PILIERO MAZZA PLLC
ATTORNEYS AT LAW

888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006
PHONE 202 857-1000
FAX 202 857-0200
WWW.PILIEROMAZZA.COM

May 6, 2015

VIA FEDERAL ERULEMAKING PORTAL

Brenda Fernandez
Office of Policy, Planning and Liaison
U.S. Small Business Administration
409 3rd Street, S.W., 8th Floor
Washington, DC 20416

Re: RIN: 3245-AG24, Comments on Proposed Rule Regarding the Small Business 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

Dear Ms. Fernandez:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule, issued February 5, 2015, 80 Fed. Reg. 6618. Our firm represents small businesses operating across the government contracting spectrum. Many of the federal contractors we represent and have talked to have been eagerly anticipating this rulemaking. The proposed expansion of SBA's mentor-protégé program heralds significant and beneficial changes for small and large businesses that work on set-aside projects. We concur with much of what SBA is proposing in this rulemaking and commend the agency for its efforts. We hope SBA will target the end of 2015 to issue the final rule.

New Mentor-Protégé Program for All Small Businesses

❖ **One New Program**

We are in favor of SBA's proposal to create one new mentor-protégé program available for all small businesses, including service-disabled veteran-owned small businesses ("SDVOSBs"), HUBZone firms, women-owned and economically-disadvantaged women-owned small businesses ("WOSBs/EDWOSBs"). This is welcome news for small and large businesses, as many more firms will be able to access the benefits of being a mentor and a protégé. We agree with SBA that one new program makes more sense than five programs, not only because so many programs would be likely to create confusion but also because of the administrative burden to manage so many programs.

❖ **Applications**

We do not believe SBA should consolidate the review and approval of all mentor-protégé agreements into the same office. While this may ensure greater consistency, that office may be overburdened with applications. Insofar as SBA is planning to maintain the existing 8(a) mentor-protégé program as a separate program, the agency should continue to process those applications through the 8(a) BD office. Furthermore, if the final rule allows 8(a) firms to participate in the 8(a) mentor-protégé program so long as they are small and eliminates the other eligibility requirements (i.e. in the developmental stage or less than half the size standard of their primary NAICS code, or never received an 8(a) contract and not in the last six months of their program participation), then we believe that 8(a) firms should only have the option of applying to the 8(a) mentor-protégé program to help maintain some balance between the volume of applicants handled by the respective programs.

We oppose the use of open and closed application periods. We certainly appreciate the agency's concern about the potential volume of applications. However, when the Department of Veterans Affairs utilized open and closed application periods, we heard from many veterans who were frustrated by their inability to apply and them not knowing when the application period would reopen. Utilizing open and closed periods raises questions about fairness, as those firms who are able to apply before the period closes may have a significant advantage over those who cannot and must wait, perhaps indefinitely, for their opportunity to apply. Although an "always open" approach may lead to longer timelines for processing applications, at least firms would know with certainty that they would be permitted to apply when they are ready to do so. Further, even if the "open" periods are clear, the fact that applications could only be submitted at specific times may cause potential protégés to rush the process of selecting a mentor, leading to situations where the chosen mentor is not the right fit or the type of assistance to be provided is not sufficient. None of these outcomes would help small businesses, especially if SBA limits the number of mentors and the term of the relationship.

Initially, there may be significant delays in processing applications under the new program depending on the level of interest from the small business community. In anticipation of this possibility, SBA should consider including a provision permitting firms with pending mentor-protégé applications to submit proposals as a joint venture. The provision could be applicable only to those applicants whose applications have been pending for a particular time. For example, ABC protégé filed its application on April 1. On July 1, ABC needs to respond to a small business solicitation and would like to use the joint venture tool but cannot because its application is pending. Under this provision, since the application has been pending for 90 days, the joint venture would be permitted to submit its proposal as a small business joint venture. If or when the agency indicated a desire to award the contract to the joint venture, SBA could fast-track the review of the pending mentor-protégé application. This would require a change to the size rules to make clear that the joint venture would be eligible for the contract as long as the mentor-protégé application was pending for at least 90 days and at the time of proposal submission and the SBA ultimately approved the application by the time of contract award. This approach would alleviate some of the burden for SBA in reviewing so many applications, because it could prioritize the review, and this would also help small businesses avoid missing out on an important contract opportunity that may only come along once every five years simply because SBA has not yet had the chance to review the mentor-protégé application by the date of proposal submission. This provision could sunset after some period of time.

