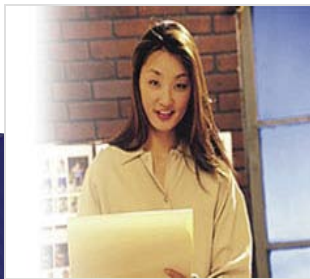




2011 NAVFAC Atlantic Industry Forum UPDATES TO SBA'S 8(A) AND SMALL BUSINESS SIZE REGULATIONS



Topics for discussion

- 8(a) Program Regulation Changes
- Size Standard Revisions
- 2010 Small Business Jobs Act

8(a) Business Development Program

Regulatory Changes

- ▶ New Rules effective on March 14, 2011, *except* Reporting Requirements for Native Owned firms (13 CFR 124.604) apply as of September 9, 2011.
- ▶ Federal Register 76 FR 8222
 - Link to Federal Register
<http://www.gpo.gov/fdsys/pkg/FR-2011-02-11/pdf/2011-2581.pdf>
- ▶ SBA Webpage -
<http://www.sba.gov/content/revised-8a-regulations>
- SBA 8(a) Compliance Guide
[http://www.sba.gov/sites/default/files/8\(a\)%20Compliance%20Guide.pdf](http://www.sba.gov/sites/default/files/8(a)%20Compliance%20Guide.pdf)

What Changes Were Made?

- Technical changes
- Substantive changes
- Mirror existing or new legislation
- Reduce potential waste, fraud and abuse
- Ensure program benefits flow to intended beneficiaries

Highlights of Substantive Changes

- Size for Primary NAICS Code
- Change of Primary NAICS Code
- Economic Disadvantage
- Excessive Withdrawals
- Suspension for Call Ups to Active Duty
- Bona Fide Place of Business
- Joint Venture Requirements
- Mentor – Protégé Program
- Fees

Size for Primary NAICS

- ▶ Must generally remain small . . . *but*
- ▶ SBA may graduate a Participant prior to the expiration of its program term **if firm does not remain small**
 - as adjusted, for three successive program years

Early Graduation and Size

- ▶ Is (early) graduation required where firm exceeds its primary NAICS?
 - NO– unfair to graduate a firm that has one very successful program year that might not be repeated
 - NO - but exceeding the primary NAICS might be an indication that firm may no longer need the business development assistance the 8(a) BD program offers

Early Graduation and Size

- Early graduation is not warranted where firm exceeds its primary NAICS AND
 - Firm can demonstrate that primary industry is changing
 - Must be a related *secondary* NAICS code
 - Must determine primary industry, using Part 121 (13 CFR 121.107)
 - Business Plan indicates firm's growth & development
 - Must show that *secondary* NAICS code, and
 - Must contain specific targets, objectives, and goals in that new industry/new primary NAICS
 - Firm can demonstrate by clear evidence that the majority of its total revenues during a **three-year** period have *evolved* from one NAICS code to another

How to Change in Primary NAICS Code? – Majority of Total Revenues

- ▶ SBA will grant such a request – to change a primary NAICS - where
 - the Participant can demonstrate that the majority of its total revenues during a *three-year* period have evolved from one NAICS code to another

How to Change in Primary NAICS Code? – Majority of Total Revenues

- ▶ SBA will grant such a request – to change a primary NAICS - **where** the Participant can demonstrate that the majority of its total revenues during a *three-year* period have evolved from one NAICS code to another.
 - “Majority of its total revenues” means
 - NAICS code accounting for
 - the largest amount of all the firm’s revenues
 - from whatever source

Expanded Economic Disadvantage Provisions

- ▶ SBA will examine
 - income for the past *three years*
 - personal net worth
 - fair market value of all assets
 - spouse's financial condition, *in certain circumstances*

Economic Disadvantage

- Objective criteria to determine **economic disadvantage**
- Applicants must demonstrate economic disadvantage;
 - **Adjusted Net Worth** must not exceed \$250,000 for initial eligibility or \$750,000 for continuing eligibility.
 - **Personal Income** must not exceed \$250,000 (averaged over three years) for initial eligibility or \$350,000 for continuing eligibility.
 - **Total Assets** must not exceed \$4 million for initial eligibility and \$6 million for continued eligibility (allows for growth during the 9 year term).

Individual Retirement Accounts

IRA Accounts –

- ▶ excluded from net worth (adjusted like business equity and home equity) - *in certain circumstances*
- ▶ not counted as an asset – *in certain circumstances*

Subchapter S Corporations, LLCs & Partnerships

- ▶ Income received will be excluded where evidence provided to show
 - income was reinvested in the firm or
 - used to pay firm taxes
- ▶ Losses from the S corporation (or other pass-throughs like LLC or partnership) are losses to the company only,
 - not losses to the individual

Excessive Withdrawals

- ▶ New definition for withdrawal—
- ▶ Officers' salaries generally not considered withdrawals
SBA will count those salaries as withdrawals where SBA believes that a firm is attempting to circumvent the excessive withdrawal limitations through the payment of officers' salaries

A large salary to a non-disadvantaged individual will be treated as an excessive withdrawal.

