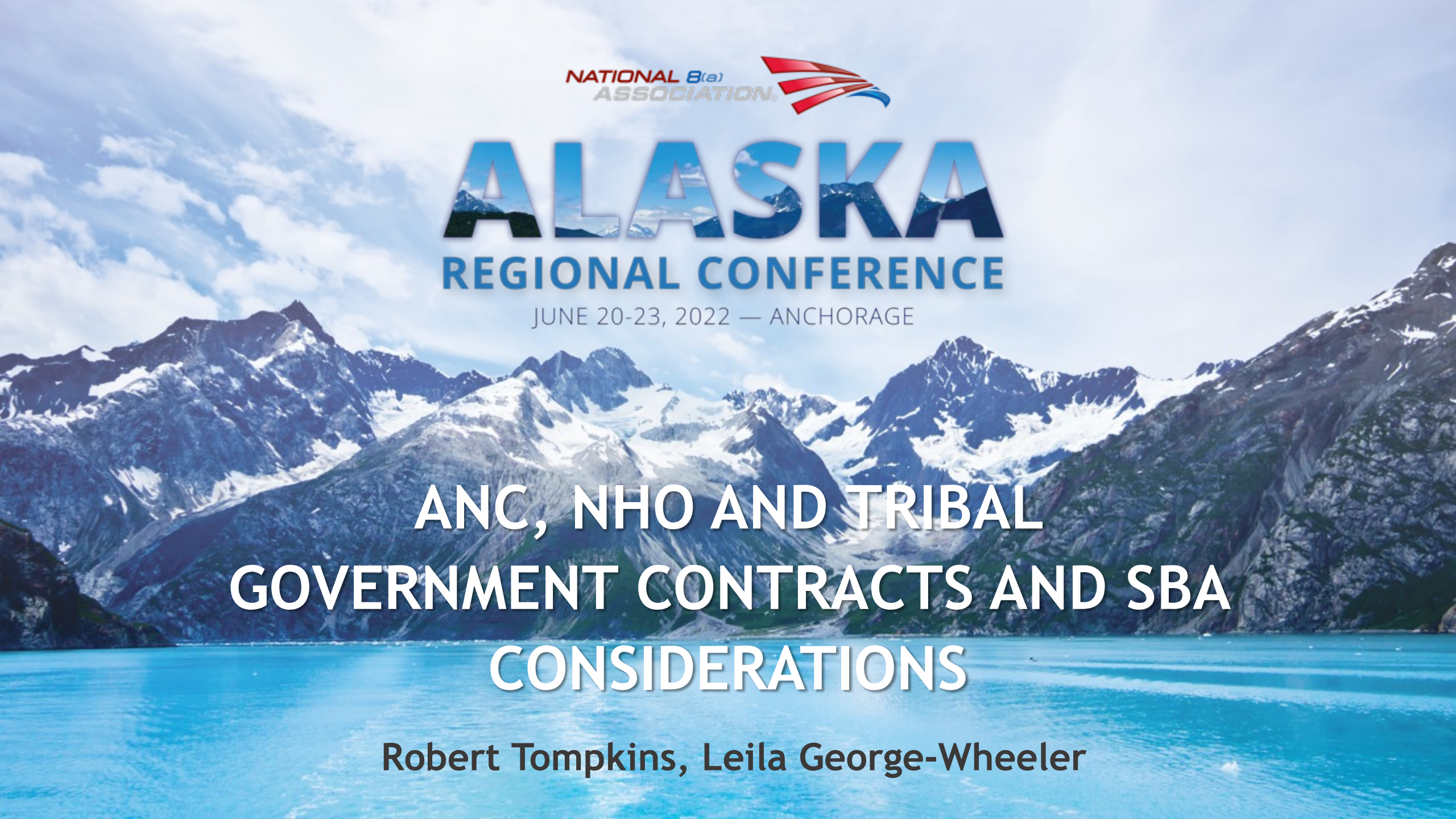
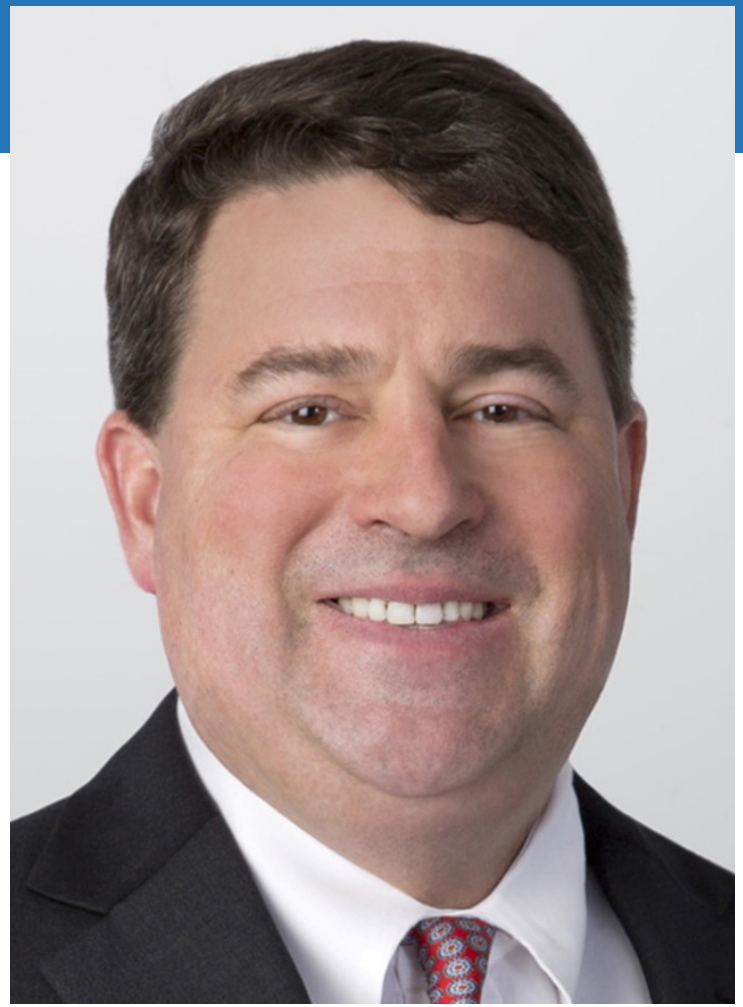


ANC, NHO AND TRIBAL GOVERNMENT CONTRACTS AND SBA CONSIDERATIONS

Robert Tompkins, Leila George-Wheeler

Speaker

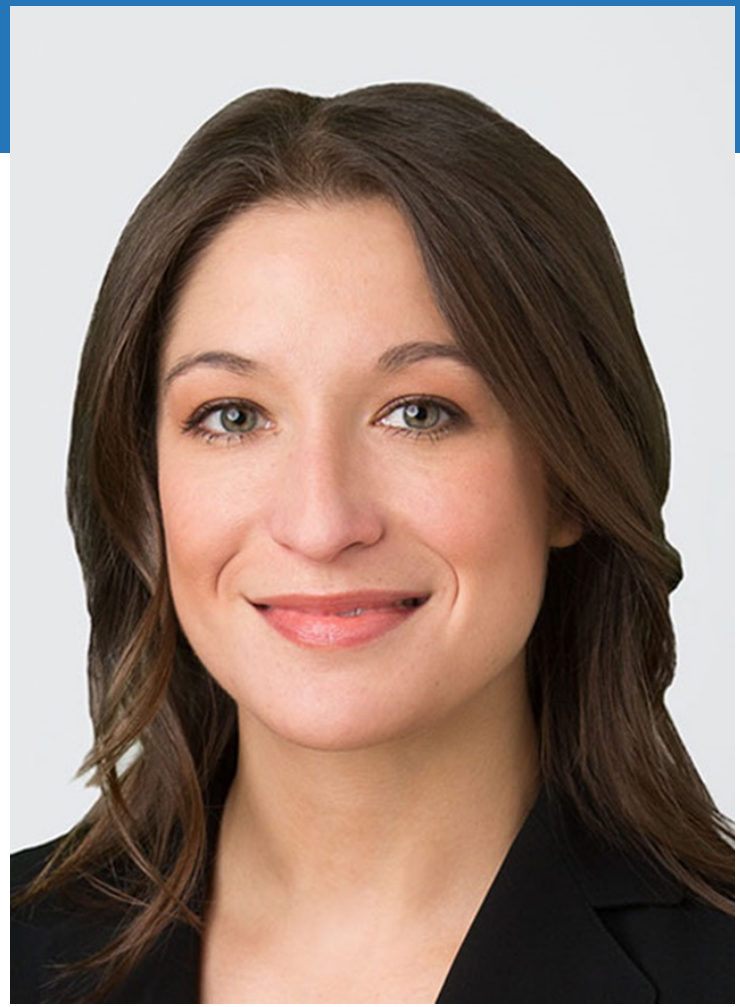


Bob Tompkins

Partner

Holland & Knight LLP

Speaker



Leila George-Wheeler

Partner

Holland & Knight LLP

Agenda

- Introduction to SBA's 8(a) Program for Entity-Owned Firms
- Enforcement and Oversight Environment (why you should care)
- Regulations, Changes & Cases (what you should care about)
- Effective Compliance Programs : What Executives Need to Know (how you should assess and manage risks)
- Handling Investigations (what to do if there's an issue)
- Case Studies (handouts)
- Resource Guide -- SBA's 8(a) Program for Entity-Owned Firms: An Overview

I. Introduction

The SBA's 8(a) and small businesss size programs seek to create opportunities for eligibile businesses to participate in federal procurement. At a high level SBA's regulations and the FAR seek to:

- Frame program benefits
- Ensure eligible entities, owners and communities receive those benefits
- Limit non-disadvantaged parties' participation
- Ensure the Government gets quality goods and services at a fair and reasonable price

Keep these considerations in mind when reviewing the regulatory requirements.

The Benefits

Benefits include procurement preferences in the form of “set-asides”, either

- Competitive
- Sole Source (for 8(a) in particular)

Large Business Subcontracting Goals

Mentoring

Other assistance, such as technical assistance

Ensuring Participants are eligible

Businesses must be

- “small” and independent (with some exceptions for entity-owned firms)
- Owned and managed* (*again with some exceptions) by socially and economically disadvantaged owners (for 8(a)) or other eligible owners for other SBA programs (WOSB, SDVOSB e.g.)
- Not subject to control by large businesses or non-disadvantaged individuals or firms

Eligibility/Benefits

The Government seeks to ensure the 8(a)/SB receives the benefits of the programs by limiting:

- Ownership and control of minority partners (both owners and teaming partners)
- Participation in Joint Ventures (JVs) by non-disadvantaged individuals and firms
- Subcontracting and flow of contract revenues under set-aside contracts

The Government also seeks to ensure 8(a)s use the program as a development program (not a perpetual way of doing business):

- Nine-year term
- Business Activity Targets (BAT)
- Primary NAICS/Sister Companies
- Management limitations

Limits on Non-Disadvantaged participants

The Government limits “ND” participation in numerous respects:

- Limits minority ownership % and rights – no control
- Limits ability to participate in multiple 8(a)s
- Limits ability to participate in contract performance (both in % and substance of the work)
- Provides incentives to mentor by relaxing these requirements a bit

Ensuring the Government gets a good deal

- Set-asides are only available if there are qualified firms able to perform at a fair market (or fair and reasonable) price
- The Government has a number of tools to ensure prices are fair and reasonable, including “TINA” (the Truthful Cost and Pricing Data Act)
- Imposing significant approval and reporting requirements (especially for 8(a))
- Expecting participants, like all contractors, to have meaningful ethics and compliance programs set up to prevent and detect misconduct

Special rules for entity-owned concerns

- The Government recognizes ANCs, NHOs and Tribes serve larger communities and therefore has created special rule that permit
  - Ownership of multiple 8(a)s and small businesses (with some limitation on primary industry, common day-to-day managers)
  - Removing “caps” on sole source awards (for NHO’s only at DOD)
  - Allowing for shared management
  - Allowing for shared administrative services for small business contract eligiblity

II. Enforcement & Oversight: What Executives Need to Know

Enforcement & Compliance: What Executives Need to Know

- DOJ & OIG enforcement priorities & compliance expectations
  - False Claims Act; Criminal Fraud; Collusion; Bribery; Kickbacks; Small Business Fraud
- Requirement for an ethics & compliance program
- Ensuring preparedness for internal & external investigations
- Strategies for maintaining adherence
- The Mandatory Disclosure Rule

DOJ & OIG Enforcement Priorities

- Biden Administration: Increased federal $ for small & disadvantaged businesses and resources for rooting out fraud.
- DOJ: Focus on corporate crime; Procurement Collusion Strike Force; Chief Pandemic Prosecutor.
- SBA OIG: Pandemic-Related Fraud; Small Business Fraud.
- Congressional Oversight: CARES Act Oversight; Small Business Set-Aside Fraud Inquiry.

