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November 15, 2017

Holly Turner  
Regulatory Reform Officer  
U.S. Small Business Administration  
409 Third Street SW.  
Washington, DC 20416

Dear Ms. Turner,

The Associated General Contractors of America (AGC) expresses gratitude to the U.S. Small Business Administration (SBA) for providing an opportunity to comment on SBA's regulations that should be repealed, replaced, or modified.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies—more than 80 percent of which are small businesses of 20 or fewer employees. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

As such, AGC has a unique knowledge of SBA regulations concerning construction and procurement. Based on that experience and this request, AGC puts forth the following regulatory suggestions for your consideration:

- Complete the Regulatory Process for Ensuring Credit for Lower Tier Small Business Subcontracting
- Standardize the Small Business Affiliation Rules
- Remove the Lifetime Limitations on Protégés in the Mentor-Protégé Program
- Count Similarly Situated Firms

### **Complete the Regulatory Process for Ensuring Credit for Lower Tier Small Business Subcontracting**

AGC appreciates SBA's issuing a final rule in 2016 that allows non-small prime contractors to receive credit towards their small business subcontracting goals for awards made to small business

subcontractors at any tier.<sup>1</sup> Despite the fact that this reform is law<sup>2</sup>, it is not currently implemented on contracts because the Federal Acquisition Regulation (FAR) Council has not issued final regulations on the reform—in spite of the NDAA requirement that these agencies complete the regulatory process in 2016. The current law only allows prime contractors to count first-tier small business subcontractors towards these goals. The simple change in this rule will encourage prime contractors to make sure small businesses have opportunities to compete for subcontracts at every tier, thereby allowing more opportunities for small business growth. In addition, it will help prevent first-tier small business “pass-through” situations and help provide transparency to the small business program.

Moreover, Congress and federal agencies will be better able to determine where small businesses are underrepresented and make informed improvements to the small business program. While questions remain as to the degree to which prime contractors must monitor or be responsible for subcontractor compliance with subcontracting plans, among other things, AGC believes this rule allow prime contractors to report small business subcontracting at all tiers will help demonstrate true small business participation on a federal contract.

### **Standardize Affiliation Rules**

Compliance with SBA’s size status is both critical for small businesses and the large businesses agreements set forth in their small business subcontracting plans. The concept of affiliation weighs heavily on the determinations of small business size status. If the SBA determines that two business concerns are “affiliates”<sup>3</sup> and thus exceeds the small business size status, the entity will no longer be considered as a small business. Small businesses understand that loosing will have severe consequences for the business and any commitments it has made under its status as small business. Once a small business is deemed a non-small business it is difficult for the entity to ever regain its small size status. Therefore, it is critical for the SBA to have a clear and standardized process of affiliation determination.<sup>4</sup>

While the SBA has made some progress in clarify the affiliation evaluation, the rules remain confusing and the standards are often subjective. The level of uncertainty surrounding affiliation rules coupled with the severe consequence of losing the small business size status introduces a level of uncertainty that results that retrains small business and acts as a barrier to the SBA mission. The SBA should simplify, clarify, and standardized the small business affiliation rules to make it easier for small business to work with other businesses without the uncertainty of losing the entity’s SBA size status.

### **Remove the Lifetime Limitations on Protégés in the Mentor-Protégé Program**

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<sup>1</sup> 13 CFR Parts 121 and 125

<sup>2</sup> Public Law No: 113-66 (12/26/2013)

<sup>3</sup> 13 CFR 121

<sup>4</sup> 13 CFR 121.103

In 2016 SBA expanded the Mentor-Protégé Program (MP Program) to include all small businesses with the stated purpose of developing strong protégé firms through mentor-provided business development assistance, and helping protégés successfully compete for government contracts.<sup>5</sup> The rule states that “a protégé may have two three-year mentor-protégé agreements with different mentors, and each may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.”<sup>6</sup> While the rule does not state a lifetime limitation, SBA has interpreted this language as limiting Protégés to a maximum of two SBA Mentor Protégé Agreements over the lifetime of the small business.<sup>7</sup>

SBA should remove the restriction on two MP Programs over the lifetime of the small business. Construction is a varied and diverse industry that requires experiences in often complex and differing jobsites. As such, a small construction business may need to participate in the MP Program many times in order to gain the requisite skills to graduate and compete successfully. Restricting small businesses to two Protégés over the lifetime of the company prevents the small business from fully participating in the program.

It is important to note that this limitation applies even if the Mentor-Protégé agreement terminates prematurely. There will be examples of small business that will be eliminated from participating in the program through no fault of the small business. Further, SBA has neither provided justification nor produced any research as to explain how the decision to limit a protégé two MP Program over the lifetime of the small business. This seemingly arbitrary restriction may have the unintended effect of undermining the stated goals of the MP Program by preventing small businesses from ever fully participating in the program and before the benefits of the program can be realized by protégé. AGC recommends SBA eliminate the restriction on two MP Programs over the lifetime of the small business.

### **Count Similarly Situated Firms**

In 2016 SBA issued its final rule enforcing the small business contracting reforms from FY 2013 National Defense Authorization Act.<sup>8</sup> The new rule clarified what the limitations of small business prime contractors have when subcontracting full or partial small business set-aside contracts.<sup>9</sup> The new allows small business prime contractors to receive credit for the subcontracted work performed by similarly situated entities. The rule states:

A small business concern prime contractor that receives a contract listed in paragraph (a) of this section and spends contract amounts on a subcontractor that

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<sup>5</sup> See About the All Small Mentor-Protégé Program, available at <https://www.sba.gov/contracting/government-contracting-programs/all-small-mentor-protége-program/about-all-small-mentor-protége-program>

<sup>6</sup> 13 C.F.R. § 125.9(e)

<sup>7</sup> See SBA’s The All Small Mentor-Protégé Program Overview, available at [https://www.sba.gov/sites/default/files/articles/All Small Mentor Protege Program Overview Final 508.pdf](https://www.sba.gov/sites/default/files/articles/All%20Small%20Mentor%20Protege%20Program%20Overview%20Final%20508.pdf).

<sup>8</sup> Public Law No: 112-239 (01/02/2013)

<sup>9</sup> 13 CRF 125.6

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is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for purposes of determining whether the small business concern prime contractor has violated paragraph (a) of this section, to the extent the subcontractor performs the work with its own employees. Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule (§ 121.103(h)(4)).<sup>10</sup>

The ability of small business primes to subcontract work to similarly situated small businesses without the risk of penalty allows small businesses more contracting opportunities. While the new rule is a welcome exemption to the limitations on subcontracting that allows for a more accurate accounting of which small businesses benefit from a small business set-aside contract. However, the rule does not allow lower tier subcontracts to be contacted beyond the first-tier subcontract. SBA Should revise the rule to count entities that are similarly situated to be included beyond the first tier and not count against the limitation on subcontracting. This reform will ensure a more accurate accounting of set-aside entities benefit from a set-aside contract and limit the risk of small businesses from being penalized from

## Conclusion

AGC appreciates the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of SBA construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

### *Submitted by:*

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<sup>10</sup> 13 CRF 125.6(c)