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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



April 6, 2015

Ms. Brenda Fernandez
Office of Policy Planning & Liaison
U.S. Small Business Administration
409 Third Street SW
Washington, D.C. 20416

RE: Comments on SBA's Small Business Mentor-protégé Program Proposed Rule

Dear Ms. Fernandez,

On behalf of the Associated General Contractors of America (AGC), I would like to thank you and the U.S. Small Business Administration (SBA) for soliciting comments on the proposed rule to expand the SBA's mentor-protégé program to all small businesses. AGC appreciates the efforts SBA has undertaken to meet its legal mandates to implement an expanded mentor-protégé program to all categories of small businesses. However, AGC has a number of concerns about a few of the proposed requirements to implement this expanded program.

In addition, **AGC respectfully requests that SBA either extend the comment period or re-issue this proposed rule for public comment after the SBA finalizes its performance of work proposed rule issued on December 29, 2014.** AGC also hopes an extended or additional comment period will help clarify critical elements of the proposal and allow SBA to receive more than the few comments it has received to date on this important proposal.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

From a public policy standpoint, AGC neither supports nor opposes SBA's expansion of the mentor-protégé program to all small businesses. Congress has mandated that SBA issue this rule under the 2010 Small Business Jobs Act and National Defense Authorization Act of 2013. However, AGC's primary objective in issuing these comments is to ensure that construction contractors—both non-small contractors and small contractors as mentors or small contractors as protégés—that choose to participate in the program have the least confusing and most clear regulations possible.

AGC is additionally obligated to note its concerns about the potential for this rule to dramatically alter the small business program and federal contracting in general. Whether that alteration is for the improvement of the small business program or not depends on where an individual small or non-small business sits and that business's individual preferences. As AGC represents both small and

non-small construction contractors, we again note that the association does not take a position on merits of the policy. But, AGC feels compelled to share the viewpoints of all its members who either support, do not support, or are simply confused about complying with or the possible ramifications of this rule.

The Creation of One—Rather than Four—New SBA Mentor-Protégé Program

AGC supports the sensible standardization of regulations to help eliminate confusion, but still account for the uniqueness of the construction industry. As such, AGC urges the SBA to create one new mentor-protégé program rather than four—in addition to the existing 8(a) mentor-protégé program—for each type of specific small business category. While AGC understands there may be some differences among HUBZone, Service Disabled Veteran Owned, and Woman Owned small businesses, for example, AGC supports SBA’s efforts to minimize those differences as much as possible in one new mentor-protégé program. This will help eliminate confusion within the industry upon initial implementation of a final rule and beyond.

Confusion Concerning Definition of “Work” and Performance of Work/Limitation of Subcontracting Requirement in the Mentor-Protégé Joint Venture

Under the proposed rule, any contract set aside or reserved for small business that is to be performed by a small business protégé and its SBA-approved mentor authorized by § 125.9, the joint venture must perform the applicable percentage of work required by § 125.6, and the small business partner to the joint venture must perform at least 40 percent of the work performed by the joint venture. The work by the small business protégé partner must be at least 40 percent of the total done by the partners.

AGC believes that both (1) the definition of “work” and (2) the performance of work requirement in this proposed regulation are unclear, especially given the proposed rule on changing the small business performance of work requirements—specifically § 125.6—to a limitation on subcontracting requirement. The association is sincerely concerned that the SBA has put the cart before the horse. As such, AGC strongly urges the SBA complete its work on its proposed limitation on subcontracting rule, before finalizing this mentor-protégé rule. SBA should resubmit this mentor-protégé rule as a proposed regulation for comment after the limitation on subcontracting rule is finalized.

As it stands, this proposed rule continually makes reference to an undefined definition of “work” and currently uncertain “performance of work” requirement. The SBA issued on December 29, 2014, a proposed rule changing that requirement to a limitation on subcontracting. That language from the December 29 proposal—specifically the term “limitation on subcontracting”—is not included in this mentor-protégé proposed rule. Rather, the current “performance of work” nomenclature is used throughout this proposed rule. Furthermore, the December 29 proposed rule changes the calculation of how to determine how much “work” a small business self-performs and subcontracts to other entities. The SBA may change provisions in that December 29 proposed rule in any final rule. How can AGC or any entity competently provide necessary feedback for the SBA on this proposed rule without having a final limitation on subcontracting rule that defines “work” and how it’s calculated?