DOJ Priorities

Actions DOJ is taking to strengthen response to corporate crime:

1. New Resources: Investing new resources in the DOJ Criminal Fraud Section. Procurement Fraud Strike Force.
2. Cooperation Credit: Companies must provide all individuals responsible and/or involved in the misconduct.
3. Prior Misconduct: Charging/resolution decisions will consider all prior misconduct, not just similar.
4. Monitorships: Renewed focus; not the exception to the rule.

SBA OIG Priorities

SBA OIG Investigation Focus:

- Pandemic Response Oversight; Disaster Assistance Oversight; Set-Aside Fraud

33,611 Hotline Complaints

- PPP-16,350; EIDL-2,010; OTHER-15,251

SBA OIG Investigation Stats:

- Oct. 2021 – Mar. 2022: 98 indictments, 85 convictions
- Apr. 2021 – Sept. 2021: 153 indictments, 105 convictions
- Oct. 2021 – Mar. 2022: 43 present responsibility referrals.

House Select Subcommittee on COVID Crisis

June 14, 2022 Hearing – Examining Federal Efforts to Prevent, Detect, and Prosecute Pandemic Relief Fraud.

- House Subcommitte estimates over $10B in COVID-related fraud.
- DOJ Pandemic Prosecutor, DOJ IG, SBA IG requests extension of statute of limitations for PPP & EIDL fraud (contained in two bipartisan bills that passed the house).
- Request $41.2M ($10M increase) in COVID-19 fraud enforcement funding for 2023.
- Secret Service mobilized more than 160 offices and 44 Cyber Fraud Task Forces to work on COVID-19 related investigations.
- DOJ Strike Teams to tackle large scale fraud.

House Oversight Committee ("HOC")

- Dec. 2021 HOC bipartisan letter to SBA Administrator about "longstanding problem" of fraud in small business set-aside contracting programs.
- Highlighted scenarios where bad actors falsified information provided to SBA, including:
  a) Using an eligible figurehead to conceal the entity/individual(s) that control the business; and
  b) Using "straw owners" to pose as female, minority, or SDVB owners.
- Noted concerns about fraud and weakness in the Certify system.
- These highlight the need for SBA to implement a comprehensive fraud risk program to combat set-aside contracting fraud.

Recent Cases: Small Business Fraud

TriMark USA, *et al* – $48.5M FCA Recovery

Largest FCA recovery based on small business contracting fraud.

- TriMark & executive improperly obtained/manipulated SDVOSB set-aside contracts through 3 small businesses.
- Former executive personally liable $100,000 for involvement.
- Joint investigation/coordination through 9 federal agencies.
- Conduct = important roadmap for both small & large businesses competing for set-aside contracts.

Recent Cases: TriMark Specific Conduct

Used SB's status to obtain set-aside contracts that TriMark performed and controlled. SB affiliation & FCA concerns went ignored.

- TriMark identified opportunities for SB to bid on;
- Instructed SB on how to prepare bid and prices to propose;
- Assisted SB in obtaining fed. supply contracts for goods TriMark supplied;
- Ghost-wrote emails for SB to send to gov. officials to appear as though SB were performing the work & posed as SB representatives;
- TriMark had access to and used SB email accounts to conduct business;
- Shared office space and equipment;
- Considered SB an "extension" and "affiliate" of TriMark

Other Recent Cases – Small Business Fraud

- CT Aerospace Component Manufacturer/Supplier paid $5.2M to resolve FCA allegations re fraudulently obtained SB contracts, incl. WOSB (June 2022).
- CO Construction Co. paid $2.8M to resolve FCA allegations involving improperly manipulated SDVOSB fed. subK (May 2022).
- WA Environmental Remediation Co. paid over $3M to settle FCA allegations re submission of false and fraudulent SB HUBZone subK reports (May 2022).
- L3 Comms, LLC, paid over $12.7M to settle allegations involving kickbacks, improperly obtaining competitive bid info., and false claims re WOSB subcontracting requirements (June 2021).
- Former Construction Co. Owners indicted for fraudulently securing over $250M in SDVOSB contracts (Mar. 2021).

DOJ & OIG Expectations

- Robust compliance, ethics and training programs are key to preventing civil and criminal misconduct and to mitigating penalties and fines when misconduct occurs.

- “A corporate culture that fails to hold individuals accountable, or fails to invest in compliance--or worse, that thumbs its nose at compliance--leads to bad results.” DAG Lisa Monaco, 10/28/2021.

- “[W]e will ensure the absence of such programs inevitably proves a costly omission from companies who end up the focus of department investigations.” DAG Lisa Monaco, 10/28/2021.

Emerging Compliance Issues

High Risk Areas for Contractors

- The classics
  - Time charging
  - Defective products or services
- False certification cases
  - Certifications required by the FAR
  - Other certifications/qualifications
  - Oversight and referral matters
  - Special areas of risk in the SBA's contracting programs
    - 13 CFR 121.108 – small business set-asides
    - Consequences of numerous SBA filings and forms

§121.108 What are the Requirements for Representing Small Business Size Status, and What are the Penalties for Misrepresentation?

- Required by the Small Business and Jobs Act of 2010 and added to SBA's regulations in June 2013
- Provides
  - Government's presumed loss when there's a misrepresentation of size is the total value of the set-aside contract
  - States that certain actions are "deemed certifications"
  - Imposes specific requirements on individuals making certifications of size
  - Provides a very limited "limitation on liability"
  - Sets forth specific "penalties" including by referencing suspension and debarment, the civil False Claims Act, and criminal sanctions

§121.108 What are the Requirements for Representing Small Business Size Status, and What are the Penalties for Misrepresentation? (cont'd)

- But…
  - Applies to "small business" representations, not 8(a) or other program representations
  - Misconstrues suspension and debarment as a "penalty" contrary to the FAR
  - SBA removed "irrefutable" presumption language from the final rule, leaving to the courts the applicability of the total contract value rule
- The foregoing arguments are just that. The rule is going to be tested.

121.108(a) Presumed Loss

"(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a **presumption of loss** to the United States **based on the total amount expended** on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern **willfully sought and received the award** by misrepresentation."

Why did Congress do this?

Arose from frustration over cases where the courts found no harm to the government as a result of set-aside false certifications because the government received the benefit of the goods and services provided under the contract. *See* e.g. Ab-Tech Construction, Inc. v. United States, 31 Fed.Cl. 429, 435 (1994). Compare U.S. ex rel. Longhi v. Lithium Power Technologies, 575 F.3d 458 (5th Cir. 2009).

121.108(b) – Deemed Certifications

(b) Deemed Certifications. The following actions shall be **deemed affirmative, willful and intentional certifications** of small business size and status…

13 C.F.R. 121.108(b)(1)

- (1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement **reserved, set aside, or otherwise classified as intended for award to small business concerns**.

13 CFR 121.108(b)(2)

- (2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

13 C.F.R. 121.108(b)(3)

- (3) **Registration on any Federal electronic database** for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

121.108(c) – Signature Requirement

- "(c) *Signature Requirement*. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern."
- Attempt to remove any argument that the individual certifying did not know what they were certifying to and to tie the certification directly to the contract.
- Increases liability exposure for individuals signing the certification(s).
- What about electronic submissions?

121.108(d) – Limitation of Liability

- (d) Limitation of Liability. Paragraphs (a) through (c) of this section **may be determined not to apply** in the case of unintentional errors, technical malfunctions, and other similar **situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§3729**, et seq.
- A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size.
- Relevant factors to consider in making this determination may include the firm's **internal management procedures governing size representation or certification**, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner.
- An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

121.108(e) – Penalties for Misrepresentation

- (1) *Suspension or Debarment*. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.
- (2) *Civil Penalties*. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.
- (3) *Criminal Penalties*. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.

121.108 Buttresses a Key SBA Compliance Issue - How to Adapt

- Key SBA compliance issues –
  - Size certifications
    - Know your size! When and how size is calculated
      - Gross receipts for three most recently completed financial years for services
      - Rolling 12 month average # of employees for manufacturing
    - Size is determined at different points in time
      - 8(a) program entry and acceptance
      - At date of initial offer including price for specific procurements and under the NAICS identified in the RFP
  - Representations in SAM.gov – ensure these are accurate and up-to-date

Other Compliance Issues: Multiple Subsidiaries

- Other issues re: ownership & control of multiple 8(a) subsidiaries
  - The actions of a single subsidiary can be attributed to the parent and sister companies for purposes of suspension and debarment proceedings
  - The parent company, as well as its officers and board members, are well within the reach of federal auditors and investigators
  - How do you balance these competing considerations?

III. Evolving Expectations: Recent Regulatory Changes & SBA OHA Decisions

Recent Executive Orders, Regulatory Updates, & Trends

- Federal contractor COVID vaccine mandate
- Labor and Employment emphasis
- Trade restrictions & domestic preference
- Increased importance on federal sustainability & green procurement
- Open FAR & DFARS cases

SBA: Regulatory Changes and Recent OHA Cases

- October 2020 final rule consolidating SBA's All Small & 8(a) Mentor/Protégé Programs
- Changes to limitations on subcontracting
- Changes related to joint ventures
- Changes related to recertification timing
- Important SBA OHA & GAO cases
- Proposed rules & impending updates

SBA: Oct. 2020 final rule

- SBA's final rule consolidating its All Small & 8(a) mentor/protégé programs became effective on 16 Nov. 2020
  - Aim was to eliminate confusion & avoid unnecessary duplication of functions within SBA
- At a high-level, SBA's final rule also addressed:
  - Change in ownership of ANC and tribally-owned 8(a)s no longer require SBA approval when moving entities under holding companies
  - SBA approval not required where the disadvantaged owner is increasing interest
- Changes to the rules governing joint ventures, limitations on subcontracting, and assignment of NAICS codes

1. Limitations on Subcontracting & Performance of Work Requirements

Contract Performance and Limitations on Subcontracting

- The FAR and SBA regulations require that the awardee perform specific percentages of work on set-aside contracts they are awarded
  - FAR 52.219-14
  - SBA: 13 CFR 125.6
- Old Rule: The prime contractor/awardee generally had perform a certain percentage of the **cost** of the work with its own employees
  - 50% for services and manufacturing
  - 15% for construction (25% for specialty trade construction)
- These rules are in the process of being changed to a **revenue-based** analysis, but those changes are not effective for all civilian agencies yet (September 10, 2021).
- CHECK YOUR CONTRACT TO UNDERSTAND YOUR OBLIGATIONS!

Summary of Changes to Limitation on Subcontracting Requirements

- In 2013, Congress directed SBA and the FAR Council to adopt a new approach that includes two additional key concepts beyond shifting from the "cost" of the contract performance to the "receipts" the party receives:
- Failure to comply is considered a matter of Responsibility, and SBA is considering whether to create uniform requirements for all contracting officers
- Similarly Situated Entities (SSEs) – subcontracts to entities that meet the same size and SBA requirements as the prime contractor are not counted against the subcontracting limit (i.e., they are counted as if performed by the prime)

Status of Implementation - Calculating Compliance

- SBA approved the changes to its regulations (13 CFR 125.6) to incorporate SSEs, and the new LoS calculations
- The FAR Council issued a proposed rule to implement these changes to FAR Part 19 and 52.219-14 (the FAR contract clause) – which became effective Sept. 10, 2021.
- DOD issued a Class Deviation making the new FAR changes effective immediately, meaning they were to start being included in solicitations as of December 2018
- DHS issued a Class Deviation in 2019.
- SBA made some additional tweaks to its treatment of Limitation on Subcontracting requirements in its ASMP rule-making

Robert K. Tompkins

So What Are the Percentages?

- Under the "new" LoS Rules, the Prime Contractor on a Set-Aside Contract must retain at least the following proportion of "Revenue" under the contract:
  - Services: 50% or more
  - Manufacturing: 50% or more (*note the "Nonmanufacturer Rule" requires that the prime manufacture the product or supply a product manufactured by another small business)
  - Construction 15% (general); 25% (specialty trade)
- Other Direct Costs and Costs of Materials may be excluded from the calculation PROVIDED they are not the principal purpose of the acquisition. (Note the FAR does not address this expressly, the way the SBA rules do).

Other Calculation Issues

- The Period over which compliance is assessed is generally each contract period (i.e. base and then option years):
  - The period of time used to determine compliance for a total or partial set-aside contract will be the base term **and then** each subsequent option period. 13 CFR. 125.6(d).
- For IDIQ's and Task Orders:
  - The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the nonmanufacturer rule for each order awarded under a total or partial set-aside contract.
- Acquisitions below the Simplified Acquisition Threshold are currently exempt from the LoS requirements.