- **Benefits of the Mentor-Protégé Relationships**

SBA's proposal to implement the same benefits available to 8(a) protégés for all small business protégés is consistent with Congress' direction to make the new program identical to the 8(a) mentor-protégé program. The proposed rule suggests that the mentor subcontracting to the protégé is envisioned under the 8(a) mentor-protégé program, although SBA indicated the thrust of the program is for the protégé to subcontract to the mentor. We have seen confusion about this in the past, and we have seen at least one Office of Hearings and Appeals ("OHA") decision that found affiliation because the mentor was proposed as a subcontractor to the protégé and OHA ruled that this was outside the mentor-protégé agreement. OHA found the joint venture to be large based upon the ostensible subcontractor rule and rejected the argument that a de facto joint venture was exempt from affiliation. See Size Appeal of InGenesis, Inc., SBA No. SIZ-5436 (2013). Therefore, we ask SBA to make clear in the final rule that the mentor subcontracting to the protégé is among the types of available assistance under the new mentor-protégé program and the existing 8(a) mentor-protégé program.

We agree with the current form of the proposed rules allowing the mentor to take a potentially permanent 40 percent ownership interest in the protégé firm. SBA requested comments on whether it should prohibit the mentor from keeping its 40 percent ownership interest after the expiration of the mentor-protégé agreement. We believe there are a number of problems with forcing a mentor to sell its ownership in a protégé by a specific date.

First, non-mentor companies have the right to take a 49 percent ownership interest in any small business, protégé or not. Granted, such an ownership interest is not shielded from scrutiny during a size protest or other affiliation review, but the same is true for the 40 percent ownership after the mentor-protégé agreement expires. At that point, the entities no longer share any special relationship and, thus, the 40 percent ownership stake can be taken into consideration when performing a size review.

Second, if SBA were to require the mentor to divest itself of its ownership interest after the expiration of the mentor-protégé relationship, the former protégé would have to buy out that mentor's interest. A mentor's ownership interest in a protégé would be a property right which cannot simply be acquired or returned without compensation for the then-fair market value of said property. If a mentor-protégé relationship is successful, that could mean the former protégé would be mandated by this potential SBA regulation to pay out large sums to buy-out the mentor's interest. This could bankrupt the former protégé and eliminate the gains made during the mentor-protégé term. Further, if the mentor were required to simply relinquish its ownership for free, that would have tax implications for the protégé firms as current IRS rules would require the former protégé to show the value of the mentor's interest as a gift or forgiveness of debt for the year in which the mentor forfeited the ownership. This, again, could create a large liability for the protégé in the form of additional taxes owed to the federal, state, and local governments.

Finally, it is possible that the protégé may no longer be small and therefore, ownership by the mentor would have no impact on the firm's size.

Thus, any revision to the proposed rules requiring divestiture of the mentor's ownership interest in the protégé by a pre-ordained deadline should be avoided.

That said, we recommend that SBA regulations governing the new program make clear that the affiliation exemption does not apply once the mentor protégé relationship has ended so that small business can carefully consider the ramifications to ownership without the exemption. SBA should consider listing some examples of the potential adverse consequences. In addition, SBA could require approval of the change in ownership at the time it reviews the mentor-protégé application or at the time the ownership change is made in order for SBA to determine that the mentor's ownership will serve the purposes of the program. Finally, SBA could restrict mentors from having an ownership interest in more than three protégés.

❖ **Written Mentor-Protégé Agreement**

We agree that, as with the 8(a) mentor-protégé program, all mentor-protégé agreements must be in writing and must specify what real and substantive development assistance is being provided to the protégé. This ensures that the true purposes of the mentor-protégé program are being met.

We disagree, however, with the rule requiring a protégé already in other mentor-protégé programs to show that the assistance being provided under any new mentor-protégé agreement differs from the assistance being provided pursuant to the mentor-protégé agreements already in place. This requirement will likely create disputes about whether certain assistance is *different enough* from the assistance already being provided. In addition, we understand SBA does not want applicants to focus on pursuing joint ventures, but the ability to form a joint venture with the mentor is one of the key distinguishing characteristics of SBA's mentor-protégé program. Would the joint venture assistance not be enough to justify a new mentor-protégé relationship in SBA's program? What about the intention to obtain the up to 40 percent equity investment from the mentor? Surely, an equity investment is a benefit and assistance unique to SBA's program.

Moreover, many other federal mentor-protégé programs may be eliminated once SBA's program is up and running. If the firm is prevented from applying to SBA's program because it is in another mentor-protégé program, that firm may be forced to go without mentoring for several months if it either (a) terminates its existing mentor-protégé relationship and then waits for SBA to approve its application; or (b) waits until the other agency declines to continue its current mentor-protégé program, at which point it would have to go through the application process with SBA. We suggest that SBA should permit firms to apply to its new program even if they have another mentor-protégé arrangement in place. And if the assistance sought under SBA's program is not very different from the assistance provided under the other mentor-protégé arrangement, SBA could require termination of the other mentor-protégé arrangement as a condition of granting admission into SBA's program.