Again, AGC strongly urges the SBA to finalize the December 29 proposed rule and then allow for a new comment period on the mentor-protégé proposed rule.

However, in the event SBA does not choose such an avenue, we will lay out as much as possible here, conceding that the definition of “work” remains ambiguous. Given AGC’s understanding of the December 29 proposed rule, AGC and its members are unclear as to how the SBA will calculate the 40 percent small business protégé’s performance of work requirement. Will the small business protégé have to self-perform at least 40 percent of the work on a mentor-protégé awarded small business set aside contract? What happens if a small business protégé subcontracts 35 percent of its 40 percent performance of work minimum to a similarly situated small business? Under the December 29 proposed rule, the subcontracting of work by a small business protégé to a similarly situated small business subcontractor, i.e., a SDVO small business protégé to a SDVO small business subcontractor, would not count against the small business protégé’s limitation on subcontracting requirement. Consequently, the small business protégé could only self-perform five percent of the work and still be in compliance. This result would seemingly counter the desired result of the protégé gaining work experience that the SBA desires from a mentor-protégé arrangement.

If SBA seeks to require the small business protégé to self-perform at least 40 percent of the contract—which AGC assumes is 40 percent of the total paid by the government to the joint venture under the December 29 proposal—the agency should consider explicitly including in any final performance of work/limitation on subcontracting rule *and* final mentor-protégé rule a restriction for small business protégés on the amount of work they can subcontract to any business, including similarly situated small businesses. As it stands, this point is not made clear in either of these two proposed rules. AGC alternatively refers SBA to its comments submitted through www.Regulations.gov for its concerns on the December 29 performance of work/limitation on subcontracting proposed rule.

Processing of SBA Mentor-Protégé Joint Venture Agreements Should be completed on a First-Come, First Served Basis

The SBA is rightfully concerned about how it will fairly and quickly process applications for mentor-protégé joint venture agreements. AGC neither expects Congress to provide the SBA with additional resources to meet application processing demand, nor does AGC believe that any system the SBA puts in place without additional resources will quickly process applications. As it stands, many AGC members with applications pending before SBA to approve 8(a) mentor-protégé arrangements have waited anywhere from eight to eighteen months without indication of approval or disapproval. AGC has little confidence that the SBA can improve the timeliness of its approvals. Consequently, AGC holds that the SBA should focus on processing applications in a manner that is fair to all parties with respect to time.

The SBA should fully process applications to all mentor-protégé programs on a rolling, first-come, first-served basis. AGC wants to ensure that competition remains fair for all parties competing on small business reserved contracts. With wait times highly variable for fully processing existing 8(a) mentor-protégé applications, contractors that have applications pending are missing out on work for which they could otherwise compete for with such an arrangement. It’s unfair for one contractor to be approved in three months while another may be approved in 13 months. It is AGC’s position that

the SBA should complete processing of applications based on the applicant's position in line. Obviously, some applications may need more attention than others, requiring additional SBA review. The SBA should seek to balance that additional, necessary review in light of the time it has taken to fully process that application.

As noted, AGC believes the acceptance of applications should be year-round and, therefore, rolling. The SBA should not have certain "windows" where it accepts applications. AGC and its members fear that the application windows could open and close on an arbitrary basis. Additionally, any timeframes the SBA chooses will ultimately be bad for some industry contractors but not others.

Again, AGC believes that the SBA could more effectively process applications with additional resources from Congress. But, given the current budgetary environment, AGC does not think such a scenario is realistic. As a result, the SBA should process applications in the fairest manner possible with respect to time. AGC believes that processing would be done on a rolling, first-come, first-served basis.