Similarly situated entities

- A "*similarly situated entity*" (SSE) is:
- A subcontractor that has the same small business program status as the prime contractor
  - for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant
- In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.
- For purposes of calculating LoS Compliance, a "SSE"'s share of revenue/work counts toward the Prime's requirement.
  - Caveat: But NOT in the context of the work a SB JV partner has to perform within the JV (40%)

SBA: Changes to limitations on subcontracting

- SBA's revised regulations provide guidance on which limitation on subcontracting requirement applies in the case of a "mixed contract"
  - 13 C.F.R. § 125.6
- Generally, small business contractors cannot pay more than 50% (for supply & service contracts) 85% (for general construction contracts) of the amount paid by the Gov't to firms not similarly situated

SBA: Changes to limitations on subcontracting

- Any work that a small business prime spends on a similarly situated subcontractor is not counted towards the prime's limitation on subcontracting, to the extent the subcontractor performs the work with its own employees
- But any work that a similarly situated subcontractor further subcontracts, however, is counted towards the prime's limitation on subcontracting requirement

SBA: Changes to limitations on subcontracting

- For mixed contracts (*i.e.*, contracts integrating any combination of services, supplies, or construction) –
  - CO must select the appropriate NAICS code
  - CO's selection of the NAICS code is determinative as to which limitation on subcontracting and performance requirement applies
  - Relevant limitation on subcontracting requirement will apply only to that portion of the contract award amount
  - "In no case shall more than one limitation on subcontracting requirement apply to the same contract"
- 13 C.F.R. § 125.6(b)

Contracts Calling for a Mix of Products and Services

- Where a contract combines services and supplies, the contracting officer selects the appropriate NAICS code (i.e., for services or for products).
- Generally, a contracting officer only assigns one NAICS code to a contract *** BUT THE RULE IS CHANGING – SEE BELOW
- The assigned NAICS code is determinative as to which limitation on subcontracting and performance requirement applies.
- The relevant limitation on subcontracting applies only to that portion of the contract related to the Primary NAICS.

“Mixed” contracts

- 13 CFR 125.6 provides
  - (b) Mixed contracts. Where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code ... The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. In no case shall the requirements of paragraph (a)(1)[Services] and (a)(2)[Supplies or Products] of this section both apply to the same contract. The relevant limitation on subcontracting in paragraph (a)(1) or (a)(2) of this section shall apply only to that portion of the contract award amount.
- So what about Orders placed on an IDIQ? Except for Multiple Award Contracts – only one NAICS can be assigned to a contract
- SBA recently changed this requirement to allow for more than one NAICS (see above)

Example of LOS and a Mixed Contract

- A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is $3,000,000, with the services portion comprising $2,500,000, and the supply portion comprising $500,000. The contracting officer appropriately assigns a services NAICS code to the requirement. Thus, because the supply portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is $2,500,000 and the prime and/or similarly situated entities must perform at least $1,250,000 and the prime contractor may not subcontract more than $1,250,000 to non-similarly situated entities.

FAR: Changes to limitations on subcontracting

- Effective 10 Sept. 2021, the FAR Council revised the FAR provisions governing limitations on subcontracting, consistent with SBA's revised regulations (2016 & 2020)
  - Under the previous FAR 19.505 and FAR 52.219-14, Limitations on Subcontracting, small business primes were required to measure their compliance based on the cost of the work (e.g., "at least 50 percent of the cost incurred for personnel with its own employees)
- Now, more in line with SBA's regulations — measured based on the overall award amount spent by the prime on subcontractors in relation to the total amount paid by the Gov't to the prime

FAR: Changes to limitations on subcontracting

- Under the revised FAR 19.505 and FAR 52.219-14, small business primes must "not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities" when performing set-aside service contracts (except construction)
  - Consistent with SBA's regulations, work performed by similarly situated first tier subcontractors does not count towards the prime's limitation
- Defines "similarly situated entity" as (1) having the same small business program status and (2) being small under the size standard associated with the NAICS code assigned by the prime to the subcontract

Limitation on Subcontracting – Who checks?

- SBA has taken the position that it is the procuring agency and the contracting officer's responsibility to ensure compliance, BUT they often don't (at least not until someone raises a concern)
- SBA does require submission of reports on subcontracting for 8(a) contracts BUT does not follow the same methodology as the LOS rules which raises the possibility of reports seeming to be inconsistent

2. Sole Source Contracts

Sole Source Contracts - Thresholds

Sole Source J&A Thresholds

- Agencies can also award “Sole Source” contracts to 8(a) concerns subject to certain caps ($4.5 million for Services; $7 million for manufacturing). 13 C.F.R. 124.506.
- There are no express caps for Tribal or ANC-owned 8(a)s. 13 C.F.R. 124.506(b)(1)
- NHO’s not subject to the caps for DOD contracts, but are subject to the caps for non-DOD contracts. 13 C.F.R. 124.506(b)(2).
- As a result of “Section 811” of the 2010 NDAA, a “Justification and Approval” (J&A) is required for 8(a) sole source awards – that threshold is currently $25 million (FAR 6.302-5(b)(4); 6.303); $100 million for DOD.

Content of the Justification FAR 6.303-2(d)

As a minimum, each justification for a sole-source 8(a) contract over $25 million shall include the following information:

(1) A description of the needs of the agency concerned for the matters covered by the contract.

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract (*see* 19.805-1).

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

(4) A determination that the anticipated cost of the contract will be fair and reasonable.

(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

Justifications must be publicly posted on SAM.gov

DOD J&A Threshold is now $100 million

DFARS Subpart 206-3:

- In 2020 DoD amended the DFARS to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92).
- Section 823 increased the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program to actions exceeding $100 million.
- Section 823 also designates the head of the procuring activity as the approval authority.

Sole Source Contracts – Special Considerations – The Truthful Cost and Pricing Data Act (formerly the Truth in Negotiations Act (aka "TINA"))

TINA Overview

- In certain cases, contractors are required to provide ***certified cost and pricing data***
- This data must be ***current, accurate and complete***
- Data must be "current" up to the time the parties agree on price for the contract or a covered modification – this requires immediate submission of updated information if it is received before the parties agree on the price of the contract or a modification
- If you discover errors, it is essential to promptly correct information provided to the government that was not current, accurate or complete

TINA - Why is this important?

- When negotiating contracts (or modifications) in excess of $2 million, the Government can require “certified cost and pricing data” especially if there is no adequate price competition
- In particular this applies to sole source 8(a) contracts unless certain exceptions are met
- There are severe penalties for failing to comply with TINA including
  - Paying the Government back for “defective pricing”
  - False Claims Act penalties
  - Criminal penalties for knowing false certifications (including failure to correct certifications)

Part 15 – Contracting by Negotiation

It applies to Negotiated contracts and modifications over $2 million, unless one of these exceptions is present:

- Adequate price competition exists
- Prices Set by Law (i.e. utility contracts)
- Commerical Item acquisitions (big open questions about what are commercial services)
- Modifications related to Commercial items
- A waiver is obtained by the Agency.

Contract Pricing & TINA

What is "Cost or pricing data": (FAR 2.101 and subpart 15.4)

- means all facts that, as of the date of price agreement . . . , prudent buyers and sellers would reasonably expect to affect price negotiations significantly . . .
- are factual, not judgmental; and are verifiable . .
- are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. . .

Contract Pricing & TINA (2.101 / 15.4)

Cost or Pricing Data Examples:

° **Vendor quotations**	° **Unit-cost trends such as those associated with labor efficiency**
° Nonrecurring costs	° Make-or-buy decisions
° Vendor quotations	° Unit-cost trends such as those associated with labor efficiency
° Information on changes in production methods and in production or purchasing volume	° Estimated resources to attain business goals
° Data supporting projections of business prospects and objectives and related operations costs	° Information on management decisions that could have a significant bearing on costs

Defective Pricing Consequences

- Provides for downward price adjustment if the negotiated price is significantly higher as a result of "defective" cost or pricing data
- TINA requires contractors to **disclose** cost or pricing data
  - Strictly a **disclosure** statute; it does not in anyway limit the price or fee a contractor can charge.
  - Not limited to data actually used to prepare proposal
  - Not limited to data unknown to negotiators
- Knowing submitting data that is not current accurate and complete, or failing to correct defective data once known, can give rise to False Claims Act liability, or even criminal liability.

Sole Source Contracts – Follow on Contracts

SBA Efforts to Address "Follow-On" Contracts

- SBA's rules preclude an 8(a) company from "receiving" a sole source contract that is a follow-on to an 8(a) contract held by a sister 8(a) company. (More on this below).
- But the same 8(a) can receive a follow-on sole source contract.
- Agencies can use other exceptions to full and open competition to award follow-on contracts if the circumstances permit (i.e. follow-on bridge contracts during a protest may be awarded on an urgent and compelling basis)

3. Sister Companies

3.a SBA's Recent Positions on 8(a) & Sister Company Management and Shared Admin services

3.b. Using Sister Company Past Performance & Resources

Bids, Proposals and Protests

- An RFP may allow an offeror to rely on affiliates, subsidiaries, key personnel, etc., to meet the RFP requirements (FAR 15.305), but
  - Be mindful of the ostensible subcontractor rule, and
  - Know that GAO has repeatedly ruled that those affiliate resources must actually be made available for contract performance in the proposal!!!

Bids, Proposals and Protests (cont'd)

"The relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities or other resources--will be provided or relied upon for contract performance such that the parent or affiliate will have meaningful involvement in contract performance." Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5 (emphasis added).

Bids, Proposals and Protests (cont'd)

"While it is appropriate to consider an affiliate's performance record where the affiliate will be involved in the contract effort, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror of the project at issue." National City Bank of Indiana, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190 at 10 (emphasis added).

Bids, Proposals and Protests (cont'd)

- "In addition, an agency properly may attribute the past performance of an affiliated company to an offeror where the record shows that the resources of the affiliate—for example, using the affiliate's employees as key personnel—will be provided for performance of the solicited requirement."
  - *GeoNorth*, B-411473, Aug. 6, 2015 (emphasis added)

Key Takeaways

- Read the RFP!
- Be prepared to challenge restrictive RFP provisions
- The Proposal must demonstrate that the resources cited will be used in the performance of the contract
- Generic statements like “full corporate reach back” are not sufficient and not effective to meet this requirement
- This issue is not specific to ANCs/Tribes
- Keep tabs on your publicly available information (sam.gov; fpds.gov; and social media) to make sure it aligns with your proposal (i.e., your personnel work for who you say they work for)

3.c. Common Administrative Services

Tribal exemption from affiliation only within the 8(a) program

- For purposes of the 8(a) program, a tribally-owned firm's size is determined independently without regard to its affiliation with the Tribe, any entity of the tribal government, or any other business enterprise owned by the Tribe, unless …
  - The Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category
  - SBA has never made such a determination

Tribal exemption from affiliation for “small business set-asides”

- There is a narrower exemption from general affiliation when the subsidiary is pursuing and performing non-8(a) set-aside procurements (i.e., small business set-asides).
- For small business set-asides, the affiliation exemption only allows for
  - common ownership,
  - common management, and
  - common administrative services, provided “adequate payment” is received for those services.
- The SBA regulations note that affiliation between ANC subsidiaries can be found for “other reasons” in the context of small business status.
- But common management and oversight provide a great deal of latitude.

Common administrative services

- Common ownership & common management are fairly clearly defined, but what about “administrative services?”
- SBA has grappled with the question of what are eligible “administrative services”?
- SBA provided a definition of this term, along with a new term, “contract administration” services, in a relatively recent re-write of its regulations

Common administrative services

- SBA has now defined “common administrative services” for purposes of affiliation outside the 8(a) program
  - Common administrative services which are subject to the exception from affiliation include bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company or parent entity without interfering with the control of the subject firm

Contract administrative services

The revised regulations also define “contract administration services” (i.e., services related to a particular contract) and then distinguish such services that would be considered “common administrative services” under the exception to affiliation and those that would not.

Contract administration services

- Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not common administrative services
- For example, negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing employees, and overall responsibility for the day-to-day and overall project and contract completion are contract administration services that would not qualify as “Common Administrative Services”
- Contract administration services which do NOT qualify as common administrative services generally must be performed by the subsidiary’s employees/management.