Further, we disagree with any arbitrary limit on the number of years a mentor-protégé agreement may be in place. So long as the protégé is still a small business and is receiving and benefiting from the assistance, and the mentor is capable of and actually providing the assistance, then the mentor-protégé relationship should be allowed to continue. While there may be a concern that no limits could lead to large businesses excessively benefiting from small business programs, current laws and regulations exist to mitigate against this possibility. For example, SBA has general oversight to review whether the parties are meeting the objectives set forth in the agreements. In addition, there are ample laws and regulations in place which, if enforced, will ferret out instances of abuse. Finally, SBA is proposing that OHA may hear size challenges which also place parameters on the ability of mentors and protégés to operate outside the parameters of their approved agreements. We believe that the current laws, regulations and oversight authorities adequately protect the integrity of the mentor-protégé program and that additional arbitrary temporal limits to the term are unnecessary and stifle the ability for protégés to truly benefit from the program and become strong competitors in the larger federal marketplace and the private sector.

Indeed, many mentor-protégé relationships take years to develop into a fruitful endeavor where both companies understand how to work with each other, how the specific assistance should be tailored to give maximum benefit to the protégé firm, and ensure that the protégé continues to develop after the mentor protégé relationship has ended naturally. Limiting the arrangement to three year terms means protégés will effectively be able to have only one mentor, because they will need the second three-year term to reap benefits from the time invested during the first three years. For this reason, we believe SBA should not place a time limit on the relationships and instead should permit them to continue so long as they are operating as intended, the protégé is benefitting, and the protégé continues to be a small business.

We suggest that SBA revisit its plan to review mentor-protégé agreements on an annual basis. While perhaps a worthy goal, it does not seem feasible. SBA should consider a three-year review, similar to the HUBZone program. Under this approach, SBA would require firms, every three years, to demonstrate they remain eligible for the program, have fulfilled their responsibilities, and continue to be in need of mentoring. Firms that meet these requirements would be permitted to remain in the program for another three years, unless terminated early by either party or SBA. Also similar to the HUBZone program, SBA could put the onus on the firms to notify SBA whenever there is a material change to their eligibility or performance under the mentor-protégé agreement.

❖ **Mentors**

We disagree with SBA's proposal to prohibit non-profit entities from acting as mentors. As SBA noted, Congress directed SBA to make its new mentor-protégé programs identical to the 8(a) mentor-protégé program, and the 8(a) program currently allows for non-profit firms to serve as mentors. SBA should give effect to Congress' overriding goal–that the new mentor-protégé program must match the existing 8(a) program. Either option SBA chooses is contrary to Congress' direction. Indeed, the result SBA has proposed–modifying the 8(a) mentor-protégé program to match its interpretation of the definition of mentor–is directly contrary to Congress' intent when it directed SBA to make the new program identical to the existing 8(a) program. We believe it would be more appropriate to adhere to Congress' overriding goal to make the new program identical to the existing 8(a) program, rather than to change the existing 8(a) program for the sake of consistency in the definition of mentor.

We believe SBA should revisit its proposal to limit mentors to no more than three protégés, in the aggregate. We work with some very large, publicly traded companies that have hundreds of small business suppliers. These firms could potentially mentor many firms, in different industries, and they have the resources to ensure each protégé will benefit as intended. Some of these firms have told us they do not participate in the mentor protégé program because they do not want to be perceived as playing favorites with only one or two permitted suppliers as protégés.

We do not believe the ability to joint venture is a reasonable justification for preventing mentors from having more than three protégés. In every joint venture, the mentor is permitted to obtain 60 percent of the work (versus the general limitation on subcontracting which allows 10 percent less or 50 percent to be subcontracted). SBA has determined that this is permissible to entice mentors and to help small businesses access larger contracts. Why does this become more problematic simply because of the number of joint ventures and protégés? A mentor is not able to continue performing joint ventures, and obtain 60 percent of additional set-aside contracts, unless its protégés are also performing in the joint ventures and obtaining 40 percent of those contracts. In other words, while it is true that mentors will obtain more benefits from more joint ventures, there would be more protégés benefiting as well.

SBA's enforcement of the mentor-protégé agreement terms, and the ongoing monitoring, is the appropriate means to ensure the protégé benefits as intended from the relationship. If the arrangements are functioning as intended per the restrictions imposed through the agreement and annual monitoring, and the mentor has the wherewithal and commitment to mentor many firms, a limitation on the number of protégés is not necessary. In short, the mentor should be limited in the number of protégés it may have based on its capability to mentor, not by an arbitrary numerical limitation.

SBA should also permit large businesses with multiple divisions or business units to establish the business units or divisions as separate mentors. And SBA should perform an individual assessment of the financial condition of the business unit or division, rather than looking at the entire company's financial condition, in assessing the mentor's eligibility.

