

GAO Rejects Unlawful Solicitation Restrictions on Mentor-Protégé Joint Ventures

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The Government Accountability Office (GAO) recently issued two decisions sustaining challenges to solicitation restrictions on mentor-protégé joint ventures. Both were matters of first impression for GAO, in which GAO interpreted new rules related to the Small Business Administration's (SBA's) mentor-protégé program. The decisions serve as important reminders that although the law may have changed, agencies may fail to implement those changes in their solicitations.

The first decision, *Innovate Now, LLC*, B-419546, Apr. 26, 2021, 2021 CPD ¶ 178, involved a solicitation provision that effectively required the protégé member of a mentor-protégé joint venture to individually have the same level of experience as other small business offerors. The protester argued that this requirement ran afoul of SBA regulations providing that:

When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture . . . [a] procuring activity ***may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.***

Although the contracting agency argued that the solicitation's experience requirements reflected its minimum needs, GAO found that it violated the express language of SBA's regulations. SBA agreed, asserting in its response to the protest that its regulations mean that "protégés must be held to a different experience standard from mentors and other offerors."

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The second decision, *InfoPoint, LLC*, B-419856, Aug. 27, 2021, 2021 CPD ¶ 290, involved a solicitation requirement that a joint venture competing for award must itself hold a Top Secret facility clearance, even if the joint venture members are cleared. The protester argued that this restriction violates various statutory and regulatory provisions governing small business joint ventures, including the SBA regulation stating that:

A joint venture may be awarded a contract requiring a facility security clearance where **either** the joint venture itself **or** the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

The contracting agency argued that the regulations of the U.S. Department of Defense (DOD), which has authority to establish procedures and standards regarding security clearances, should take precedence over any regulations issued by SBA. GAO disagreed because the express language in the National Defense Authorization Act for Fiscal Year 2020 prohibited DOD agencies from requiring small business joint ventures to have clearances when all members of the joint venture are cleared.

These decisions are a reminder to closely review solicitation requirements that may restrict the ability of mentor-protégé joint ventures to compete for set-aside opportunities. Collectively, they signal that GAO intends to hold contracting agencies to new legislative and regulatory provisions aimed at making it easier for participants in SBA's mentor-protégé program to pursue set-aside awards as a joint venture.