Contract administration services

- Contract-related services that might constitute “administrative services” covered by the affiliation exception
  - Contract administration services that are administrative in nature would fall within the exception to affiliation. For example:
    - Record retention not related to a specific contract (e.g., employee time and attendance records)
    - Maintenance of databases for awarded contracts
    - Monitoring of regulatory compliance, template development, and assisting accounting with invoice preparation as needed
    - Administration of an ethics and compliance program and mandatory disclosure reporting

Clarification re: business development support

- SBA amended regulations address shared business development services by entity-owned concerns and the extent to which such services fall under the “administrative services” exception to affiliation
- SBA has stated that business development services provided to an entity-owned concern by a parent or holding company may fall within the definition of common administrative services

Clarification re: business development support

- SBA notes in the revised rules that the nature and timing of the services must be considered in order to determine whether they may properly be considered within the administrative services exception to affiliation
- The entity identified as the offeror must be “involved” in the preparation of the proposal especially those tasks or items that are specific to the contract being sought (vs. general background information)
- Even with the rule changes, this area is still very gray

Common administrative services: a recap

- Business concerns owned and controlled by … Tribes … are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.
- Administrative services vs. "contract administrative services"
  - "Actual and direct day-to-day oversight and control of the performance of a contract/project"
- BD
  - "Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered 'common administrative services'" …
  - But subsidiary and a representative of the subsidiary must be involved in preparing an appropriate offer

4. Joint Ventures

Joint ventures: the basics

- What is a joint venture?
  - Distinct (if properly designed) from a prime/subcontractor relationship
- The FAR contemplates the two different approaches as part of "teaming arrangements" (FAR part 9)
- SBA rules provide that parties that are engaged in a joint venture are deemed to be affiliates, unless certain exceptions apply
- Beware of the ostensible subcontractor rule!

SBA's joint venture affiliation exception

- SBA's regulations provide for two areas of exception to the joint venture affiliation rules:
  - Where both parties to the joint venture are "small" for the procurement(s) they are pursuing
  - Where the parties are in a SBA-approved mentor/protégé arrangement & the protégé is small & meets the socioeconomic requirements of the solicitation (*i.e.*, 8(a) if applicable)
- In both cases the JV must adopt an agreement that meets SBA's requirements.

SBA regulations governing joint ventures

- SBA's regulations impose significant requirements on joint ventures including:
  - Joint ventures can only be of **limited duration** (2 years) and for **limited purposes** (pursuit of specific contracts)
  - The parties must adopt a **written joint venture agreement**, confirming to SBA's regulatory requirements
  - The joint venture must be "**unpopulated**"
  - The joint venture must be registered in SAM & obtain CAGE Code, DUNS, etc.
- More on these and other issues below in the context of SBA's recent regulatory changes…

First things first: setting up the joint venture

- Joint ventures must be **unpopulated**, meaning the joint venture cannot be populated with individuals intended to perform contracts awarded to the joint venture
- BUT the joint venture can directly employ **administrative personnel**, and such personnel may specifically include **Facility Security Officers**… (just not separate employees to perform contract work)
- 13 C.F.R. § 121.103(h)

Joint venture agreements

- Previously, SBA was required to approve all joint venture agreements for 8(a) set-aside procurements, including addenda to such agreements for additional opportunities
  - But not a requirement under SBA's All Small Mentor/Protégé Program…
- As part of the rule change, SBA dropped the approval requirement for joint venture agreements for all but sole source 8(a) awards
  - Reasoning? Protest process will address competitive 8(a) awards

But you still need a joint venture agreement

- Joint ventures must adopt a joint venture agreement conforming to SBA's regulations:
  - For small business joint ventures, see 13 C.F.R. § 125.8
  - For 8(a) joint ventures, see 13 C.F.R. § 124.513
  - Parallel regulations for WOSB JVs, HUBZone JVs & SDVOSB JVs
- The joint venture agreement must conform to the content prescribed by SBA's regulations…
- Note: regulations also require that the small business prime control the joint venture (e.g., by being the managing JV partner, etc.)

Ok, so what needs to be in the JVA?

- First, joint venture agreements must address each specific procurement the JV intends to compete for!
  - Why? Keeps with SBA's view that joint ventures should not be on-going entities, but rather something formed for a limited purpose with a limited duration
- 13 C.F.R. § 124.513(c) Contents of joint venture agreement.
  - "Every joint venture agreement to perform an 8(a) contract" must contain a provision…

Joint venture agreements: required contents

- (1) Setting forth the **purpose** of the joint venture;
- (2) Designating an **8(a) Participant as the managing venturer** of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").
- (3) Stating that with respect to a separate legal entity joint venture the **8(a) Participant(s) must own at least 51%** of the joint venture entity;
- (4) Stating that the 8(a) Participant(s) must receive profits from the joint venture **commensurate with or exceeding the work performed by the 8(a) Participant(s)**;
- (5) Providing for the establishment and administration of a **special bank account in the name of the joint venture**.
- (6) **Itemizing all major equipment, facilities, and other resources** to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical.
    - [Again, think limited purpose (*i.e.*, procurement-specific]

Joint venture agreements: required contents

- (7) Specifying **the responsibilities of the parties** with regard to **negotiation of the contract**, **source of labor**, and **contract performance**, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet **the performance of work requirements** . . . where practical.
  - [More on the performance of work requirements in a minute]
- (8) Obligating all parties to the joint venture to **ensure performance of the 8(a) contract** and to complete performance despite the withdrawal of any member;
- (9) Designating that **accounting and other administrative records** relating to the joint venture be kept in the office of the 8(a) Participant managing venturer (waiver from District Director possible);
- (10) Requiring the **final original records** be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;
- (11) Stating that **quarterly financial statements** showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) **must be submitted to SBA** not later than 45 days after each operating quarter of the joint venture; and
- (12) Stating that a **project-end profit and loss statement**, including a statement of final profit distribution, **must be submitted to SBA** no later than 90 days after completion of the contract.

And what happens if the JVA does not meet these requirements?

- A JVA which fails to contain the required terms can result in a finding of **affiliation between the joint venture partners**, rendering the joint venture ineligible for award
- There has been an uptick in size protests (as SBA expected) of JV arrangements on this basis…

JV not eligible for exemption from affiliation

- *DSC-EMI Maintenance Solutions, LLC, Native Energy & Technology, Inc.*, SBA No. SIZ-6096 (May 2021) (affirming Area Office determination that JVA did not comply with requirements for such agreements because it **failed to identify the responsibilities of the parties for providing an important component of the work on the contract resulting from the solicitation**)
  - Therefore, joint venture not eligible for the exemption from affiliation afforded qualified joint ventures under 13 C.F.R. § 121.103(g)
- *KTS Solutions, Inc.*, SBA No. CVE-146-P (Feb. 2020) (finding JVA did not meet the requirements of 13 C.F.R. § 125.18(b)(2)(vi) and (vii) because the agreement **failed to itemize equipment** to be used in performance of the contract; **did not specify the parties' responsibilities** regarding contract negotiation, source of labor, and performance; and **omitted any description of the tasks that each JV member would perform** on the contract, or which employees of each member would perform those functions)
  - Contents of a JV agreement particular to an IDIQ effort

Joint venture agreements: draft and UPDATE as required

- So, be sure to take the time to draft & update JVAs, as required, & be prepared to show that the JVA meets SBA's requirements
- *See, e.g.*, ***Klutina River Contractors*, SBA No. SIZ-6117 (Aug. 2021)** (finding joint venture agreement did set forth a specific purpose of the JV (**13 C.F.R. § 125.8(b)(2)(i)**) and did itemize all major equipment, facilities, and resources (**13 C.F.R. § 125.8(b)(2)(vi)**) & thus Area Office clearly erred in finding joint venture partners affiliated on this basis)

Ok, now that we have our JVA…

- It is time to discuss contract performance
- SBA's regulations require the protégé firm to perform **at least 40%** of the work performed by the joint venture
- In Oct. 2020 final rule, SBA clarified that the **same rules** set forth in 13 C.F.R. § 125.6 (**governing limitations on subcontracting**) **apply to the calculation** of a protégé firm's workshare in the context of a joint venture

Performance of work

- The joint venture must perform the applicable percentage of work per the limitation on subcontracting requirement
- The protégé firm must perform 40% of joint venture's work
  - Calculation of the protégé's 40% follows the same rules as in § 125.6, including exclusion of the same costs from the limitation on subcontracting calculation
  - E.g., cost of materials excluded from the calculation in construction contracts
- Work performed by a similarly situated entity **will not count** towards the protégé's 40% — the protégé itself must perform 40% of the joint venture's work

Performance of work

- Simplifying the analysis — start with the limitation on subcontracting requirement
  - For a $10 million services contract, the joint venture can subcontract up to 50% ($5 million) to non-similarly situated entities; work subcontracted to similarly situated entities continues to be excluded from the analysis
  - E.g., if a similarly situated subcontractor is going to perform $2 million of the required services, then the joint venture must perform $3 million of the required services to get to $5 million (or 50% of the contract)
- Then calculate the protégé's workshare
  - Of the $3 million to be performed by the joint venture, the protégé firm itself must perform at least 40% (or $1.2 million)
  - Cannot subcontract any of the $1.2 million (even to similarly situated entities)

The 3-in-2 rule is gone, but the 2-year duration remains

- Previously, SBA considered a joint venture as something that could not be formed for more than 3 contracts over a 2-year period (the "3 in 2" rule)
  - Joint ventures could receive only 3 contracts in the 2-year period, then must form a new joint venture thereafter
- Effective 16 Nov. 2020, this is no longer the case — SBA removed 3 contract limitation for JVs, BUT JVs still cannot exceed the 2-year period
  - "SBA believes that a joint venture should not be an on-going entity, but, rather, something formed for a limited purpose with a limited duration."
  - Once a JV receives a contract, it may submit additional offers for a period of 2 years from the date of that first award; where the JV submits an offer after 2 years from the date of first award, SBA will find the JV partners affiliated
    - 13 C.F.R. § 121.103(h)
- Important considerations re: timing & how the rule applies…

The 2-year duration

- The 2-year “clock” starts when the joint venture is awarded its first contract or when its first contract is novated to it
- Contracts awarded on the basis of proposals submitted within the two year window fall within the coverage of the rule (this includes novation packages submitted in the 2-year window)
- Generally, the date of initial offer including price is what counts but there are special rules for two-step bidding

Joint ventures: experience & past performance

- Procuring agencies are prohibited from requiring the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally
  - 13 C.F.R. § 125.8(e)
  - Requires agencies to consider the **separate experience** of the JV members in determining whether the JV meets the solicitation's requirements
- "The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner."
  - Unreasonable to require the protégé firm itself to have the same level of past performance and experience (either in $, # of contracts performed, years of experience, or otherwise) as its large business mentor
  - Solicitation provisions requiring protégé & mentor to have the same level of past performance = unreasonable & should be permitted

Joint ventures: experience & past performance

(e) **Capabilities, past performance and experience.** 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 established pursuant to this section, ***a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously***. 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. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

So what does this mean, practically?

- If the terms of a solicitation attempt to restrict the agency's evaluation of JV's capabilities, past performance, and/or experience to the JV itself OR to the protégé member of the JV → **consider filing a pre-award protest**
  - See, e.g., ***Innovate Now, LLC*, B-419546 (Apr. 2021)** (sustaining protest challenging solicitation requirement that protégé members of a joint venture have the same level of experience as other offerors)
  - ***Computer World Services Corp.*, B-419956.18 (Nov. 2021)** (sustaining protest challenging solicitation terms that restricted the number of experience examples that may be submitted by a large business mentor)

One last point on JVs: facility clearances

- Previously, some procuring agencies would not award a contract requiring a facility clearance to a JV if the JV itself did not have a clearance (even in instances where both JV partners individually had such clearances)
  - SBA found such a restriction inappropriate
- Now, a JV may be awarded a contract requiring a facility security clearance **where either the JV itself or the individual partner(s) to the JV that will perform the necessary security work** has (have) a facility security clearance
  - 13 C.F.R. § 121.103(h)(4)

Again, what does this mean practically?

- Aside from allowing for more competition from JVs, the rule provides a basis for JVs to file a **pre-award protest** if the terms of a solicitation attempt to require the JV itself to hold a facility clearance
- *See, e.g.*, ***InfoPoint LLC*, B-419856 (Aug. 2021)** (sustaining pre-award protest challenging requirement that **joint venture** hold a top secret facility clearance as opposed to the **joint venture's members**)

5. Business Activity Targets (“BAT”)

BAT Reporting

- How does BAT data keeping and reporting work?
- As part of the annual update, the participant should clearly document efforts to meet BAT in the 8(a) business plan, certify forms and Attachment to Profit & Loss form.
- Participant should document BAT in Certify:
  - Breakdown of the 8(a) and non-8(a) revenue and contract forecasts
  - evidence of the participant's attempts to comply by documenting the number of solicitation responses submitted in the previous year broken down into 8(a) vs non-8(a)
  - Transition Management Plan narrative

BAT Strategy

- Strategies for dealing with BAT
- Confusion between “program” year and “financial” year
- Planning is key
  - BAT should not come as a surprise
  - Monitoring potential to meet BAT should begin in Year 4
  - During transition years, quarterly monitoring is recommended
- Non-8(a) targets may be met via GSA schedules, commercial contracts or even contracts with sister subsidiaries.