We do not believe it makes sense to require a protégé, in either mentor-protégé program, to give up its protégé status simply because it separately seeks to be a mentor. Again, we believe SBA should focus on determining eligibility based on the individualized assessment of the prospective mentor and protégé. Whether a prospective mentor is currently a protégé in another relationship is a factor SBA should consider in deciding if the firm can impart sufficient assistance as a mentor. But it should not be the only factor that automatically eliminates a firm from being both a protégé and a mentor at the same time. The goal of the program should be to help as many small businesses as possible receive the mentoring they need to be successful. Whether the prospective mentor has many other protégés, or is also itself a protégé, should not prevent that firm from acting as a mentor to another protégé if it can demonstrate it has the capability to fulfill the requirements of a mentor.

We would like to see SBA provide an explanation or definition of what constitutes "good financial condition" for a mentor. DoD's mentor requirements are much simpler–the firm must have an active subcontracting plan and be eligible for federal contracts. While the exact same approach may not make sense for SBA's program, the agency should consider a simplified approach. The assessment of good financial condition is designed to ensure the mentor can provide the mentoring. So long as it can provide the assistance required, the financial condition should be satisfied. In addition, mentoring may not necessarily be financial. Thus, SBA could simplify the requirement so the mentor needs to establish that it has the financial, management, and/or technical experience and expertise to impart whatever assistance is envisioned under the mentor-protégé agreement. An approach like this will avoid unfair results when focused too narrowly on the mentor's financial statements, which has led to very large mentors being denied from the program because of an anomaly on their books for the prior year. As an alternative, in order to make the "good financial condition" standard less subjective, SBA could require that mentors provide a letter from an accounting firm, bank, or other similar financial institution with knowledge about the mentor's financial condition, stating that the mentor is financially sound. That would allow the application of GAAP and other similar standards to mentors, and remove some of the subjectivity from the regulations, which can lead to needless litigation.

❖ **Protégés**

We are in favor of SBA's proposal to relax the requirements for firms seeking to qualify as a protégé in either mentor-protégé program. More firms will benefit from the mentor-protégé programs if they are able to qualify simply if they are small and are able to demonstrate a need for mentoring. We do not believe the focus of the mentor-protégé program should be on only the smallest of small businesses. Again, we believe the eligibility criteria should be geared toward the individualized assessment of whether the firm can demonstrate the need for mentoring. When SBA approves and renews mentor-protégé arrangements, it should consider the growth of a small business as a factor in determining the extent to which that firm is in need of mentoring. It may be that in some cases a maturing small business is not sufficiently in need of mentoring to justify inclusion or continuation in the program. However, we have worked with many maturing small businesses that can still benefit from mentoring, particularly as they approach the transition from small to large business in their industry.

We do not agree with SBA's proposal that the protégé must be small in its primary industry. This will unfairly penalize protégés and defeat a key advantage of the program, which is to help small businesses grow and diversify in other areas. This will also add unnecessary additional burden to SBA and protégés in the assessment of the protégé's primary industry. SBA should simply require that protégés, including firms participating in the 8(a) mentor protégé program, be small in whatever industry corresponds to the mentoring they are seeking.

For the reasons above, we strongly support the SBA's proposal to eliminate the eligibility requirements for proposed 8(a) protégés that they be either in the developmental stage or less than have the size standard of their primary NAICS code or never have received an 8(a) contract. SBA should also consider whether it should eliminate its prohibition on approving 8(a) mentor-protégé applications if the 8(a) firm is within six months of graduation. As noted about, with these changes, 8(a) firms could be required to exclusively utilize the 8(a) mentor protégé program until graduation. Finally, we recommend that SBA clarify that an 8(a) firm need not be half the size standard to participate in a joint venture with another small business.

We do not believe SBA should impose a numerical limitation on the number of mentors a protégé may have. We believe the program would be better served by focusing the eligibility criteria on the individualized assessment of the need for and potential to benefit from mentoring. One firm could potentially benefit from mentoring in multiple areas. Limiting a protégé's ability to have only one or two mentors effectively requires the protégé to stay locked in a particular area and limits its ability to concurrently grow the company in different and new directions with the help of multiple mentors. Not every protégé would be able to demonstrate that this could work for them, but for those that can, SBA should not restrict the number of mentors those firms may have.

We understand the reasoning behind SBA's proposal to require prospective protégés to undergo a size determination before they are eligible for the mentor-protégé program. However, we are concerned with the amount of time this will add to what will already likely be a lengthy application process and whether it unfairly penalizes those firms that have never before undergone a size determination. A firm that may have undergone a size determination years ago can simply provide a self-certification that no circumstances have changed, while a firm that has never undergone a review must go through a full size determination. Why not allow all firms to simply self-certify and then, if SBA has concerns during the protégé approval process, it could refer a particular matter for a size determination at that point? This would be similar to SBA's statement that it "may" examine status eligibility for SDVOSBs and WOSBs as part of the protégé approval process. Like the SDVOSB and WOSB programs, small business is a self-certification. Allowing self-certifications for all prospective protégés will not unfairly prejudice the application process in favor of those firms that have already had a size determination for whatever reason.

