the 8(a) program for NHOs is more similar in structure and purpose to the 8(a) program for ANCs and Tribes, for the purposes of establishing economic disadvantage, the 8(a) program for NHOs is more similar to the program for individuals. Conversely, unlike individual-owned firms, individuals who serve as members or directors of a NHO must manage and control a non-profit organization, potentially multiple for-profit firms, while also ensuring the NHO serves the Native Hawaiian community. It is extremely difficult to find individuals who are capable of achieving all of these objectives and also meet the thresholds established for determining economic disadvantage. This puts NHOs at a severe disadvantage and limits their ability to successfully serve the Native Hawaiian community.
In summary, basing economic disadvantage on Native Hawaiians in the State of Hawaii would not diminish the entire economic disadvantage requirement for NHOs. It will, however, provide parity in the treatment of Native Hawaiians and American Indians as indigenous people and enable NHOs to be more successful by attracting qualified members/directors. Additionally, it is important to note that economic disadvantage is just one of the many criteria used to determine eligibility for the 8(a) program. The NHO and its for-profit firms will still need to demonstrate potential for success and good character, among other requirements.

- Individual NHO Members or Directors: While not the preferred approach (due to the aforementioned reasons), economic disadvantage of NHOs could continue to be based on members/directors of the NHO Board. However, if this is the case, we recommend that these individuals would only establish disadvantage once, upon the NHOs initial 8(a) BD application. Thereafter, only if the composition of the Board changes or if requested by SBA would the NHO have to re-establish economic disadvantage.

Rules of Procedure Governing Cases Before OHA

1. Administrative Record

We oppose the proposed change of 13 CFR 134.406 regarding review of the administrative record. As is evident in many OHA cases, the administrative record is often lacking in terms of SBA reasoning and documentation. Providing that the Administrative Law Judge will uphold a "decision of less than ideal clarity" as long as the SBA's path of reasoning can reasonably be discerned is unfair to small businesses and encourages a lack of accountability. We believe that interests would be better served by allowing a trial de novo on the facts.

Conclusion

We recognize and appreciate the thought and effort that went into drafting the proposed rule. We support many of the changes contemplated by the proposed rule, as we feel that the spirit and intent of the changes are favorable for small businesses. However, as outlined above, we do have concerns regarding the administrative burden(s) that the changes impose on small businesses and the SBA. With respect to the increased burdens on SBA, this comes at a time when a corresponding increase in resources to handle increased administration is not anticipated. Thus, we would urge the SBA to consider this very significant practical limitation as well as the other issues identified in these comments in developing the final rule.

Furthermore, we hope that our comments regarding the way in which NHOs are determined to be economically disadvantaged encourage SBA to explore an alternative approach. We welcome the opportunity to further discuss these comments with you and to address any questions or concerns you may have.

Thank you very much for your time and consideration.

Very Respectfully,

/s/

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