Non-8(a) Revenue – What Counts? 13 CFR 124.509(a)/SOP

- Non-8(a) revenue is defined as any business outside of the 8(a) BD program:
  - Work performed for any federal agency other than through an 8(a) contract, including GSA schedules
  - Work performed as a subcontractor, including work performed as a subcontractor to another 8(a) participant on an 8(a) contract
  - Work performed on non-federal contracts
  - Work performed under a JV that is not an 8(a) contract award

Business Activity Targets (BAT)

- Background
  - Starting in Program Year (PY) 5, 8(a) companies are required to derive a certain percentage of their revenue from non-8(a) contracts
  - Non-8(a) contracts are defined broadly and include:
    - full and open contracts including GSA FSS work,
    - Small Business or other set-aside work,
    - commercial work,
    - subcontracts under an 8(a) contract
- Until now the consequence of failing to meet BAT requirements was a suspension of new sole source awards

Business Activity Targets (BAT) - Changed Percentages

Changed the percentages for BAT Targets for the final three PY years:

Year in Transition Stage	Old Target	New Target
1 (PY 5)	15	15
2 (PY 6)	25	25
3 (PY 7)	35	30
4 (PY 8)	45	40
5 (PY 9)	55	50

Relaxed Consequences for Failure to Meet BAT:

- SBA will increase monitoring
- Before allowing new sole source awards, SBA may require a non-compliant participant to:
  1. Obtain management assistance, technical assistance or counseling, or
  2. Attend seminars related to management assistance, BD, financing, marketing, accounting or proposal preparation
- AND The Participant must show it has made a "good faith" effort to meet BAT.
- Decision made at District Office level (not SBA Administrator)

So What's a "Good Faith" Effort?

- The regulation does not say.
- However, it does note extenuating circumstances that might make it difficult to meet BAT, such as:
  - Reductions in government funding
  - Continuing Resolutions and budget uncertainties
  - Primes awarding less work to subcontractors than anticipated
- Firms should also document efforts to obtain non-8(a) work, such as:
  - Lost competitive opportunities
  - Marketing efforts
  - Networking efforts
- Advance communication with your BOS will be important

Robert K. Tompkins

Eligibility Tracking Overview & Compliance Strategies

- Tribes must track and forecast: Size, NAICS Codes, and BAT, as well as contract back-log and opportunities, especially follow-ons.
- This requires coordination between the portfolio of government contracting subsidiaries and discipline as to which subsidiaries pursue which opportunities
- There can be a tension between these compliance issues and putting the most qualified subsidiary forward
- Be prepared to consider things like:
  - Early graduation
  - Petitioning for formal primary NAICS change
  - Subcontracting or Joint Venturing

6. NAICS Codes

NAICS Codes – Background

- Contracting Officers assign a NAICS Code and Size Standard to each set-aside procurement.
- An offeror must qualify as “small” under that NAICS code to be eligible for award.
- The assigned NAICS code also has an impact on compliance with Limitation on Subcontracting requirements.
- Historically, SBA has only allowed a single NAICS code to be assigned to a procurement even if the procurement covers more than one product and/or service.
- That NAICS Code would apply throughout the life of the contract, including to any orders placed under an Indefinite Delivery, Indefinite Quantity (IDIQ) contract.

NAICS Codes – Background

- The **contracting officer** is responsible for selecting the NAICS code for a procurement.
- That decision can be challenged via a protest and appealed to SBA's Office of Hearings and Appeals.
- The contracting officer has a great deal of discretion in selecting the NAICS code.
- The issue is addressed both in the FAR (19.102) and the SBA regulations (13 CFR) – but they are not entirely consistent!

NAICS - WHAT THE FAR SAYS

FAR 19.102(b):

- (b) Determining the appropriate NAICS codes for the solicitation. (1) Unless required to do otherwise by paragraph (b)(2)(ii)(B) of this section, contracting **officers shall assign one NAICS code and corresponding size standard to all solicitations, contracts, and task and delivery orders**. The contracting officer shall determine the appropriate NAICS code by **classifying the product or service being acquired in the one industry that best describes the principal purpose of the supply or service being acquired**. Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service descriptions in the solicitation, the relative value and importance of the components of the requirement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component that accounts for the greatest percentage of contract value.

NAICS - The FAR (cont.)

- NAICS selections are made early in the process and must be considered as part of the Acquisition Plan (see FAR 7.105 requiring selection of the service or product) - procurement forecasts typically contain the NAICS assigned, e.g. – GET AN EARLY READ
- Beyond the elements listed in FAR 19.102, NAICS selection may be impacted by other considerations including
  - Historical precedent (i.e. predecessor contracts and requirements)
  - Programmatic or Appropriations limitations and requirements
  - Consideration of the marketplace (i.e. available sources, impacts on competition, etc.)
- NAICS selections can be complicated and often defy bright-line analysis (but contracting officers have wide discretion in their selection)

NAICS - Recent SBA Changes

SBA's recent changes regarding NAICS codes include:

- Suggesting contracting officers can assign multiple NAICS codes to a single contract (FAR requirement projected to be added effective October 2022, but SBA's regulations don't align perfectly with FAR Part 19),
- Reminding contracting officers they can assign a different NAICS code at the task order level on IDIQs and MACs but the NAICS must be among those on the base contract
- Requiring the assignment of NAICS at the task order level on unrestricted MACs (but not FSS), BUT
  - Do not expressly address single award IDIQs, and
  - Does not change the general rule that a contractor's size under an IDIQ holds for the full five year term of the contract, absent a merger, etc.

NAICS – What if the NAICS is Unclear or Unfavorable?

- As noted above, the NAICS assignment for a procurement is usually determined VERY early in the procurement process;
- Know the issues the contracting officer is required to consider per FAR 19.102 and engage them early – in the market research phase if not before
- If a NAICS assignment is unclear or seems inappropriate, consider the elements the contracting officer is required to consider and reach out with your position, and document it in writing.
- If you need to protest the NAICS, you must be mindful of SBA's timeliness requirements -- 10 days from the issuance of the solicitation or assignment of the NAICS!
- Better to attempt to resolve this well before any protest would have to be filed.

NAICS - IDIQs

- Multiple NAICS will now be possible, at least starting in October 2022
  - Consider how this will impact size eligibility where there are multiple NAICS/size standards
- Task Order level NAICS assignment and re-certification requirements may get more wide-spread use
  - BUT, SBA's regulations are still primarily focused on MAC contracts, not single-award IDIQs
  - Remember, the NAICS assignment impacts your Limitation on Subcontracting obligations.

Rule change: Follow-On Contracts vs. “New” Requirements

What is a “new” requirement?

SBA is seeking to provide a uniform definition of “new” for each scenario and has established the following test:

1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities;
2) whether the magnitude or value of the requirement has changed by at least 25 percent; and
3) whether the end user of the requirement has changed.

These considerations should be a guide, and not necessarily dispositive of whether a requirement qualifies as “new.”

SBA rejected a bright line test on the 25 percent “rule.”

SBA: “Applying the 25 percent rule contained in this definition rigidly could permit procuring agencies and entity-owned firms to circumvent the intent of release, sister company restriction, and adverse impact rules.”

Robert K. Tompkins

New requirements

- The question of whether a contractual requirement is “NEW” comes into play in several different contexts, including:
- ‘Adverse Impact’ test to determine whether a previous small business requirement can be moved to 8(a)
- Determining whether a requirement can be removed from the 8(a) program
- Determining whether a sister company can receive a follow-on contract

Primary NAICS Code

SBA Efforts to Address "Follow-On" Contracts

- Primary SBA Concern: Perceived practice of Tribes passing down a particular government requirement (contract) from one 8(a) it owned to another
- Resulted in changes to the 8(a) regulations several years ago
- A sister 8(a) company may participate in a secondary NAICS Code that is the primary code of a sister company, but the rules were revised to preclude an 8(a) company from "receiving" a sole source contract that is a follow-on to an 8(a) contract held by a sister 8(a) company

SBA Efforts to Address "Follow-On" Contracts (cont'd)

- Important to proactively monitor NAICS Codes to determine whether to graduate early and to consider follow-on capture strategies
  - Teaming arrangements with other SBA qualified firms
  - Working with the agency to modify the procurement
- Managing primary and secondary NAICS Codes for 8(a) subsidiaries is vital for any ANC/Tribe

Follow-On Restrictions: Primary NAICS

- A Tribe may **NOT** own 51% or more of another firm which at the time of application or within the previous two (2) years has been operating in the 8(a) program under the same primary NAICS Code as the applicant
- Tribes may own a participant or other applicant that conducts secondary business in the 8(a) program under the NAICS Code which is the primary NAICS Code of the applicant entity
- Who gets to decide if there's a change?
- What happens if the restriction is breached?

Change in Primary NAICS – by the 8(a)

- (1) A participant may request that the primary industry classification contained in its business plan be changed by filing such a request with its servicing SBA district office. SBA will grant such a request where the participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS Code to another.

Change in Primary NAICS – by SBA

- (2) SBA may change the primary industry classification contained in a participant's business plan where the greatest portion of the participant's total revenues during the participant's last three completed fiscal years has evolved from one NAICS Code to another. As part of its annual review, SBA will consider whether the primary NAICS Code contained in a participant's business plan continues to be appropriate.
- So how does this happen?

Change in Primary NAICS – by SBA (cont'd)

- (i) Where SBA believes that the primary industry classification contained in a participant's business plan does not match the participant's actual revenues over the participant's most recently completed three fiscal years, SBA may notify the participant of its intent to change the participant's primary industry classification and afford the participant the opportunity to respond.
- What if the 8(a) disagrees?

Change in Primary NAICS – by SBA (cont'd)

- (ii) A participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate, despite an increase in revenues in a secondary NAICS Code beyond those received in its designated primary industry classification…
- (iii) As long as the participant provides a reasonable explanation as to why the identified primary NAICS Code continues to be its primary NAICS Code, SBA will not change the participant's primary NAICS Code.

Primary NAICS Code Change Process

- As discussed above, 8(a) participants may apply to have the primary NAICS Code contained in their business plan changed by filing a request with their servicing SBA district office.
- Participants must demonstrate that the majority of its total revenues during the prior three-year consecutive period has evolved from one NAICS Code to another.

Primary NAICS Changes to be Made by SBA (13 CFR 124.112 (e) (2))

- SBA may change an 8(a) participant's primary NAICS if revenues for past three (3) consecutive fiscal years show a different primary NAICS than the original primary. During annual review, SBA considers whether the primary NAICS in the participant's business plan is still appropriate.
- SBA will notify participant of its intent to change primary NAICS.
- Participant may challenge the change. SBA will consider all reasonable explanations if participant wishes to challenge the change.

Restrictions for Primary NAICS Changes for Entity-Owned Participants

If a primary NAICS change of an entity-owned 8(a) participant results in the entity having two (2) participants with the same primary NAICS, the newer participant will not be able to receive any 8(a) contracts in the same primary NAICS that is the primary NAICS of the older participant for a period of time equal to two (2) years after the older participant leaves the program.

8(a) Compliance Status

NO COMPLIANCE ISSUES

POSSIBLE ISSUES

OUT OF COMPLIANCE

8(a) Firm	Size Threshold	Non-8(a) Business Activity Targets (BAT)	LOS Self Perform%	Primary NAICS change	Mgmt Issues

BAT only applies to firms in Transition (Years 5-9 of 8(a) Program)

Robert K. Tompkins

7. Recertification

SBA: Changes related to recertification timing

- As part of the Oct. 2020 rule rewrite, SBA revised its regulations governing **when the size status of a concern is determined**, including on MACs
  - 13 C.F.R. § 121.404
- **General rule**: A concern that represents itself as "small," and qualifies as "small" at the time of its initial offer including price, is generally considered "small" throughout the life of the contract
- **Unrestricted MACs**: Small at the time of offer & contract-level recertification, small for goaling purposes for each order issued, **unless recertification requested in connection with a specific order or BPA**
  - Set-asides for small businesses → requirement to recertify
- **Set-aside MACs**: Small at the time of offer & contract-level recertification, small for each order or BPA, **unless recertification requested in connection with a specific order or BPA**

SBA: Changes related to recertification timing

- **Effect of size certification and recertification**: Concern grows to be other than small, procuring agency may still exercise options & count award as a SB award
- **Contract novation ((g)(1))**: Must recertify or inform the agency that it is other than small; if other than small, agency cannot count the options or orders issued, from that point forward, towards SB goals
- **Merger, sale, or acquisition ((g)(2))**: Must recertify or inform the agency that it is other than small; if other than small, agency can no longer count the options or orders issued, from that point forward, towards SB goals
- **Merger, sale, or acquisition after offer, but prior to award**: If the merger, sale, or acquisition occurs after submission of initial offer, but prior to award → offeror must recertify size status prior to award
  - If the merger, sale, or acquisition occurs **within 180 days of the date of offer** & offeror is **unable to recertify as small**, it will not be eligible as a small business to receive the contract
  - If the merger, sale, or acquisition occurs **more than 180 days after the date of offer**, award can be made, but it will not count as an award to a small business