SBA can require protégés to provide financial statements, tax returns, etc., along with the self-certification of size status. That way, if SBA has a concern about a particular application, it could be referred for a size determination. But such a step may not be necessary in most cases, which would save considerable time and resources for applicants and SBA.

If SBA sticks with the current proposal, the agency should provide additional certainty for the applicants as to how long it will take for SBA to process size determinations for mentor-protégé applications. We assume such size determinations would be subject to appeal, but we ask SBA to confirm. Also, there appears to be a numbering error for the proposed new addition to 13 C.F.R. § 121.1001(b)(10), as this provision already exists.

SBA should also make clear in the final rule that in no event would it be necessary to perform a size determination on the mentor, either for the new mentor-protégé program or the existing 8(a) program. Because the mentor need not be a small business, it is a waste of time and resources for SBA and contractors to conduct a size determination on a mentor. We are aware that some SBA District Offices require mentors to complete SBA Form 355s when applying to become a mentor and then again if applying for approval of an 8(a) joint venture. This paperwork is unnecessary and should be eliminated.

- **Impact on Other Federal Mentor-Protégé Programs**

We agree with SBA in questioning the utility of the other federal mentor-protégé programs. There is much confusion about which programs are sanctioned by SBA and which carry heightened risk of affiliation. That said, we are concerned about SBA's ability to handle mentor-protégé applications for the entire government if it were to encourage other agencies to shut down their programs. Providing more time and an easier process to agencies to help them obtain SBA's approval for their programs may make it easier for SBA to manage its own program.

In the end, we believe SBA is right to expect that many agencies will decide not to continue their programs once SBA's new program is up-and-running. Therefore, we believe SBA should incorporate the subcontracting incentives found in other mentor-protégé programs to ensure these useful benefits are not eliminated for mentors and protégés if many of the other federal mentor-protégé programs are discontinued.

We do not see a need for the VA's separate mentor-protégé program after the expiration of the one-year grace period. Given the confusion and difficulties that have arisen in several contexts because of the two separate SDVOSB programs, the government should be looking to consolidate and simplify these programs as much as possible.

Joint Ventures

- **Informal and Populated Joint Ventures**

We appreciate SBA's reasoning for proposing to eliminate populated joint ventures. While we have worked with some clients that prefer populated joint ventures, most choose the unpopulated structure. That said, we are confused as to why SBA's proposed language focuses on eliminating the populated joint venture structure when a joint venture is formed as a separate legal entity. We do not believe SBA means to suggest that firms may continue to use the populated joint venture structure when they do not form the joint venture as a separate legal entity. SBA should clarify this, and should go further to eliminate its reference to "informal" and "formal" joint ventures and "separate legal entities". We agree the existing language is confusing, and we do not believe the proposal is clearer. Technically, any joint venture may be considered as a separate legal entity since each is required to have separate EIN numbers, DUNS numbers and to register in SAM and open a separate bank account. Under most state laws, unless the joint venture is formed as a limited liability company or a corporation, it will be treated as a partnership. We think it would be helpful if SBA's rules state that joint ventures may be formed as LLCs or as unincorporated entities which may be viewed as partnerships under state law. SBA can simply state that all joint ventures must be in writing. It does not seem necessary to address the result of that writing (i.e., whether the joint venture is a partnership or an LLC) to get the point across that the joint venture must be in writing.

Most of the joint ventures we help to form are LLCs, which we recommend to limit liability. However, the downside is that forming an LLC requires additional time and expense, before the parties will know whether the joint venture will be successful in winning any work.

Thus, we believe SBA should not disturb firms' ability to form a joint venture more quickly and cost-effectively simply by signing a joint venture agreement.

❖ **Joint Venture Certifications**

We disagree with SBA's proposal to require joint venture partners to provide a certification of compliance with the joint venture regulations and agreement prior to performing the contract and for each year during the contract. There are already sufficient certification and reporting requirements to address SBA's concern about greater awareness and accountability for joint ventures. At most, SBA should require one certification prior to performance of the contract. If a joint venture has submitted one certification indicating it will perform the contract consistent with the application rules and agreement, it is unclear why additional certifications during the contract would do more to heighten the joint venture's accountability or the government's ability to take action against the joint venture for an inaccurate representation. The annual certifications on the contract simply add an unnecessary paperwork burden for small businesses.

