



April 6, 2015

Brenda Fernandez
U.S. Small Business Administration
Office of Government Contracting
409 Third Street, SW, 8th Floor
Washington, DC 20416

Re: Comments regarding RIN: 3245-AG24

Dear Ms. Fernandez:

The Native Hawaiian Organization Association (NHOA) is an advocacy organization whose mission is to protect, promote, and advance the legislative intent of the SBA 8(a) Business Development program for Native Hawaiian Organizations. In response to the proposed rule published in the Federal Register on February 5, 2015 [80 Federal Register, No. 24, RIN: 3245-AG24], we respectfully submit the following comments.

1. Regarding The Proposal For A Government-Wide Mentor-Protégé Program for Small Businesses

NHOA opposes this proposed rule change. We would prefer to see five separate mentor-protégé programs because currently Small Business Mentor-Protégé Joint Ventures (SBMPJVs) are exempt from SBA approval and we would want to see this exemption maintained. Furthermore, we are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide mentor-protégé program would add considerably to this burden. We would like to see dedicated Small Business Representatives (SBRs) assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

2. Regarding the Proposed Requirement For Written Documentation of Joint Ventures

NHOA supports this proposed rule change to § 121.103 (h) which would clarify that any Joint Venture (JV) arrangement must have some written documentation, but does not require a separate legal entity to be established.

3. Regarding the Proposal That If a JV Exists As a Separate Legal Entity, the JV Cannot Be Populated With Individuals Intended to Perform Contracts Awarded to the JV.

NHOA opposes this proposed rule change. We feel that the right to decide whether to populate the JV or not should be retained by the mentor and the protégé. The purpose of the Mentor-Protégé Joint Venture (MPJV) is to build the qualifications and experience of the Protégé. This is accomplished whether or not the JV is populated or not. Therefore the decision to populate or not should be based upon business considerations. In some instances, prohibiting the JV from having its own separate employees to perform contracts awarded to the JV would cause undue and unfair hardship. For

example, some contracts have specific language which suggests that the staff performing the contract actually need to be directly employed by the JV because of the Federal Tort Claim Act (FTCA) (10 U.S.C. 1089). The FTCA provides medical malpractice insurance for staff working under a personal service agreement. In these types of contracts, if the JV is prohibited from employing staff that perform the contract, it would incur additional medical malpractice costs.

4. Regarding the Proposal to Require All JV Partnerships to Be Formed As Separate Legal Entities

NHOA supports this proposed rule change.

5. Regarding the Proposal to Allow JVs for HUBZone contracts between a HUBZone protégé firm and its mentor.

NHOA is neutral regarding this proposed rule change.

6. Regarding Joint Venture Certifications and Performance of Work Reports

NHOA supports this proposed rule change. It would promote the ability of small businesses to negotiate work share arrangements to be in compliance with the regulations and build past performance, which is the intent of the joint venture program. These requirements are already in place under the 8(a) program. So expanding the requirement to other SBA socially disadvantaged programs would level the playing field.

7. Regarding Tracking Joint Venture Awards

- a. Regarding the proposal to require all JVs to include in their names “small business joint venture,” and to require all MPJVs to include in their names “mentor-protégé small business joint venture”

NHOA opposes this proposed rule change as we already certify in the Representations and Certifications that we are a Small Business Joint Venture (SBJV) or a Small Business Mentor-Protégé Joint Venture (SBMPJV). So this would be an unnecessary administrative requirement.

- b. Regarding the proposal to require contracting officers to identify awards as going to SBJVs or to SBMPJVs

NHOA is neutral regarding this proposed rule change.

- c. Regarding the proposal to require SBCs to amend their System for Award Management (SAM) entries to specify that they have formed a joint venture

NHOA opposes this proposed rule change as we already certify in the Representations and Certifications that we are a JV. So this would be an unnecessary administrative requirement.

- d. Regarding the proposal to require each JV to get a separate DUNS number

NHOA supports this proposed rule change.

8. Regarding the Application for SBA's Small Business Mentor-Protégé Program

Small businesses seeking a mentor-protégé (MP) relationship would be required to submit an application to SBA for approval of the MP relationship through the 8(a) BD program or through the government-wide program. SBA is considering having one office review applications for approval or declination to ensure consistency in the process. SBA seeks comments as to what approach should be implemented.