Excessive Withdrawals

- ▶ New definition for withdrawal—
 - Includes, but is not limited to, the following:
 - cash dividends;
 - distributions in excess of amounts needed to pay S Corporation, LLC or partnership taxes;
 - cash and property withdrawals;
 - payments to immediate family members not employed by the Participant;
 - bonuses to officers;
 - investments on behalf of an owner

Excessive Withdrawals

- ▶ The withdrawal amounts will be in the aggregate and are as follows:
 - Firms with sales up to \$1M, \$250,000
 - Firms with sales between \$1M and \$2M, \$300,000
 - Firms with sales exceeding \$2M, \$400,000
- ▶ *SBA will look at a totality of the circumstances when reviewing excessive withdrawals*

New Suspension Rule

- ▶ If the disadvantaged individual owner(s) of the 8(a) firm called to **active military status**
 - SBA will no longer terminate the firm

Firm may elect to

- be suspended from program participation or
 - continue participation if another disadvantaged individual(s) can control to control the firm
- ▶ The length of suspension time is added to program term when individual returns to control the firm.
 - ▶ If one or more other disadvantaged individuals can continue to control the firm in absence, the firm may elect to continue to operate as an 8(a) firm.

Bona Fide Place of Business

- ▶ May have a bona fide places of business in more than one location
- ▶ SBA determines if firm can establish a bona fide place of business in a particular geographic location
 - A Participant must submit a request for a business determination to the SBA DO servicing the firm
 - SBA district office (DO) serving the geographic area of that location must determine if that location in fact qualifies
 - For processing, forward request from the servicing DO to the SBA DO serving the geographic area of the particular location

Bona Fide Place of Business

- ▶ The effective date is the date that the evidence (paperwork) shows that the business in fact **regularly maintained its business** at the new geographic location.
- ▶ In order to be eligible to submit an offer for a 8(a) procurement limited to a specific geographic area, the Participant must receive a determination from SBA **prior to submitting its offer** for the procurement from SBA.

Joint Ventures

- Tightens requirements for joint ventures (JV) so that
 - non-disadvantaged firms do not unduly benefit from the 8(a) BD program
- JV agreement may be informal or formal (separate business structure) but
 - Must be in writing
- Can be unpopulated or populated (own separate employees) and
 - Different rules for each.
- Change from no more than 3 offers to **contracts** over **2 year** period without
 - a finding of general affiliation
- Same two entities may form additional JVs and each may be awarded 3 contracts over 2 years

Mentor-Protégé Agreements

- ▶ **Non-profits** can be Mentors
- ▶ Mentor can have **up to 3 protégés** at one time
- ▶ Protégé can have **second Mentor**, corresponding to an unrelated, secondary NAICS code
- ▶ A firm **cannot be both** a Protégé and a Mentor at the same time
- ▶ Assistance provided by the Mentor **must** be tied to the Protégé's SBA-approved business plan
- ▶ Mentor/Protégé Agreement must be approved by SBA **before** the firms can submit a joint venture offer on a procurement as a small business
- ▶ In order to receive the **exclusion from affiliation** on any non-8(a) contracts, the agreement **must comply** with the 8(a) JV requirements (other than SBA approval).
- ▶ SBA approved Mentor/Protégé joint ventures are **small** for federal **subcontracts** (DOE)
- ▶ SBA **prohibited** from approving a new Mentor/Protégé relationship **within six months** of the end of an 8(a) Participant's program term.
- ▶ Benefits derived from Mentor/Protégé relationship end once the protégé leaves the 8(a) BD program
- ▶ Specific **reconsideration process** when a Mentor/Protégé Agreement is declined

MPAs – Failure of Mentor

- Consequences if Mentor does not provide agreed to assistance
- Mentor is notified and provided an opportunity to respond
- SBA may terminate the Mentor/Protégé Agreement
- Mentor is ineligible to participate for 2 years
- SBA may recommend a stop work order for each contract the Mentor and Protégé are performing as a JV and where they have received the exclusion from affiliation
- SBA may authorize substitution of the protégé firm for the JV
- Failure to provide the agreed-upon assistance may constitute grounds for Government-wide suspension or debarment

Fees for Applicant & Participant Representatives

- ▶ The **compensation** received by any packager, agent or representative of any 8(a) applicant or Participant for assisting in obtaining certification, 8(a) contracts or other assistance **must be reasonable** in light of services provided.
- ▶ The fee charged **cannot be** a percentage of gross contract value.
- ▶ **SBA may suspend** a packager, agent or representative from assisting 8(a) applicants or Participants.

Additional Changes

- ▶ Disadvantaged individual must reside in the U.S.
- ▶ Annual Financial Statement Submittal
 - Under \$2 Mil, in-house financial statements are sufficient
 - \$2 Mil to \$10 Mil reviewed statements are required
 - >\$10 Mil require audited statements
- ▶ More than one family member may participate in the 8(a) program at the same time.

Questions Regarding 8(a) Regulations

- Who to contact with additional questions?
 - Questions may be emailed to RDO8aProgram@sba.gov or 8aBD2@sba.gov

Proposed Size Regulation Changes

- ▶ A complete review and possible revision of most size standards is underway. SBA has published a white paper on the methodology available in the October 21, 2009 Federal Register
- ▶ SBA has proposed to increase size standards for NAICS Sector 54, Professional, Technical and Scientific Services. Comment period for the public was extended to June 15, 2011.
- ▶ Most recently SBA has published proposed size standard revisions for NAICS Sector 48-49, Transportation & Warehousing; comments period closes on July 12, 2011

Summary of 2010 Jobs Act Provisions

- ▶ Multiple Award Contract Set-Asides
- ▶ Bundling & Consolidation of Contracts
- ▶ Sub-Contracting Plan Improvements & Timely Payments
- ▶ Mentor Protégé Programs for SDVOSB, WOSB and HUBZone firms
- ▶ Presumption of Loss Related to false representation of size
- ▶ New SBA Lending programs

Thank you!

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