❖ **Past Performance of Joint Venture Partners**

We applaud SBA's attempt to require procuring agencies to consider the past performance of each partner to the joint venture. While most agencies do consider the past performance of the partners, some do not and the joint venture receives a neutral rating which often defeats the purpose of the joint venture and eliminates it from competition. Since both parties to the joint venture are responsible for performance of the contract, if awarded, we fail to see why their past performance should not count for evaluation purposes. Consistency in this regard will assist small businesses and their joint venture partners in making decisions on how to structure their team–whether as a prime/subcontractor or joint venture relationship and will provide guidance to procuring agencies that may not be familiar with use of joint ventures. Likewise, we believe that SBA should recommend that the General Services Administration allow use of joint ventures for Schedule buys where both parties to the joint venture are Schedule holders, particularly if populated joint ventures are no longer permitted. Currently, this practice is not permitted and the joint venture itself must hold the Schedule, which is impractical.

❖ **Tracking Joint Venture Awards**

We appreciate SBA's desire to better-track awards to joint ventures, but we oppose a requirement that would impose a naming convention on joint ventures, such as by requiring the name to include the words "Small Business Joint Venture." We think this may create confusion for mentor-protégé joint ventures and joint ventures participating in various set-aside programs. In addition, firms with similar names trying to register their joint venture in the same jurisdiction may face problems because they will not have as much flexibility to vary the entity's name. In addition, we believe that other options, such as requiring a disclosure within SAM.gov, would better balance SBA's goal and contractors' concerns about the confidentiality of their business arrangements.

We would also appreciate if SBA took this opportunity to clarify what (and what does not) constitute an award of a contract for purposes of ensuring a joint venture's compliance with the "3-in-2" rule found at 13 C.F.R. § 121.103(h). Many of our clients have come to us with questions regarding whether, for example, award of a task order under a multiple award contract constitutes a separate contract award for the purposes of this rule. Section 8(a) firms also question whether joint venturing for subcontracts counts toward the rule. We believe that SBA should define the types of contract awards that count towards the three total contract awards that joint ventures may receive before they must stop bidding on additional work.

❖ **Joint Venture Rules for Each Program**

We agree with SBA's proposal to adopt joint venture rules for each small business program that is uniform and comparable to the 8(a) joint venture rules. We also agree with SBA's proposal that a small business joint venture need not be in any particular format or specify any particular provisions to qualify as small.

We are unsure why SBA is proposing that joint venture partners must receive profits commensurate with their ownership interests if the joint venture is a separate legal entity, but the partners may share profit commensurate with work performed for an "informal" joint venture. Again, we believe SBA should eliminate all references to "informal" and "formal" joint ventures from the rules. Additionally, it is unclear why SBA decided to depart from the current 8(a) rules, which permit profit to be split commensurate with the work performed except in a populated separate entity joint venture. Allowing a mentor to perform up to 60 percent of the work in a separate legal entity joint venture, but limiting its share of the profit to no more than 49 percent, does not make sense. SBA should allow profit to be shared commensurate with work performed for all joint ventures.

We also note that SBA's proposed rule is inconsistent with the limitations on subcontracting proposed rulemaking regarding how SBA will determine the size of a joint venture. In the proposed rule addressing the limitations on subcontracting, SBA proposed to allow small businesses to joint venture for any project, regardless of the size of the project, as long as each small business meets the project's small business standard. However, the mentor-protégé rulemaking retains language SBA sought to change, which provides that, absent an exception, small businesses must be small in the aggregate to form a joint venture. SBA should make sure this is uniform in both final rules and should adopt the proposal in the limitations on subcontracting rulemaking, as that proposal would allow more small businesses to use joint ventures.

Currently, SBA typically will not receive an 8(a) joint venture agreement, let alone review and approve it, until the contract award is imminent. SBA is now proposing to approve 8(a) joint ventures at any time, whether or not in connection with a specific 8(a) contract. We are in favor of this proposal, which we believe will benefit 8(a) joint venture partners, as well as contracting agencies, by allowing for greater certainty about the eligibility of a joint venture before a proposal is submitted.

The new rule changes recent OHA case law which held that disappointed offerors could not protest the size of an SBA-approved 8(a) joint venture. Because SBA does not determine the size of the 8(a) concern or the size of a joint venture, in approving an 8(a) joint venture, SBA has concluded that 8(a) joint ventures should not be immune from size protests. We understand SBA's reasoning here, but we believe the agency should make clear that such protests would pertain only to the small business status of the joint venture (i.e., whether the joint venture partners meet the applicable size standard). Protesters should not be permitted to contest the provisions of the joint venture agreement and raise questions about whether SBA should have approved the joint venture. The approval may not be dispositive of whether the firms are small if SBA chose not to look closely at size during its review of the joint venture, but the permitted protest should be narrowly focused on size alone.

