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February 7, 2020

Via Federal eRulemaking Portal

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

Re: RIN 3245-AG94
Consolidation of Mentor Protégé Programs and Other
Government Contracting Amendments
Docket No.: SBA-2018-0006

Dear Ms. Fernandez:

The Surety & Fidelity Association of America (“SFAA”) is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of premium and loss statistics for surety and fidelity. The vast majority of bonds that secure regulatory obligations are provided by SFAA members. Members of the National Association of Surety Bond Producers (NASBP) are bonding agencies that specialize in providing surety bonds for construction contracts and other purposes to companies and individuals needing the assurance offered by surety bonds. NASBP members engage in contract and commercial surety production throughout the United States, Puerto Rico, Guam, and a number of other countries.

As leading representatives of the surety bond industry, we have a significant interest in ensuring the SBA’s Mentor-Protégé program remains a viable avenue for smaller contractors to access larger contracts through partnering with more experienced and financially secure mentors/joint venture partners. In order for a smaller contractor to access government contracts it must procure the necessary performance and payment bonds from a licensed surety to be eligible to bid on large public works projects. Under current law, all federal construction contracts in excess of \$150,000 require the contractor to post performance and payment bonds (40 U.S.C §§ 3131 et seq.). This requirement ensures the government is adequately protected in the event a contractor defaults while working on a public contract. Sureties that provide performance and payment bonds require contractors to exhibit the operational capability and financial strength necessary to perform contracts successfully. A key to facilitating a contractor’s access to surety credit and, therefore, access to larger federal projects is measured contractor development.

Over the years, the amount of set aside opportunities have grown considerably for smaller contractors; however, many of the high-dollar value projects may not be accessible to smaller contractors without unduly exposing the government to a greater risk of contractor default. Many qualified small contractors are able to secure bonds at some level but cannot obtain bonds for some larger scale projects (we have observed set-aside contracts in excess of \$50 million). The Mentor Protégé Program has provided an excellent means for smaller contractors to participate in larger public construction projects without adding unnecessary risk to the SBA's contract portfolio.

SFAA and NASBP appreciate the opportunity to respond to the Small Business Administration's (SBA) request for information concerning surety companies doing business in the United States as the SBA considers the consolidation of the Mentor-Protégé Programs. We submit the following comments related to the potential elimination of Joint-Venture pre-certification by the SBA and the limitation on mentor size contemplated in the proposed rulemaking.

1) Joint-Venture pre-certification by the SBA

In response to Executive Orders 12866, 12988, 13132, 13175, 13563, 13771, the Paperwork Reduction Act (44 U.S.C. § 35), and the Regulatory Flexibility Act (5 U.S.C. §§601-612) the SBA contemplates in its notice of proposed rulemaking the elimination of its review and approval of joint venture agreements for work to be completed on competitive 8(a) contracts. We strongly urge against the SBA adopting rules that place greater burden on the private sector to self-regulate whether an entity is qualified or not to apply for set-aside contracts through the joint venture program.

Specifically, removing SBA's role as an approver of 8(a) Small Business Contractors (SBCs) seeking award of 8(a) contracts may place an implied burden on larger contractors partnering with protégé contractors, thereby implicating the surety bond issued on the project. Evaluating a contractor's size and qualifications to ensure eligibility as an SBC is not part of the underwriting procedures undertaken by sureties. This prequalification process undertaken by the sureties does not extend to a determination that its contractor has been accurately certified as a Federal small business. Sureties simply look to see if the contractor has been designated to be an 8(a) contractor or the like. In light of certain developing law concerning the False Claims Act (31 U.S.C. § 3729), the above language may have a chilling effect on the willingness of sureties to participate in providing surety credit for 8(a) set aside contracts.

Accordingly, we advise SBA to continue its role in requiring 8(a) SBCs seeking award of an 8(a) contract to submit their JV agreement for pre-approval by the SBA.

2) Potential limitation on mentor size

Section 125.9 in the proposed rule contemplates limiting firms with annual revenues of \$100 million or greater from the potential pool of mentors available to small business protégé firms. We strongly recommend that the SBA not move forward with this proposed change to the program.

By removing mentors with annual revenues greater than \$100 million, the SBA would be removing some of the most sophisticated firms from the resources potentially available to small and emerging business contractors, without creating any real benefits for small businesses participating in the program. As you may know, this would eliminate Hensel Phelps, CB&I, Sundt Construction, and many other highly qualified mentor contractors from said program. If the SBA is considering this because it feels these firms don't need access to the set-aside contracts, that certainly may be the case, *but* this program is explicitly "to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts." When considering the needs of small and emerging contractors, the proper focus of the SBA program, one understands that these large firms are the very firms to whom small contractors need and should have access through this program, companies to which the protégés would not otherwise have access. Furthermore, the companies this would eliminate from participation are often the very companies that have the resources to dedicate to such a program.

The \$100 million threshold for mentors to qualify for participation appears to be an arbitrary number, without an evident reason for eliminating certain companies from being mentors. Is a dollar threshold actually needed? Is it that the SBA has found that historically these companies are not participating as mentors? Is the threshold proposed at \$100 million because these are not companies that the SBA feels should have access to set-aside contracts? SFAA and NASBP believe it is most important to focus on the needs of the protégés and how best to serve their needs to develop as a business with access to surety bonding so that they can bid on public projects.

Based on the reasons outlined, we urge the SBA to adopt the criteria articulated in 13 CFR § 125.9(b)(1) highlighted in the proposed rulemaking and to eliminate this proposed restriction for participation as a mentor.

3) Conclusion

SFAA and NASBP and many of our members continue to champion SBA Programs such as the SBA Bond Guarantee Program, which recently enhanced the Program, creating further opportunities for small and emerging businesses and particularly the Mentor-Protégé Program. Together, we are united with the SBA towards a common goal of increasing access to bonding and bonding capacity for all qualified contractors. We appreciate this opportunity to submit comments and suggestions to the Proposed Rule Making issued on November 8, 2019. Ultimately, this program is focused on providing small and emerging contractors, ones that have historically been

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disadvantaged, access to the best resources available in the construction industry to increase their opportunities to develop and to bid on public works projects. As you know, bonded contractors are far better positioned to achieve stability and growth. SFAA and NASBP do not believe there is a good reason to reduce that pool of potential resources made available to participating protégés.

As always, SFAA and NASBP are happy to further discuss these recommendations and comments with you at your convenience.

Respectfully submitted for your consideration,



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