SBA: Changes related to recertification timing

- Two decisions issued in 2021 addressing the revised 13 C.F.R. § 121.404 —
  - ***22nd Century Technologies, Inc.*, SBA No. SIZ-6122 (Sept. 2021)** (OHA affirms Area Office determination that set-aside task order under unrestricted IDIQ MAC required recertification)
  - ***Odyssey Consulting Group, Ltd.*, B-419731 et al. (July 2021)** (GAO, deferring to SBA's interpretation of 13 C.F.R. § 121.404, concludes offeror that recertified as "other than small" following acquisition remained eligible for award of set-aside task order)

22nd Century Technologies

- In 2015, the Army issued a solicitation, seeking to establish an unrestricted IDIQ MAC
- Included a section titled, “Task Orders Restricted to Small Businesses,” which stated that any proposals submitted in response to a task order solicitation restricted to small businesses were to include a representation concerning the offeror’s size status
- Only contractors eligible to compete as a small business were permitted to submit proposals in response to task order solicitations restricted to small businesses
- In May 2015, the appellant submitted a proposal for the IDIQ MAC, for which it subsequently received an award four years later, in March 2019
- The appellant then submitted a proposal in response to a task order issued by the Army in December 2020, that was restricted to small businesses in accordance with the relevant sections of the IDIQ MAC
- The appellant represented itself as small & the Army subsequently awarded the task order to the appellant
- Two small business offerors then filed protests to SBA, challenging the appellant’s size

22nd Century Technologies

- The Area Office found 13 C.F.R. § 121.404(a)(1)(i)(A) controlled
- The underlying IDIQ MAC was unrestricted solicitation & the task order was issued on a restricted basis to small businesses
- Because the task order solicitation was issued after the new regulation became effective, the Area Office found that all offerors must recertify their size status and be qualified as small businesses as of the date they submitted their proposal, which included price (February 2021)
- The Area Office determined that the appellant was other than small
- OHA affirmed the Area Office's determination that the task order required recertification at the task order level
- And because the appellant "unmistakably certified" its status as small in its February 2021 proposal, the Area Office properly determined the appellant's size as of that date (other than small)
- OHA therefore denied the appeal and affirmed the Area Office's determination

Odyssey Consulting Group

- Protest involved a challenge to an offeror's eligibility for the award of a task order under GSA's OASIS small business pool IDIQ contract
- 38 days after submitting its proposal, the awardee informed GSA that it had been acquired and that it no longer qualified as small because of the acquisition
  - Nonetheless, the awardee argued that it was still eligible for task orders set-aside for small businesses, absent an order-specific recertification requirement

Odyssey Consulting Group

- SBA provided its interpretation, specifically addressing the interplay between 13 C.F.R. § 121.404(g)(2)(iii) and (g)(4)
- SBA clarified that it interprets (g)(2)(iii) "as applicable to pending and subsequent awards, including task orders"—meaning, "that if a firm recertifies as other than small within 180 days of offer and before award, the firm will generally be ineligible for the award of either a task order or a contract"
- However, although SBA interpreted (g)(2)(iii) as applying at the task order level, SBA viewed (g)(4) as "an exception to the general rule" for size recertification between offer and award in circumstances involving a MAC set-aside for small businesses
- SBA asserted that, in accordance with (g)(4), the agency could make award to the awardee, but could no longer receive small business credit for pending and future awards against the awardee's OASIS contract

Odyssey Consulting Group

- GAO began by noting, "The regulation at issue here **is not a model of clarity**"
  - While (g)(4) is silent on a firm's eligibility for award, "its express indication—that new orders issued under a multiple award contract to firms that are other than small cannot count against an agency's small business contracting goals—implies (or seems to assume) that the agency is permitted to issue task orders to firms when the procurement is set aside for small businesses"
  - In contrast, GAO noted that (g)(2)(iii) "shows that the drafters knew how to draw distinctions between a firm's ineligibility and the agency's ability to count contract awards towards small business goals, and yet did not do so in this provision"
- In the end, GAO deferred to the SBA's interpretation of its own regulation—an interpretation that permitted the agency to award the task order to the awardee, while prohibiting the agency from counting the award towards its small business goals

8. Other New SBA Rules and Proposed Rules

SBA: Proposed rules & impending updates

- On June 6, 2022, SBA issued a final rule changing the period of calculation for employee based size standards from 12 to 24 months.
- The new rule is effective starting July 6, 2022.
- SBA previously extended the period of calculation for receipts based size standards from a three-year to a five-year lookback.
- SBA also extended the same calculation periods to its non-procurement programs (loans, SBIC, etc.)

SBA: Proposed rules & impending updates

- On Nov. 18, 2021, SBA issued a proposed rule that would "provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts"
  - Stems from Section 868 of the NDAA FY 2021
- Two new methods for obtaining qualifying past performance:
  - A small business may use the past performance of a joint venture's contract(s) **for work performed as a member of the joint venture**
  - A small business may use the past performance it **obtained as a first-tier subcontractor** on a prime contract with a subcontracting plan

SBA: Proposed rules & impending updates

- With regard to the latter — using past performance for work performed as a first-tier subcontractor — the proposed rule would require the prime contractor to provide a rating of the small business's past performance w/in 15 days
  - Requirement to be added to 13 C.F.R. § 125.3

FIRST CASE STUDY

IV. Effective Ethics and Compliance Programs

Why Now is the Time to Deal With This

- Ethics and Compliance Programs are MANDATORY for Contractors
- Recent enforcement activity has continued to focus on government contracting and small business programs in particular
- DOJ has issued Guidance (April 30, 2019) for the evaluation of ethics and compliance programs and their effectiveness - Emphasis on Risk Assessments
- There has been a lull in regulatory activity, especially with respect to the FAR – it's a good time to catch up!

Why is Compliance So Important?

- FAR 52.203-13 (2009) requires a compliance program
- DOJ Prosecutorial Guidance and Federal Sentencing Guidelines
- Suspension and Debarment Provisions of FAR Part 9
- Reputation – internal and external
- Efficiency and Effectiveness
- Most of all: avoiding trouble!

FAR Requirements

- Contract clause 52.203-13 in all contracts exceeding $5.5M and 120 days
  - Requires a written code of business ethics and conduct
  - Must be made available to every employee involved with government contracts
  - Contractor must diligently promote compliance to prevent and detect criminal conduct and create an organizational culture that encourages ethics and compliance
- These basic requirements apply to small and large contractors

Minimum FAR Requirements for “Internal Control System”

- Assignment of responsibility at a high level and ensure adequate resources
- Procedures to bar individuals potentially involved in improper conduct
- Periodic compliance reviews and audits of procedures, policies and internal controls (see below)
- Anonymous internal reporting mechanism (hotline)
- Appropriate disciplinary action for failing to report or prevent misconduct and zero-tolerance policy for retribution or retaliation
- Timely disclosure of violations – The Mandatory Disclosure Rule (see below)
- "Full cooperation" with any Government audits, investigations or corrective actions
- The clause must be flowed down to subcontractors if the subcontract meets the same threshold ($5.5 million and in excess of 120 days).

Internal Controls – Periodic Reviews (cont'd.)

- Periodic Reviews of company business practices, procedures, policies and internal controls for compliance with the Code of Business Ethics and Conduct AND the special requirements of Government contracting, including –

1. Monitoring and auditing to detect criminal conduct
2. Periodic evaluation of the effectiveness of the Program and internal control system, especially if criminal conduct has been detected
3. Periodic assessment of the risk of criminal conduct, with appropriate steps to design implement or modify the Program and internal controls to reduce the risks identified.

What Substantive Issues Should an Effective Ethics & Compliance Program Address? And What are the Key Components of a Program?

Compliance Program Content Fundamentals

- What government contracts rules and principles are important?
  - Key Federal Procurement Laws, including the False Claims Act
  - The Federal Acquisition Regulation (FAR)
  - SBA's Regulations
  - Contracting Agency Regulations
  - Contract Terms and Conditions
  - Good Business "Ethics" and Practices

Fundamentals (cont.)

- Focus on areas that could give rise to criminal liability, civil fraud liability, and suspension and debarment
  - 18 USC; and certain 41 USC provisions
  - The False Claims Acts (civil and criminal)
  - FAR Parts 3 and 9 The Federal Acquisition Regulation (FAR)
  - Other areas based on the nature of your business (i.e. SBA regulations, laws related to foreign business, etc.)

Key Federal Procurement-Related Laws Contractors Must Address

- Bribery (18 USC 201(b))
- Gifts and Gratuities (18 USC 201(c); FAR Subpart 3.2, e.g.)
- Antitrust and Bid Rigging (FAR 3.103 and Subpart 3.3)
- Anti-Kickback Statute (41 USC Ch. 87; FAR Subpart 3.5)
- Procurement Integrity Act (41 USC 2101, et seq; FAR 3.104)
  - Employment Discussions with Federal Officials
  - Gifts and Gratuities to Federal Procurement Officials
  - Procurement Sensitive Information (Source Selection Information and Competitor Proprietary Information
- Organizational Conflicts of Interest (FAR Subpart 9.5)
- Personal Conflicts of Interest
- Whistleblower Protections (FAR Subpart 3.9)
- Covenant Against Contingent Fees (FAR Subpart 3.4)
- Anti-Lobbying Rules (FAR Subpart 3.8)

Other Potentially Relevant Provisions to Address

- Foreign Corrupt Practices Act (if operating overseas)
- Export Control Issues (ITAR/EAR)(if handling covered items or information)
- Labor and Employment Issues (Service Contract Act, Davis Bacon, EEO/Affirmative Action)
- Anti Human Trafficking
- Domestic Preference Laws (Berry Amendment, Buy American and Trade Agreements Act)(manufacturing)
- Cost Accounting (if engaged in cost-type contracting)
- Small Business Requirements
- Cyber Security Requirements
- Special Security Requirements (i.e. NISPOM)
- And others – Review your contracts including Sections H and I, especially

Summary of Key Compliance Program Elements – Mechanical and Process Issues

- An overarching ethics and compliance policy adopted at the highest level of the organization
- Written code of ethics and business conduct tailored to the company's circumstances
- Regular compliance training for employees, principals*, agents and subcontractors
- A senior official charged with carrying out the Program and equipped with adequate resources
- An internal control system (see above)
- A Hotline or other anonymous reporting system
- A process for evaluating and making Mandatory Disclosures to the Government (see below)
- Periodic reviews of the program: monitoring/audits, evaluation of effectiveness, and risk assessments
- Authorization and Oversight of the Program from the Board on down

V. Ensuring Preparedness for Internal and External Investigations

Top-Down Compliance

- Compliance starts—but does not stop—at the top.
  - C Suite
  - Board of Directors
  - Company Counsel
  - Compliance Officer
- DOJ looks for a top-down approach, but increasingly is focused on mid-level management (*i.e.*, project management level)

Develop the Proper Policies and Procedures

- In addition to a Comprehensive Compliance Program, consider instituting audit/investigation-specific policies:
  - Internal investigation procedures
  - Mandatory disclosure policy
  - Document retention policy
  - Litigation/investigation hold
  - Pre-audit planning
  - Plan ahead for when audits might be expected

Elevate Concerns

- Once an audit/investigation is announced, elevate to management/counsel
  - May not be “officially” announced
- Establish strategy to:
  - Establish contact with the Government team
  - Uncover and manage the scope of the inquiry
  - Meet to understand expectations
  - Prepare management/employees for next steps
  - Advise on company approach: passive vs. proactive
  - Manage the scope of the inquiry

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  - Advise on company approach: passive vs. proactive
  - Manage the scope of the inquiry

Practical Tips: Keep an Eye on Parallel Issues

Be proactive on parallel issues:

- Assess compliance – is there a violation? Is there a difference of interpretation of program rules or requirements?
- Assess internal controls – were they sufficient? can they be enhanced?
- Determine the need for corrective action, and take it where appropriate.
- Communicate your efforts to the IG/GAO and, where appropriate, to the agency customer.
- Consider what other processes may be underway – i.e. Suspension and Debarment

The Mandatory Disclosure Rule

The Mandatory Disclosure Rule

- The Mandatory Disclosure Rule (MDR) was added to the FAR in late 2008 and requires:
  - "Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733." FAR 52.203-13(c)(2)(ii)(F).
  - There is an enormous amount of nuance to this – shortly after its adoption the ABA published a 230-page-plus Guide to the "MDR"
  - So what does this requirement mean???

Elements of the Disclosure Requirement

- A contractor must
  - **timely disclose**
  - **in writing** to the **agency OIG**, with a **copy to the Contracting Officer**,
  - whenever, in **connection** with the award, performance, or close out of the **contract or any subcontract** thereunder,
  - the contractor has credible evidence
  - that a **principal**, employee, agent, or subcontractor
  - has committed a **violation** of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations in Title 18 U.S. Code or a violation of the civil False Claims Act.
- Each of these elements is open to interpretation.