We also believe that SBA should consider amending the 8(a) joint venture requirements found at 13 C.F.R. § 124.513(c) & (d) based on the recent OHA decision of Size Appeal of Kisan-Pike, a Joint Venture, SBA No. SIZ-5618 (2014). In Kisan-Pike, OHA found that the venturers to an 8(a) joint venture to be affiliated because they had not sufficiently itemized the resources and contributions of each joint venture partner in accordance with the requirements found at 13 C.F.R. § 124.513(c) & (d). We believe that the result of Kisan-Pike may be applied too far in instances where the joint venture has prepared an agreement responsive to an IDIQ solicitation, for example, and the joint venture cannot yet know what the individual parties will be contributing to contract performance. By their very definition, IDIQ contracts are "indefinite" in nature. Offerors are not given the specific requirements governing performance until after contract award, when discrete task orders are issued. Therefore, offerors are not provided enough details in IDIQ solicitations to specify specific equipment, facilities, resources, or employee assignments. The specific listing as required by Kisan-Pike is neither feasible nor realistic when the very requirements of the solicitation are indefinite. We believe SBA should forestall a harsh application of Kisan-Pike by carving out an exception to the requirements of 13 C.F.R. § 124.513(c) & (d) for joint ventures submitting offers responsive to IDIQ solicitations. In addition, it may be useful for SBA to provide more specificity and examples of what is considered adequate to meet the current rule for definite contracts.

HUBZone Program

We are strongly in favor of allowing HUBZone firms to joint venture with any other small business, as this will make joint ventures a much more viable option for HUBZone firms. By not having to find another HUBZone small business concern, small business firms in the HUBZone program will have more opportunities to find joint venture partners. This, in turn, will increase their expertise and experience through relationships with non-HUBZone small businesses and large businesses in a mentor-protégé relationship. Allowing mentor-protégé relationships and joint ventures with non-HUBZone firms, and eliminating the requirement of finding another HUBZone firm to partner with, makes sense and will greatly advance the purposes of the HUBZone program.

HUBZone firms will have an easier time finding mentors with this restriction lifted and they will benefit from the mentoring and joint venture assistance. HUBZone firms will gain business development assistance including technical, management, and financial support thereby enhancing the protégé's capabilities and fulfilling the purpose of the mentor-protégé program. Securing a strong mentor will strengthen the HUBZone firm's ability to benefit historically-underutilized areas. Additionally, large businesses and non-HUBZone small businesses will have a greater incentive to joint venture or enter into a mentor-protégé relationship with HUBZone qualified small businesses stimulating growth and bringing new jobs into geographical areas with chronically high unemployment and low income.

For the reasons discussed above, we believe allowing non-HUBZone firms to serve as mentors and joint venture partners for HUBZone firms is consistent with the spirit and intent of the HUBZone program.

Changes to the 8(a) Program Rules

❖ **Establishing Social Disadvantage**

We oppose the proposed change to 13 C.F.R. § 124.103(c) to allow SBA to reject a claim of social disadvantage if SBA believes the applicant has not sufficiently rebutted an alternate theory by SBA for the claimed discrimination. This proposed change will create a slippery slope that will make it much easier for SBA reviewers to reject what the applicant has offered to show social disadvantage, even if the information is uncontroverted.

Specifically, prior OHA cases have allowed 8(a) applicants to prove social disadvantage with affidavits and sworn statements attesting to events in their lives that the applicants believe were motivated by bias or discrimination. Under the Proposed Rule, SBA could disregard a claim of social disadvantage "where a legitimate alternative ground for an adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground." Proposed Rule at p. 6624. As such, the Proposed Rule would seek additional evidence from applicants showing that such negative events (e.g., being passed-over for a promotion or not being hired) were more likely than not due to bias or discrimination and not simply due to other benign factors (e.g., another candidate had some tangible or intangible qualities–aside from race or social status–that made him more attractive for the job).

According to the Proposed Rule, when the SBA asks for evidence corroborating an individual's claims of social disadvantage:

> What the SBA is really requesting is for the individual to provide additional facts to make his or her claims of discriminatory conduct more likely than [other] possible non-discriminatory reasons for the same outcomes.

Id. The evidence necessary to corroborate an applicant's claim of social disadvantage would include: (1) when and where the discrimination occurred; (2) who committed the discrimination; (3) how the discrimination took place; and (4) how the individual was adversely affected by such acts. Id.

To defend itself in the face of what seems like an increased burden placed upon individuals applying to the 8(a) program when asking for more corroborating evidence, the SBA states that "such requests do not raise the evidentiary burden placed on an 8(a) applicant above the preponderance of the evidence standard." Id. A preponderance of the evidence is a low evidentiary standard in a civil lawsuit and the current standard of evidence required to establish a social disadvantage. However, the SBA's modification requiring a showing of negative impact places an increased burden upon individuals applying to the 8(a) program. As the SBA itself admits in the Proposed Rule, "this clarification would alter the rule expressed in Matter of Bartkowski Life Safety Corp., SBA No. BDPE-516 (2014), in which OHA ruled that 'a petitioner's claims can each be offered as evidence of social disadvantage, negative impact, or both.'" Proposed Rule at p. 6624 (emphasis added).