NHOA opposes proposed rule change. We are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide MP program would add considerably to this burden. We would like to see dedicated SBRs assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

9. Regarding the Proposal for SBA to Implement "Open" and "Closed" Periods For The Acceptance of Applications for the New MP Program

NHOA is vehemently opposed to this proposed rule change, as it would limit the ability of all small businesses to actively pursue work. We believe small businesses should be able to submit their MP Agreements to the SBA for review and approval at any time. Small businesses cannot predict when it would be most advantageous to seek, find, and form a MP relationship with a large business. The need to form a MP relationship is driven by the small business's need to acquire specific management or skill set in order to be more competitive. If this proposed change is implemented, NHOA can envision opportunities hitting the street and small businesses being unable to pursue them because the MP approval period is closed. Because this rule would constrain the ability of small businesses to compete, it is not aligned with the mission of SBA to promote and grow small businesses.

10. Regarding Mentors

- a. Regarding the proposal to amend 8(a) regulations to no longer allow non-profit entities to form JVs with 8(a) firms

NHOA is neutral regarding this proposed rule change.

- b. Regarding limitations on the number and types of protégés that a mentor may have. SBA will allow a mentor to have up to three protégés, but no more than three protégés at one time. A mentor can have one or more protégés in one program and one or more in another program, but no more than three in the aggregate. Further, no mentor can have protégés that are competitors.

NHOA supports this proposed rule change.

- c. Regarding the proposal that a protégé may not become a mentor to another firm and retain its protégé status.

NHOA supports this proposed rule change.

11. Regarding Protégés

- a. Regarding the proposal to eliminate restrictions to qualify as a protégé for the 8(a) MP program.

NHOA supports this proposed rule change.

- b. Regarding the proposal to allow any firm that qualifies as small to participate in a mentor-protégé program, or if participation should be restricted to smaller firms.

NHOA supports this proposed rule change.

- c. Regarding the request for comments as to whether there should be a maximum of two mentors per protégé, or another maximum.

NHOA opposes this proposed rule change, as there are already other requirements in place to gauge the continuation of the MP agreement. So this would be an unnecessary administrative requirement. Furthermore, we oppose the limit of two mentors per protégé, as there could be a significant benefit to a small business having more than two mentors with each representing different core business lines.

12. Regarding the proposal to limit the duration of a MP agreement to no more than three years.

NHOA opposes the limitation of the MP relationship to no more than three years and would oppose any limitation on the length of the MP relationship. The learning process of each small business is different due to the specific skill set or management area, or business segment it is trying to learn. As an example, relying on the mentor to provide the management expertise for a small business to acquire an ISO 9001 certified Quality Management System could take more than three years. Other corporate certifications, such as DCAA Approved Finance Systems, ITIL Certifications or PMP Certifications for Leaders, take time to develop. NHOA recommends that the SBA not impose any time limits on MP relationships beyond the current rules tied to the life of the 8(a) firm in the 8(a) program. As long as the parties are making good faith efforts to meet the requirements of the MP agreement, the MP relationship should be allowed to continue.

13. Regarding the proposal to require firms to receive a size determination from SBA that a firm qualifies as a small business before approving that firm to act as a protégé in a SBMP relationship.

NHOA supports this proposed rule change.

14. Regarding Mentor-Protégé Programs of Other Departments and Agencies

- a. Regarding the NDAA provision that a Federal department or agency cannot carry out its own agency specific MP program for small businesses unless approved by SBA. The NDAA specifically excluded the Department of Defense's MP plan from this requirement, but included all other current MP programs of other agencies.

NHOA is neutral regarding this proposed rule change.

- b. Regarding the request for comments about whether there would be a continuing need for other SBMP programs once SBA's various programs are implemented.

NHOA is neutral regarding this proposed rule change. This decision should be made by these other departments and agencies.

- c. Regarding the request for comments about whether the subcontracting incentives authorized by MP programs of other agencies should specifically be incorporated into SBA's MP programs.

NHOA supports this proposed rule change as it would promote and grow small businesses.

15. Regarding The Benefits of Mentor-Protégé Relationships

- a. Regarding the proposal to allow a MPJV to qualify as small for any contract or subcontract provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement.

NHOA is neutral regarding this proposed rule change, as it is consistent with existing requirements.

- b. Regarding the rule that does not allow a JV to qualify for any other small business program. For example, a JV participating in the SBMP program would not qualify for a contract reserved for a specific set-aside such as 8(a), HUBZone, or SDVOSB.

NHOA supports this proposed rule change.

- c. Regarding the proposal to allow a mentor to a small business to own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm and the request for comments on whether this 40% ownership interest should be a temporary interest, being authorized only as long as the mentor-protégé relationship exists, or whether it should be able to survive the termination of the mentor-protégé relationship.

NHOA opposes this proposed rule change, as this should be a decision made by the mentor and the protégé. Our concern is that this proposed rule change would have a chilling effect on the creation of mentor-protégé agreements.

16. Regarding Written Mentor-Protégé Agreements

- a. Regarding the proposal to require all MP agreements be in writing. The document must identify the benefits intended to be derived by the protégé firm. SBA must approve any agreement prior to the firms receiving any benefits through the MP program.