Consequences of failing to report as required by the MDR

- The MDR is contained in a contract clause (52.203-13); failure to abide by it can constitute a breach of contract and be a basis for contract termination.
- Violation of the MDR is also expressly addressed in the FAR Responsibility regulations (FAR Part 9) and can form a basis for a non-Responsibility determination (i.e. debarment).
- Failure to disclose may also run afoul of Sentencing Guideline requirements.

Principals and the Mandatory Disclosure Rule

- Who is a Principal"?

  Definition of Principal added to FAR 2.101 in 2008-

  "An officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

  - February 23, 2010: FAR 2.101 and 52.209-5 definition revised to remove "subsidiary" to just read "head of division or business segment"

- The MDR addresses Principals' responsibilities and their exposure in the MDR process
  - Knowing failure by a principal to timely disclose to the Government credible evidence of certain misconduct or significant overpayment known to the principal results in a violation of the MDR.
  - Individual Principals can be subjected to suspension and debarment for failure to disclose.
- This substantially impacts how investigations are conducted.

Takeaways

- Practice Pointers:
  - Even if you determine NOT to make an MDR report of an alleged incident that implicates offenses enumerated in the MDR, document the basis for that decision.
  - Consider the extent of Principals' involvement in the investigation – vesting Principals with knowledge of a potentially reportable incident puts them and the company at risk.
  - Consider the extent of Principals involvement in the MDR reporting decision -- what do you do if two Principals disagree about whether a MDR report should be filed???
  - Contractors should have an MDR policy.
  - Most importantly, investigators must be aware of the MDR and conduct investigations in a manner that allows the MDR requirements to be met.
- Query: How to balance the "Credible evidence" reporting trigger with DOJ demands for a "full disclosure"? Likely necessitates incremental reporting and requires you to be clear about the context of your report.

Recent Executive Orders, Regulatory Updates, & Trends

CASE STUDY NUMBER 2

Resource Guide --SBA's 8(a) Program for Entity-Owned Firms: An Overview

SBA's 8(a) Program for Entity-Owned Firms: An Overview

- Entity Owned Firms – Overview of SBA programs
- Affiliation and Management of multiple subsidiaries
- Evolving Expectations – Regulation and Case Law Changes
  - Joint Ventures
  - Limitation on Subcontracting
  - Business activity targets
  - Primary NAICS issues
  - Sister Company Past Performance

8(a) program for entity-owned firms

- SBA's 8(a) program helps "socially and economically disadvantaged" business compete for federal contracts
- The program is available to business owned by socially & economically disadvantaged individuals, as well as tribes, ANCs, and NHOs

Benefits of the 8(a) program

- Federal acquisition policies encourage federal agencies to award a certain percentage of their contracts to small businesses, including 8(a) firms.
- The overall federal small business goal is 23% of total prime contracting dollars (3% for 8(a))
- To achieve these goals, agencies can “set-aside” contracts so only “small” firms can compete for them
  - The same goes for 8(a)
- Large businesses are also required to attempt to place a certain percentage of their subcontracts with 8(a) and other small business concerns

Benefits of the 8(a) program

- Agencies can also award “Sole Source” contracts to 8(a) concerns subject to certain caps, but there are no express $$ caps for Tribes/ANCs/NHOs
- Regulations permit teaming arrangements and partnerships, but require that the 8(a) (or small business) derive significant benefits and generally be in control of management and contract performance
- Mentor-Protégé opportunities are also available but have important limitations and requirements
    - In 2016 SBA expanded the Mentor-Protégé program for ALL small business programs

SBA 8(a) business development program length

- A business concern may participate in the SBA 8(a) Program for no more than nine (9) years
- If a participant no longer meets the eligibility criteria for the business development program (such as the size limitation), it may graduate early from the program, even before the end of the nine (9) year term (*+ 1 year for COVID)
  - SBA can initiate this, or
  - The concern can do so (a strategic consideration)

SBA's treatment of tribally-owned concern

- SBA's regulations define "Tribe" broadly to include Alaska Native Corporations
  - *Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. *See* definition of "tribally-owned concern." 13 CFR 124.3
- In this presentation, "Tribes" includes ANCs except where specifically noted
- There are a few important areas where the requirements for Tribes, ANCs and NHOs differ

Tribally-owned advantages

- Qualified Subsidiaries of Tribes have some special advantages in the program, including:
  - Tribes can own more than one subsidiary at a time in the 8(a) program (limitations discussed below)
  - Tribes can receive sole source contracts of any value, but contracts over $25 million are subject to additional justification and approval requirements under FAR Part 6 and a statutory provision known as “Section 811”
  - Tribes can have “common management” of their 8(a) and small business subsidiaries
  - Tribes can engage in shared services arrangements – with some important limitations – to support their 8(a) and small business subsidiaries

ANCs' place in the 8(a) program

- Qualified Subsidiaries of ANCs have some special advantages in the program, including:
  - ANC-owned firms are deemed by law to be "socially" and "economically" disadvantaged (other participants have to prove these elements, and Tribes and NHOs only the latter)
  - The same is true of direct and indirect subsidiaries, joint ventures, and partnerships of ANCs. That is, if an ANC has the majority equity and voting power of the subsidiary, joint venture, or partnership, then it is considered to be a "minority and economically disadvantaged business enterprise"
- Section 29(e) of the Alaska Native Claims Settlement Act [43 U.S.C. 1626(e)]

ANCs have a number of different requirements from tribes

- ANCs may have non-shareholders manage their subsidiaries (Tribes must have tribal members manage their 8(a) companies)
- By virtue of the statutory provisions above, ANCs can have multiple layers of holding companies, whereas Tribes can generally only have a single layer of holding company between the Tribe and the 8(a) companies; NHOs cannot have holding companies
- Again, ANCs are presumed to be “economically” disadvantaged, where Tribes must demonstrate they are economically disadvantaged, at least to enter the 8(a) program the first time

SBA's treatment of NHOs

- NHOs are eligible to own multiple 8(a) concerns, subject to certain limitations.
- The primary SBA regulation governing participation by NHOs is 13 CFR 124.110.
- NHOs participate largely on the same basis as Tribes and ANCs
- There are a few important areas where the requirements for Tribes, ANCs and NHOs differ

NHO-owned advantages

- NHOs have some special advantages in the program over individually owned concerns, including:
  - can own more than one subsidiary at a time in the 8(a) program (limitations discussed below)
  - can receive sole source DOD contracts of any value, but contracts over $22 million are subject to additional justification and approval requirements under FAR Part 6 and a statutory provision known as “Section 811”
  - can have “common management” of their 8(a) and small business subsidiaries – BUT SBA only allows an individual to manage one NHO 8(a) at a time!
  - can engage in shared services arrangements – with some important limitations – to support their 8(a) and small business subsidiaries

NHOs have a number of different requirements from tribes (and in some cases ANCs)

- NHOs and ANCs may have non-shareholders manage their subsidiaries (Tribes must have tribal members manage their 8(a) companies)
- NHOs must own their 8(a) companies directly – no holding companies
  - By virtue of their statutory, ANCs can have multiple layers of holding companies, whereas Tribes can generally only have a single layer of holding company between the Tribe and the 8(a) companies
- Again, ANCs are presumed to be “economically” disadvantaged, whereas NHOs and Tribes must demonstrate they are economically disadvantaged, at least to enter the 8(a) program the first time

Small business subcontracting requirements

- Large businesses have to provide small business subcontracting plans that include separate goals for subcontracting with:
  - Small businesses
  - VOSBs
  - SDVOSBs
  - HUBZone small businesses
  - Small disadvantaged businesses
  - WOSBs
- Goals expressed in terms of total dollars subcontracted and as percentage of total planned subcontracting dollars
- Under FAR 52.219-9, subcontracts to ANC or Tribal entities count toward subcontracting goals for small businesses and small disadvantaged businesses regardless of the ANC or Tribal entity's actual size

Key 8(a) & Small Business Eligibility Requirements

Key eligibility requirements

- Tribally-owned concerns can qualify as “small businesses”
  - Can also qualify for the 8(a) program, which is a subset of SBA’s overall small business contracting program
- Graduated 8(a) concerns may retain their small business status & continue to be eligible to pursue small business set aside contracts
- As small businesses, they may also be eligible to form joint ventures with other SBA-preferred entities to pursue 8(a), women-owned, SDVOSBC and HUBZone set-aside contracts
- The next slides explore basic requirements for “small business” and 8(a) eligibility and special rules for tribally-owned companies

Key eligibility issues

- What is a “Small Business”?
  - SBA has developed size standards for hundreds of industries as defined by NAICS Codes
    - Services – based on average of gross receipts for three* most recently completed financial years (*changing to five years)
    - Manufacturing – average number of employees of prior 12 months
  - Size is defined by size standards associated with each NAICS Code
    - For each specific contract, the RFP will assign a NAICS Code – the entity must meet the size standard for that RFP and NAICS Code
    - Size is also relevant for 8(a) program eligibility – the question there is: what is the concern’s primary industry?

Measuring size – a new(ish) twist

- In late 2018 Congress passed the Small Business Runway Extension Act
- This one sentence law extends the period of measurement for size from three years to **five** years
- SBA issued a final rule implementing the new five year requirement, effective Jan. 6, 2020
- Most small businesses seem to like and want the new rule
- A limited number of companies, which are shrinking back into small business status, see a downside to it — therefore SBA provided companies an option to use the three or five year lookback period until January 6 2022
- SBA is proposing to change the employee-based calculation to a two-year lookback from the current one-year lookback — will there be a phase-in?

Small business – common misconceptions

- The following are WRONG:
  - I don't have to update my size until I get my audited financials. WRONG – size is calculated on a five (three if elected) year trailing average based on the most recently completed financial years. On the first day of the new year, size must be re-calculated based on the prior three years data.
  - I only count revenues in my primary NAICS. WRONG – All receipts are counted.
  - I don't have to count subcontracted work. WRONG – All prime contractor receipts are counted. NOTE: In Joint Ventures, only the proportionate share of JV revenue is counted though.
  - I don't update size as an 8(a) for new contracts until I complete my current program year – WRONG. For new contract actions, size must be updated at the time of proposal submission.

Tribal eligibility - ownership

- Tribes must own a majority of the applicant entity:
  - (3) Ownership. (i) For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest.
- SBA limits Tribes to one 8(a) in a given NAICS Code:
  - A Tribe 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.
- More on this below…

Multiple subsidiaries – key takeaways

- Tribes may have more than one subsidiary (directly-owned or owned through a wholly-owned “holding company”).
- Each 8(a) participant must have a unique service line and primary NAICS Code.
- Program intent is for 8(a) participants to diversify with different lines of business, not to perpetuate contracts through follow-on entities.
- Once an 8(a) participant graduates, there is a 2-year waiting period before the Tribe can submit another 8(a) applicant under the same primary NAICS Code.

Tribal eligibility requirements - recap of key points

- The NHO/ANC/Tribe's subsidiaries (not the NHO/ANC/Tribe itself) are eligible to be admitted to the 8(a) program.
- Subsidiaries are NOT "ANCs" or "Tribes" or "NHOs"; they are state or tribal law entities (typically LLCs or corporations).
- A subsidiary must be "small" under its primary industry (as defined by the NAICS system) to qualify for the 8(a) program.
- For ANCs and Tribes, an individual is only allowed to manage the day-to-day operations of no more than two 8(a) subsidiaries at a time, one for NHO 8(a)s.

Affiliation

Affiliation

- Under the Small Business Act, a small business must be “independently owned and operated” and be small according to SBA’s definitions. 15 U.S.C. 632(a).
- SBA applies the concept of “affiliation” when two or more entities are subject to common control and aggregates their size for small business eligibility purposes. 13 C.F.R. 121.103.
- SBA will find common control (and affiliation) where there is common ownership, common management, an extensive contractual relationship, economic dependence, an “identity of interest,” as well as in other circumstances.
- This results in “General” affiliation and affects the size of the entity generally (as opposed to with regard to a specific contract, see below).
- ANCs (and Tribes) enjoy exemptions from “affiliation” in certain circumstances (discussed below).