In Bartkowski, OHA found that SBA "applies improper standards, fails to discuss relevant evidence, or omits necessary analysis and explanation." In the Matter of Bartkowski Life Safety Corp., SBA No. BDPE-516 (April 14, 2014). The individual in Bartkowski offered examples of gender-motivated bias in all three evaluated phases of her life proving the social disadvantage that hindered and frustrated her entrepreneurial opportunities. Id. SBA, however, chose "to disbelieve Petitioner's testimony without offering any cogent reason for its skepticism" and without articulating "a valid, evidence-backed reason to discount or disregard it." Id. OHA remanded the agency's decision finding SBA's decision arbitrary, capricious, and contrary to law without "specific reasons for each finding based on the facts relating to each significant incident described by Petitioner" to establish gender based social disadvantage. Id.; see also Matter of Ace Technical, LLC, SBA No. SDBA-178 (April 17, 2008).

Our concern is that SBA reviewers will interpret the new rule as permitting them to disbelieve an applicant and issue the type of denial that was criticized in Bartkowski. By having to bear the burden of establishing that an individual's claim of social disadvantage is "more likely than [other] possible non-discriminatory reasons for the same outcome" an individual may find this too high a hurdle to overcome. It is well-established that corroborating evidence of discrimination is typically very difficult, if not impossible, to obtain. That is the reason for the preponderance of the evidence standard. We should give the benefit of the doubt to the applicant when he or she believed the incidents he or she faced were the result of discrimination.

Requiring the applicant to go further to disprove an alternate theory raises the burden too high and may be impossible to meet in many instances.

SBA may believe in theory that this rule change does not increase the burden, and simply protects the agency from those cases where an applicant has offered nothing to explain why a male counterpart received the promotion over a female. But, in practice, this rule change will permit SBA reviewers to place a much-heavier burden on applicants and will make it easier for them to deny applications. Furthermore, making it more difficult for applicants in non-designated groups to get into the 8(a) program feeds the perception that the 8(a) program is a race-based program. We believe SBA should be working to dispel, not strengthen, this perception.

Interestingly, SBA did not request comments on this part of the proposed rule but the significance of this change warranted analysis and comment. Again, we are strongly opposed to this change as it will make it too challenging for individuals to be found socially disadvantaged–one of the main prongs for 8(a) eligibility–and therefore much easier for SBA to deny individuals' acceptance into the program.

❖ **Other Proposed 8(a) Rule Changes**

Generally, we are in agreement with the other proposed 8(a) rule changes. <u>See</u> Proposed Rule at pp. 6625-6627. For example, the new rule would provide that no one individual can be responsible for the management or daily operations of more than two Tribally-owned 8(a) firms at the same time. The proposed rule would allow 8(a) firms to elect to be suspended from the 8(a) Program when its principal office is located in a geographical area where a major disaster has occurred or there has been a lapse in Federal appropriations. In addition, benefit reporting would no longer be part of the annual review submission, but instead would be done at the time of the 8(a) firm's annual submission of financial statements.

SBA also proposed a rule that would give it discretion to change an 8(a) firm's primary NAICS code when the greatest portion of total revenues during a three-year period have changed from one NAICS code to another. This does not mean that more than 50 percent of a firm's revenue must come from the primary NAICS code. Rather, revenue from a firm's primary NAICS code must exceed revenues generated from any other NAICS code. We question whether this standard is different from that set forth in 13 C.F.R. §121.107, posing the question "How does SBA determine a concern's 'primary industry'" which then states that:

> In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

This analysis is different from the one SBA is suggesting in this proposed rule. While the current regulation defines primary industry and not primary NAICS code, we question whether there is a distinction. If not, and in order to avoid confusion, we believe that one standard should be adopted. In addition, an analysis of primary NAICS code should be conducted by SBA's size specialists and not an individual firm's business specialist.

SBA requested comments on whether or not the change should be automatic based upon FPDS data. We do not recommend this change as FPDS may not include all data on a particular contractor. For example, subcontracts and lower tier subcontracts may not be recorded, information as to size of the contract or amount expended may be inaccurate and commercial work will not be included. Rather, we recommend that SBA use its definition of primary NAICS code in 13 C.F.R. Section 121.107, and information received from the firm in order to determine whether or not a change is required.

Please do not hesitate to contact Pamela Mazza, Jon Williams, Cy Alba, or Kimi Murakami at (202) 857-1000 if you have any questions about these comments.

Very truly yours,

Pamela J. Mazza

Pamela Mazza
Jon Williams
Cy Alba
Kimi Murakami

PilieroMazza PLLC