NHOA is neutral regarding this proposed rule change. It would protect the protégé to have the agreement in writing.

- b. Regarding the request for comments about whether SBA should consider limiting its review and approval of MP agreements to a certain open periods each year or allow submission of agreements at any time, but limit the number of MP agreements it will review and/or approve each year.

NHOA is vehemently opposed to this proposed rule change, as it would limit the ability of all small businesses to actively pursue work. NHOA believes small businesses should be able to submit their MP Agreements to the SBA for review and approval at any time. Small businesses cannot predict when it would be most advantageous to seek, find, and form a MP relationship with a large business. The need to form a MP relationship is driven by the small business's need to acquire specific management or skill set in order to be more competitive. If this proposed change is implemented, NHOA can envision opportunities hitting the street and small businesses being unable to pursue them because the MP approval period is closed or because SBA has already reached the maximum number of MP agreements it will approve that year. Because this rule would constrain the ability of small businesses to compete, it is not aligned with the mission of SBA to promote and grow small businesses.

- c. Regarding SBA reviewing agreements annually to approve continuation of the agreement for another year.

NHOA is neutral regarding this proposed rule change.

- d. Regarding the proposal to clarify existing regulations for MP agreements through the 8(a) program that if control of the mentor changes, the previously approved MP relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the MP agreement and that it continues its commitment to fulfill its obligations under the agreement.

NHOA supports the SBA's proposed rule that would allow a MP relationship to continue after a mentor is acquired by another business, so long as the new mentor expresses in writing that the MP agreement will remain, and that the new mentor is committed to fulfill

the obligations under the agreement. However, NHOA is concerned that the protégé should have the right to refuse to continue under the new mentor.

17. Regarding to proposal to clarify that interested parties may protest the size of an SBA approved 8(a) JV that is the apparent successful offeror for a competitive 8(a) contract.

NHOA opposes this proposed rule change. The 8(a) joint venture already goes through the process of being vetted by SBA and being determined to be small. So this proposed rule change would conflict with current regulations and standard operating procedures. Furthermore, it would be an unnecessary administrative requirement.

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

NHOA is neutral regarding this proposed rule change.

19. Regarding Substantial Unfair Competitive Advantage Within an Industry Category

NHOA supports the SBA's proposed rule that for entity-owned business concerns the definition of an unfair competitive advantage is viewed at the national level, and not the local market level.

20. Regarding Management of Tribally Owned 8(a) Program Participants

The proposal would specify that the individuals responsible for the management and daily operations of a tribally-owned concern couldn't manage more than two Program Participants at the same time.

NHOA vehemently opposes this proposed rule change as the same management team can effectively manage more than two Program Participants at the same time.

21. Regarding the Control Requirement for Native Hawaiian Organizations (NHOs)

NHOA opposes the proposed rule that would allow SBA to require individual NHO Board members to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day-to-day operations of the firm (similar to individually owned firms). The regulations state that an NHO can appoint a non-disadvantaged individual with demonstrated technical expertise to manage the day-to-day operations of the firm and the Board members need only have the managerial experience to run the firm. SBA's Office of Certification & Eligibility in San Francisco has, in the past, taken a hard line stance that the NHO's Board Members need to have specific industry-related experience, and not merely managerial experience. NHOs have the opportunity to add several entity-owned concerns to its portfolio. Adding new companies to its portfolio carries the additional burden

that each new company must be in a different business sector (Primary NAICS Code). The burden of finding or adding new NHO Board members with industry-related experience in every new business, yet share the same value system as the current board, is unwarranted, nor prudent. The continuity of the NHO relies on Board Members who have a long personal history with each other, the Native Hawaiian community, and other Native Hawaiian businesses. Their clout lies with the Non-Profit NHO, not on the For-Profit side of the business. Adding new NHO Board members because a potentially new entity-owned business is in a new industry is not necessary. If the NHO Board has already demonstrated that it can provide management oversight over one business, it doesn't need to prove it can over another business. The entity-owned concern will hire (either at the President level, or Vice President level or even at the Program level) the individual who has the specific industry-related skills to make the business successful.

22. Regarding the clarification that an NHO-owned firm's eligibility for 8(a) program participation is separate and distinct from the eligibility of individual members, directors, or managers.

NHOA supports this proposed rule change.

23. Regarding the Determination of Economic Disadvantage for NHOs

NHOA is opposed to NHOs being treated as tribes. Instead, NHOA proposes that NHOs be deemed economically disadvantaged, as are the ANCs. If this requires a statutory change, NHOA proposes in the alternative that economic disadvantage of NHOs be based upon statistics compiled by the US Census, the State of Hawaii or the Office of Hawaiian Affairs demonstrating that Native Hawaiians are economically disadvantaged. A second alternative would be for NHOs only be required to prove economic disadvantage of a majority of its Board members at the time they certify their first 8(a) subsidiary. Thereafter, as long as the qualifying Board members remain as the majority of the Board, further qualification would be unnecessary.

