Column: The Implications of SBA's Proposed Rule Changes for Tribally-Owned 8(a) Firms

By Peter B. Ford and Emily J. Rouleau, attorneys, PilieroMazza PLLC

The Small Business Administration (SBA) recently published a proposed rule (*https://bit.ly/2RQhpwb*) that would merge its mentor-protégé programs and amend many of its rules governing the 8(a) Business Development program.

Our Firm's Managing Partner, Pamela Mazza, recently explained the rule's significant implications for the government contracting community. In particular, SBA's proposed rule would make a number of changes to the 8(a) program and regulations applicable to tribally-owned 8(a) businesses.

We have highlighted a few of the proposed changes that may benefit these firms.

Change of Ownership

First, in a welcome amendment to 13 C.F.R. § 124.109, SBA's proposed rule would provide that an 8(a) firm owned by a tribe or Alaska Native Corporation (ANC) does not need to request a change of ownership from SBA when the tribe or ANC merely reorganizes ownership by inserting or removing a wholly-owned business entity between the tribe or ANC and the 8(a) firm.

SBA noted that it believes that a tribe or ANC should be able to replace one wholly-owned intermediary company with another without going through the change of ownership process and obtaining prior SBA approval.

Importantly, SBA noted—and we agree—that the underlying ownership of the 8(a) firm does not change: the 8(a) firm is still a tribally-owned business, regardless of the addition or removal of an intermediate company.

This benefits tribes and ANCs by removing an unnecessary barrier when they insert or eliminate an intermediary and the underlying ownership of an 8(a) firm does not change.

Potential for success

SBA's proposed rule would further amend 13 C.F.R. § 124.109 to clarify how tribally-owned applicants to the 8(a) program could demonstrate that they possess the necessary potential for success.

Under SBA's regulations, once tribal eligibility for the 8(a) program has been established—i.e. once the tribe is found socially and economically disadvantaged—applicants must also establish business eligibility.

There are numerous eligibility requirements, which include the potential for success. A tribally-owned applicant can establish potential for success in any one of three ways, including if the tribe itself makes a firm, written commitment to support the operations of the applicant concern and has the financial ability to do so.

SBA's proposed rule also would permit tribally owned applicants to satisfy the potential for success requirement by submitting a letter of support from a tribally-owned economic development corporation or other relevant tribally-owned holding company rather than from the tribe itself.

The proposed rule would also provide that, in order for the letter of support from a tribally-owned holding company to be sufficient, there must be sufficient evidence that the tribally-owned holding company has the financial resources to support the applicant and sufficient evidence that the tribally-owned holding company is controlled by the tribe.

This proposed rule benefits tribally-owned 8(a) businesses because tribally-owned holding companies are often authorized to act on behalf of a tribe and can become an economic arm of the tribe itself.

It is also more practicable, given tribal sizes and applicable bureaucracies, for a tribally-owned 8(a) applicant to seek support from holding companies, which are relied upon by tribes to support tribal operations and tribal subsidiaries.

Multiple 8(a) participants

Finally, SBA's proposed rule seeks to clarify the rules pertaining to a tribe or ANC owning more than one participant in the 8(a) program.

Under the regulations, a tribe or ANC may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant.

Additionally, if SBA believes that an 8(a) firm's primary NAICS code does not match the 8(a) firm's actual revenues over the most recently-completed three fiscal years, SBA may change the 8(a) firm's primary NAICS code.

SBA's proposed rule would clarify that when SBA has changed the primary NAICS code for a tribally-owned 8(a) firm, the tribe or ANC could immediately submit an application to qualify another one of its firms for participation in the 8(a) program under the primary NAICS code previously held by the firm whose primary NAICS code was changed by SBA.

These proposed changes to SBA's regulations would benefit tribally-owned 8(a) businesses.

Editor's Note: SBA has extended the deadline for comments on the proposed rule to Feb. 7.

Peter Ford is a Partner in PilieroMazza's Government Contracts Law and Native American Law practice groups. Emily Rouleau is an Associate in PilieroMazza's Government Contracts Law practice group. This article has been reprinted with permission from PilieroMazza PLLC.