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ATTORNEYS AT LAW

MEMORANDUM

To: Clients and Friends

From: Pamela J. Mazza
Antonio R. Franco
Jonathan T. Williams
Isaias "Cy" Alba IV

Date: May 18, 2012

Re: SBA Issues Technical Amendments to 8(a) Rules Pertaining to Primary Industry Classification, Eligibility for Follow-on 8(a) Subcontracts, Profit Distribution Requirements for 8(a) Joint Venture Partners, Dollar Limits on Sole Source 8(a) Contracts, and Standards Governing Approval of Second Mentors

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On May 14, 2012, the U.S. Small Business Administration ("SBA") issued amendments to its 8(a) regulations correcting various "errors" found therein. See 77 Fed. Reg. 28237 (May 14, 2012). These amendments, some of which could have an impact on your business, take immediate effect.

By way of background, on February 11, 2011, SBA issued a Final Rule which made significant changes in its 8(a) regulations, size regulations, and regulations affecting small disadvantaged businesses. However, SBA has identified "errors" in that Final Rule that these amendments are designed to correct.

Although these amendments to some extent merely clarify ambiguities in the text of the regulations, some changes may well have impact on individual 8(a) firms. The "corrections" worth noting include the following:

- **Definition of "Primary Industry Classification" (13 C.F.R. § 124.3).** When it amended its 8(a) regulations last year, SBA intended to provide that an 8(a) firm can change its primary industry classification if it is able to demonstrate by clear evidence that the majority of its total revenues during a three-year period have evolved from one NAICS code to another. However, the definition of "primary industry classification" that actually appeared in the 8(a) regulations reflected a two-year rather than a three-year period. Accordingly, the amendment changed the definition of "primary industry classification" to confirm that a primary industry classification can change only when the majority of total revenues during a three-year period changed from one NAICS code to another.

- **Restrictions for Award of Follow-On 8(a) Contracts by Native Hawaiian Organizations ("NHOs") and Community Development Corporations ("CDCs") (13 C.F.R. §§ 124.110, 124.111).** In issuing its Final Rule, SBA stated that an 8(a) subsidiary owned by an Indian Tribe or Alaska Native Corporation ("ANC") could not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another 8(a) firm owned by the same Tribe or ANC. However, these restrictions were inadvertently not included in the 8(a) regulations regarding NHOs and CDCs. Accordingly, the amendment states that an 8(a) subsidiary owned by an NHO or CDC may not receive an 8(a) sole source contract that is a follow-on 8(a) contract that was performed immediately previously by an 8(a) firm owned by the same NHO or CDC.

- **Profit Distribution Between Partners in Populated and Unpopulated 8(a) Joint Ventures (13 C.F.R. § 124.513(c)).** With respect to the SBA regulation pertaining to provisions that are required in 8(a) joint venture agreements, the amendment clarifies that for "populated separate legal entity joint ventures" the 8(a) firm must receive profits commensurate with its ownership interest in the joint venture. For 8(a) joint ventures that take other forms, such as unpopulated joint ventures, the 8(a) joint venture agreement must provide that the 8(a) firm receive profits commensurate with the work performed by the 8(a) firm.

- **Dollar Limits on 8(a) Contracts (13 C.F.R. § 124.519(a)).** In amending the regulation with regard to the dollar limits on 8(a) contracts that an 8(a) firm (other than an 8(a) firm owned by an Indian Tribe, ANC, or NHO) may receive, SBA restored the actual dollar amounts that were inadvertently deleted in the Final Rule. Thus, the restored dollar limits for 8(a) firms (other than ones owned by an Indian Tribe, ANC, or NHO), are as follows:

    - 8(a) firms having a receipts-based primary NAICS code at time of program entry can no longer receive 8(a) sole source contracts when the firm has received a combined total of competitive and sole source 8(a) contracts either (a) in excess of five times the size standard corresponding to its primary NAICS code or (b) $100,000,000, whichever is less.

    - 8(a) firms having an employee-based primary NAICS code at time of program entry can no longer receive 8(a) sole source contracts when the firm has received a combined total of competitive and sole source 8(a) contracts in the amount of $100,000,000.

    - In determining whether an 8(a) firm has reached its limit, SBA will not count 8(a) contracts awarded under $100,000 towards the limit.

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- **Standard Governing SBA Approval of Second Mentors for Protégés (13 C.F.R. § 124.520(c)(3)).** The standard providing for the approval of second mentors for protégés in the SBA Mentor-Protégé Program was determined by SBA to be ambiguous. A protégé firm may generally have only one mentor at a time. However, under the amendment, SBA's Associate Director for Business Development may approve a second mentor under the following conditions. First, the second relationship must not compete or otherwise conflict with the business development assistance set forth in the first mentor-protégé relationship. Second, the second relationship must pertain to a secondary NAICS code OR the protégé firm is seeking to acquire specific expertise that the first mentor does not possess.

If you would like our assistance in understanding these new changes to SBA regulations and how it will impact your firm, please do not hesitate to contact us at 202-857-1000.

With kind regards,

Pamela J. Mazza

Antonio R. Franco

Jonathan T. Williams

Isaias "Cy" Alba IV