24. Regarding the Proposal for SBA to Have Authority to Change a Participant's Primary Industry Classification

- a. Regarding the requirement that an applicant must select a NAICS code that is different from the primary business classification of any other Participant owned by that same entity.

NHOA is opposed to this proposed rule change. Unless the entity is dominant on a National level, more than one subsidiary owned by the same entity should be allowed to have the same NAICS code.

- b. Regarding SBAs contention that there is no current requirement that the newly admitted Participant actually perform most or any work in its NAICS code designated as its primary industry. SBA believes this could allow firms to circumvent the intent of the regulations.

NHOA vehemently disagrees and opposes this comment because the SBA approves the newly admitted Participant's Primary NAICS code based on work performed by the applicant in the previous 2 years. This work may have been outside of the Federal Government, or even if it was with the Federal Government, outside of the 8(a) program. The newly admitted Participant will have access to new clients and customers in Federal agencies because of their new classification as an 8(a). Limiting their access to new work outside of their Primary NAICS based on past history would have a significant limiting effect on the newly admitted Participant.

- c. Regarding the proposal to allow SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. The proposed language intends that revenue from the primary NAICS must exceed revenues generated from any other NAICS code.

NHOA vehemently opposes this proposed rule change, as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year.

- d. Regarding the proposal to provide discretion to SBA in deciding whether to change a Participant's primary industry classification because SBA can recognize whether a portion of a firm's revenues is derived from one NAICS code as opposed to one or more other NAICS codes is a snapshot in time.

NHOA vehemently opposes this proposed rule change for the same reason.

- e. Regarding the proposal that would require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate.

NHOA vehemently opposes SBA having the ability to change the primary NAICS.

- f. Regarding the request for comments on whether a change in primary industry should instead be automatic based on FPDS data.

NHOA vehemently opposes this proposed rule change, as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year.

25. Regarding 8(a) BD Program Suspensions

NHOA opposes this proposed rule change. However, NHOA would support a suspension due to a major disaster, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended. NHOA would also support a suspension due to a lack of appropriations, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended.

26. Regarding Benefits Reporting Requirement

NHOA opposes amending the time frame for reporting of benefits and strongly prefer to submit our benefits report during the annual review submission.

NHOA also opposes the imposition of a mandatory benefits reporting form because there are additional social and economic benefits that are not readily quantifiable. NHOA would support the optional use of a benefits reporting form if Participants have the option to attach an additional letter detailing and/or explaining their benefit activities. Designing a report form must be done with full participation of the Tribes, ANCs and NHOs. It cannot be a one size fits all approach that is imposed upon Native 8(a) companies.

27. Regarding Reverse Auctions

NHOA is neutral regarding this proposed rule change.

28. Regarding The Processing of Applications for HUBZone Certification

NHOA is neutral regarding this proposed rule change.

29. Regarding Reconsideration of Decisions

NHOA is neutral regarding this proposed rule change.

30. Regarding Administrative Record in 8(a) Appeals

NHOA is opposed to this proposed rule change. We do not want a review of the record and prefer instead to have a new trial on the facts.

31. Another Issue of Concern Regarding The Ability of NHOs to Have Sole Source Contracting Opportunities With All Federal Agencies.

While looking at the proposed rule changes published on February 5, 2015, NHOA also noticed that another issue of concern should be brought to the attention of SBA. Alaska Native Corporations (ANCs) and the Tribal-Owned Native 8(a) firms have the right to sole source contracts of unlimited dollar amounts with all federal agencies whereas NHOs sole source contracting is limited to Department of Defense contracts. The reason for this limitation is that the NHO program was passed under the Defense Authorization Act, limiting the sole-source capability to Department of Defense contracts whereas ANC and tribal-owned 8(a) firms are derived from their sovereign relationship with the U.S. government. NHOA supports the ability of NHOs to have sole source contracting opportunities with all federal agencies.

Thank you for your time and consideration of NHOA's comments.

Respectfully,



Ron Jarrett
President
Native Hawaiian Organizations Association

cc: U.S. Senator Brian Schatz
U.S. Senator Mazie Hirono
U.S. Representative Tulsi Gabbard
U.S. Representative Mark Takai
John Klein, Associate General Counsel for Procurement Law, SBA
John Shoraka, Assoc. Administrator, Government Contracting and Business Development, SBA
Chris James, Assistant Administrator, Office of Native American Affairs, SBA
Kevin Allis, Executive Director, Native American Contractors Association