The Mentor and Protégé Should have the Flexibility to Agree to the Mentor's Taking Up to a Permanent Forty Percent Equity Interest in the Protégé

The SBA requests comments on whether the mentor and protégé may agree to taking up to a forty percent equity interest in the protégé's business on a temporary basis. AGC does not believe such a temporary equity interest would be feasible from a practical standpoint. Additionally, a temporary equity interest would likely turn off many potential mentors from participating in the program.

First, AGC believes that a mentor's having a temporary equity interest in a protégé would not always work. Assume that the mentor must sell back its equity interest to the protégé in three years. The protégé may not have the liquid funds necessary to buy out the mentor. As a result, the protégé may have to leverage funds, impacting its bonding capacity to win new work and grow. If the SBA mandates a three year buy-out deadline, a mentor would conceivably face penalties if it failed to sell its equity interest back to the protégé. Such an artificial deadline could also unfairly enhance the protégé's position to buy back its equity interest from its mentor at a lower than fair market value.

Secondly, when a non-small or small business chooses to mentor a firm, it is essentially helping to educate and grow its competition. This is not something many potential mentor firms would want to do, especially without some form of reward. The mentor, as well as the protégé, share tremendous risk when endeavoring to navigate not only the legal confines of such an arrangement but the practical ones involved with completing a construction project on budget and on time amid complying with thousands of pages of other federal regulations. There's an argument here for the mentor being the party with the most to lose, having to share its technical and practical knowledge and resources. Furthermore, the mentor will be opening its market to a competitor in perpetuity. A short-term equity interest in a small business protégé is unlikely to drive significant numbers of or well-qualified potential mentors to take the legal and practical risks involved with establishing a mentor-protégé arrangement.

AGC adds that a former mentor is probably more likely to continue to work with its former protégé when it graduates from the small business program or seeks full and open contracts where the mentor

has a permanent equity interest in the protégé. Remember, when a small business graduates from the small business program, it falls off the cliff. It no longer has the security of competing against similar sized companies for the same contract. The graduate will face an open market of not just \$100 million companies, but multi-billion dollar companies. Providing an avenue through which a protégé can have “friends” after graduation from the small business program will help the small business survive outside of it in a very competitive marketplace.

Additionally, the SBA must not forget that, ultimately, the mentor-protégé agreement is a contract to which both the mentor and protégé voluntarily agree. A protégé does not have to sell a 40 percent interest in its company. It may negotiate for less than that amount. There are many potential mentor companies that are interested in finding protégés. In this sense, the SBA should allow the parties of the mentor-protégé agreement to freely negotiate. If the SBA is concerned that a protégé may not be sophisticated enough to understand the consequences of protégé’s selling a 40 percent or less equity interest permanently in its business, the SBA may want to consider requiring that the mentor-protégé agreement include mandatory clauses meant to raise such awareness for the protégé. However, again, the SBA should not otherwise interfere any further with the parties to freely and voluntarily negotiate the terms of a mentor-protégé agreement.

AGC Urges Balanced Implementation of Any Expanded SBA Mentor-Protégé Program(s)

As noted above, AGC neither supports nor opposes SBA’s expansion of the mentor-protégé program to all small businesses. However, AGC must comment on the general feedback it has received from its members on this proposed rule.

AGC represents construction contractors of all types—general, specialty/trade, union, non-union—and all sizes—from small and emerging to multi-billion dollar firms. AGC has heard from small businesses—of all set-aside types and sizes—that oppose the expansion of the SBA mentor-protégé program to those that support it. Similarly, AGC has heard from non-small businesses that support the expansion of the SBA mentor-protégé program to those that oppose it. There is no consensus within AGC’s membership on the merits of SBA’s moving forward with this proposed rule. That stated, AGC members generally agree that the SBA should take a balanced approach to finalizing and implementing this new mentor-protégé program. What does this mean?

AGC members are concerned that the expanded mentor-protégé program will fundamentally alter competition for federal government contracts within the small business program. Non-small businesses are concerned that small business set-aside projects will grow larger in size for a greater number of agency contracts. Such non-small businesses fear that they will be pushed out of competing for projects they would otherwise be qualified for because they do not have or have no interest in mentoring a small business protégé. For example, the Small Business Act requires agencies to set aside a contract when two or more qualified small businesses will compete for the contract. This is known as the “Rule of Two.” As more non-small/small business mentor-protégé JVs—which are considered the same as a stand-alone small businesses—enter the marketplace, there will likely be more and larger dollar amount contracts set aside because these mentor-protégé teams could satisfy the “Rule of Two.”