Subsidiaries must be small businesses

- Size is important at various times, including in determining 8(a) program admission and eligibility, and with respect to any set aside contracts (small, 8(a), etc.)
- As a general rule, a business must include the size of its "affiliates" in determining its own size
- Affiliation can be
  - "general" – meaning two entities are subject to common control all the time, or
  - "contract specific" – meaning two entities are affiliated based on their relationship on a specific contract or proposal

General affiliation

- Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party controls or has the power to control both. It does not matter whether control is exercised, so long as power to control exists.
- SBA considers factors such as ownership, management, previous relationships or ties to other concerns, and contractual relationships in determining whether affiliation exists
- Control may be affirmative or negative (i.e., through veto rights or quorum requirements)
- SBA can also consider the totality of the circumstances, not just one single factor, in determining whether affiliation exists

Contract "specific" affiliation

- As set out above, common control will cause SBA to find entities to be general "affiliates" of one another
- Affiliation can also arise in a contract-specific way if the small business or 8(a) is too reliant on its teaming partner
- Specifically, SBA will also find affiliation where the small business is "unusually reliant" on its putative subcontractor or where the partner will perform the "primary and vital" portions of the work (*see* 13 C.F.R. 121.103(h)(4))
  - This is known as the "**ostensible subcontractor rule**"
  - Parties that fall within this rule are deemed to be joint venture partners
- By regulation, partners to a "joint venture" are deemed to be affiliated
  - 13 C.F.R. 121.103(h)

Affiliation exemptions applicable to Tribes and ANCs

- NHOs, Tribes, & ANCs have two different exceptions or exemptions from the general affiliation rules: one that applies for purposes of the 8(a) program, and a more limited exception that applies for the "small business" set-aside program
  - In both cases, these exceptions only apply to the **NHO, Tribe or ANC and other entities owned by the particular NHO, Tribe or ANC**
  - **They do not create any exception for affiliation with third parties – including individual tribal members or ANC shareholders**

Tribal exemption from affiliation in the 8(a) program

- Subsidiaries of Tribes are exempt from general affiliation as between their parent and other entities owned and controlled by the Tribal parent
  - 13 CFR 124.109(c)(2)(iii)
- This includes sister companies and holding companies
- This exemption is fairly absolute for purposes of 8(a) program and 8(a) set-aside contract eligibility (but there are other eligibility requirements that serve to limit the interconnectedness of tribal subsidiaries)

Tribal exemption from affiliation only within the 8(a) program

- For purposes of the 8(a) program, a tribally-owned firm's size is determined independently without regard to its affiliation with the Tribe, any entity of the tribal government, or any other business enterprise owned by the Tribe, unless …
  - The Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category
  - SBA has never made such a determination

Tribal exemption from affiliation for “small business set-asides”

- There is a narrower exemption from general affiliation when the subsidiary is pursuing and performing non-8(a) set-aside procurements (i.e., small business set-asides).
- For small business set-asides, the affiliation exemption only allows for
  - common ownership,
  - common management, and
  - common administrative services, provided “adequate payment” is received for those services.
- The SBA regulations note that affiliation between ANC subsidiaries can be found for “other reasons” in the context of small business status.
- But common management and oversight provide a great deal of latitude.

Common administrative services

- Common ownership & common management are fairly clearly defined, but what about “administrative services?”
- SBA has grappled with the question of what are eligible “administrative services”?
- SBA provided a definition of this term, along with a new term, “contract administration” services, in a relatively recent re-write of its regulations

Common administrative services

- SBA has now defined “common administrative services” for purposes of affiliation outside the 8(a) program
  - Common administrative services which are subject to the exception from affiliation include bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company or parent entity without interfering with the control of the subject firm

Contract administrative services

The revised regulations also define “contract administration services” (i.e., services related to a particular contract) and then distinguish such services that would be considered “common administrative services” under the exception to affiliation and those that would not.

Contract administration services

- Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not common administrative services
- For example, negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing employees, and overall responsibility for the day-to-day and overall project and contract completion are contract administration services that would not qualify as “Common Administrative Services”
- Contract administration services which do NOT qualify as common administrative services generally must be performed by the subsidiary’s employees/management.

Contract administration services

- Contract-related services that might constitute “administrative services” covered by the affiliation exception
  - Contract administration services that are administrative in nature would fall within the exception to affiliation. For example:
    - Record retention not related to a specific contract (e.g., employee time and attendance records)
    - Maintenance of databases for awarded contracts
    - Monitoring of regulatory compliance, template development, and assisting accounting with invoice preparation as needed
    - Administration of an ethics and compliance program and mandatory disclosure reporting

Clarification re: business development support

- SBA amended regulations address shared business development services by entity-owned concerns and the extent to which such services fall under the “administrative services” exception to affiliation
- SBA has stated that business development services provided to an entity-owned concern by a parent or holding company may fall within the definition of common administrative services

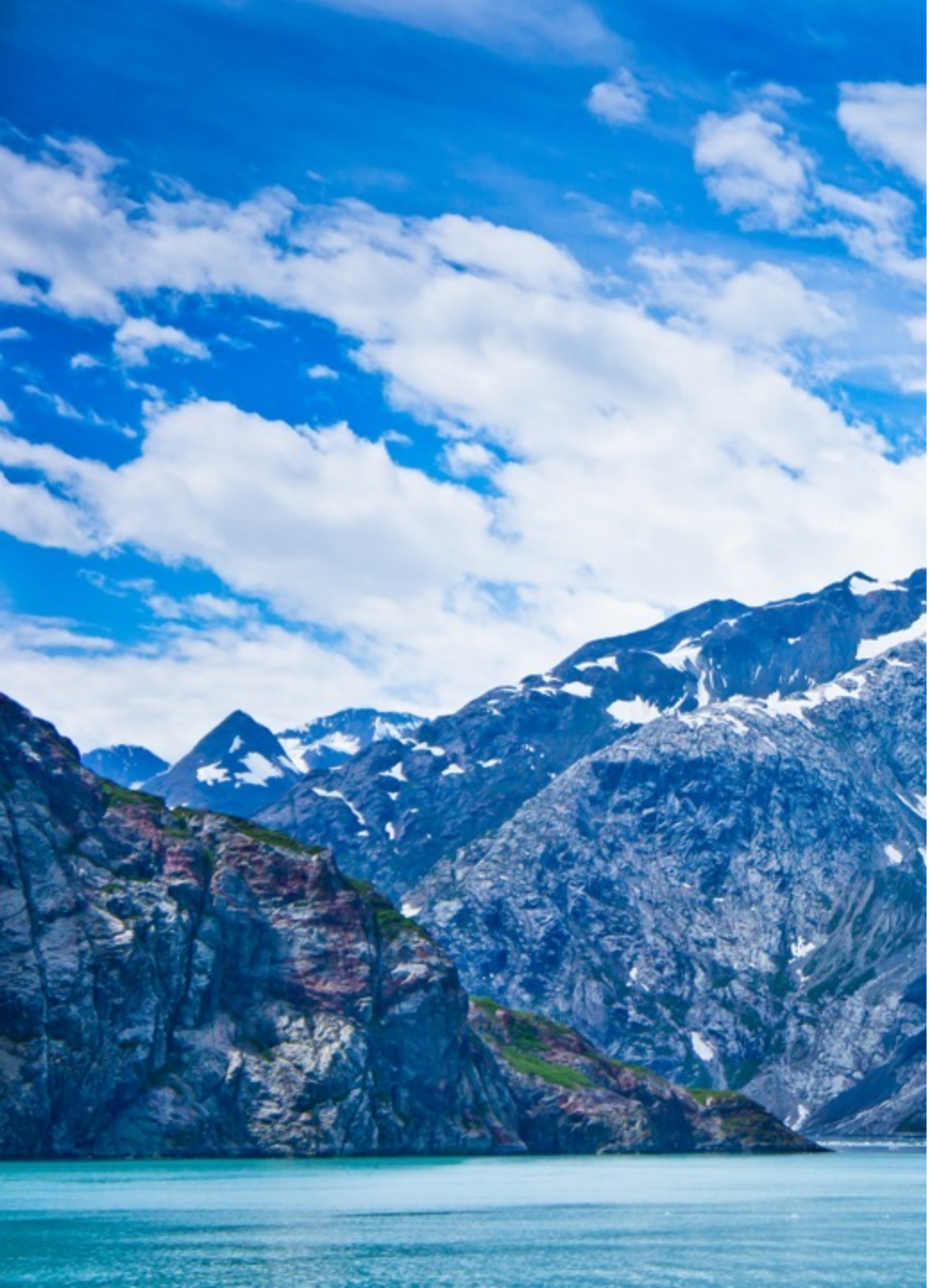
Clarification re: business development support

- SBA notes in the revised rules that the nature and timing of the services must be considered in order to determine whether they may properly be considered within the administrative services exception to affiliation
- The entity identified as the offeror must be “involved” in the preparation of the proposal especially those tasks or items that are specific to the contract being sought (vs. general background information)
- Even with the rule changes, this area is still very gray

Common administrative services: a recap

- Business concerns owned and controlled by … Tribes … are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.
- Administrative services vs. "contract administrative services"
  - "Actual and direct day-to-day oversight and control of the performance of a contract/project"
- BD
  - "Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered 'common administrative services'" …
  - But subsidiary and a representative of the subsidiary must be involved in preparing an appropriate offer

Questions



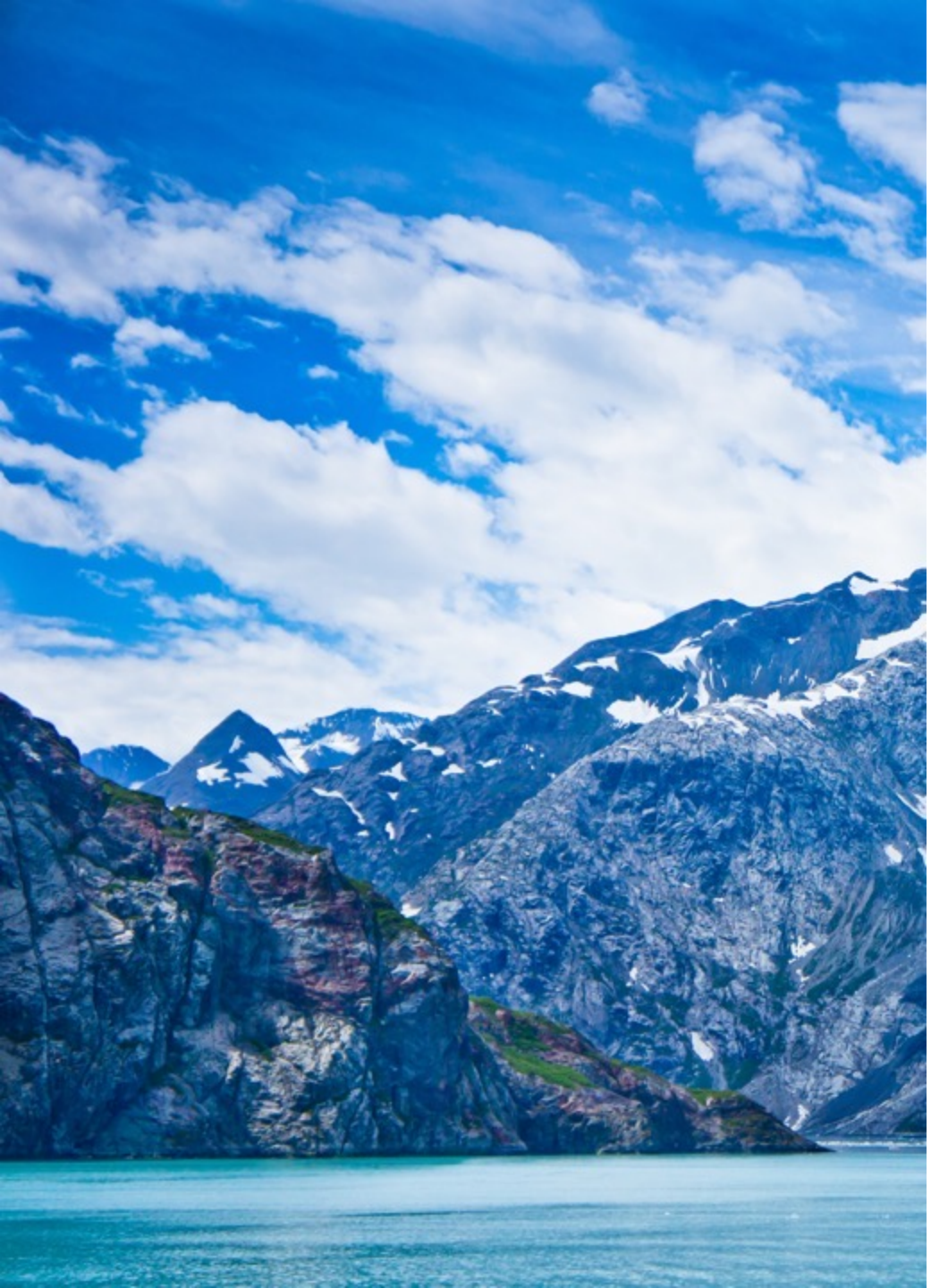
Contact Information

Robert Tompkins, Holland & Knight

Robert.Tompkins@hklaw.com

202.469.5111

NATIONAL 8(a) ASSOCIATION



Contact Information

Leila George-Wheeler, Holland & Knight

Leila.George-Wheeler@hklaw.com

202.469.5254