Likewise, small businesses that do not want a mentor fear that they will not be able to compete fairly as a stand-alone small business in a growing marketplace where non-small business mentors joint venture with small business protégés. In a risk adverse federal contracting environment, many stand-alone small businesses worry that agency contracting officers will prefer the non-small mentor/small protégé JV to their lone small business. The thought goes that contracting officers will prefer having a non-small business with a greater bonding capacity and financial resources to a stand-alone small business that is well-qualified but has a lower bonding capacity and fewer financial resources than a non-small business. Such situations play off a contracting officer's desire to avoid risk on the jobsite and even possible contractor default.

Furthermore, agencies are already prone to bundling and consolidating contracts. Despite the rules and SBA efforts to prevent bundling, AGC and its members continue to see agencies bundle contracts to the detriment of increased competition, especially for small businesses. When a federal agency seeks to set aside work for small business, its focus remains on meeting the small business contracting goals. AGC is comfortable stating that when it comes to meeting these goals, the ends justify the means for agencies. Here, our concern is that agencies will seek to set aside fewer contracts for small businesses at larger dollar amounts to meet their small business goals. The larger the contract dollar amount, the more difficulty stand-alone small businesses will have competing for them. However, under such a scenario, the dollar figures of work going to small businesses may increase, but the dollars will go to fewer small businesses and non-small businesses will share those dollars with small businesses. Fewer contract procurements save agencies money on acquisition resources and the project delivery process. In an environment where agencies can let fewer small business contracts as a result of contract dollar size increasing, the agencies will save costs on procurement while also meeting or exceeding their small business goals. On paper, the statistics may look good and play well in the press. In reality, fewer stand-alone small businesses will have the opportunity to compete for federal government contracts.

The SBA should consider efforts to ameliorate the situations noted above when implementing this new program. First, AGC agrees with the SBA that transparency is paramount. The SBA should take the least burdensome steps possible to help track mentor-protégé JV contract awards. As such, SBA may consider steps to identify these JVs through their registration under the System for Awards Management (SAM). Ultimately over time as the program matures, the data generated—assuming it is well qualified—should help inform SBA's further implementation. This leads AGC to its second point. If the situations above are happening to a significant degree, the SBA may want to consider setting agency-wide or specific percentage of contract awards limitations for mentor-protégés. Again, SBA should first capture the data and analyze it before the agency makes any such significant changes to implementation of the mentor-protégé program.

Even with these concerns stated, AGC has many members—small and non-small—that are excited for and interested in the expanded mentor-protégé program and are less or not concerned about the situations described above. As previously noted, expansion of this program can help small businesses survive after they graduate from the small business program. However, AGC urges SBA to take a balanced approach when implementing this program that—to the best extent possible—promotes the positive development of small businesses on one hand, while not harming them with the other hand.

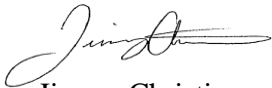
Conclusion

In sum, AGC appreciates the SBA's submitting this proposed rule for public comment. However, the association believes it is necessary for SBA to either extend this comment period or re-issue this proposed rule for public comment after the SBA finalizes its performance of work proposed rule issued on December 29, 2014, as explained above.

Again, AGC's primary objective in issuing these comments is to ensure that construction contractors—both non-small contractors and small contractors as mentors or small contractors as protégés—that choose to participate in the program have the least confusing and most clear regulations possible. Nevertheless, given the outpouring of interest from our membership, we urge SBA to take a balanced approach to implementing any final program that does not drastically alter the small business program to the detriment of robust competition.

Thank you for your consideration of AGC's concerns.

Sincerely,



Jimmy Christianson
Director of Government Affairs
Federal & Heavy Construction Division
Associated General Contractors of America