



# ALASKA REGIONAL CONFERENCE

JUNE 20-23, 2022 — ANCHORAGE

**AFFILIATION:  
ITS BENEFITS AND BURDENS**

**ROBERT MISULICH  
CHRISTOPHER SLOTTEE**



# ROBERT (ROB) MISULICH

## Shareholder

Robert J. Misulich represents Alaska Native Corporations (ANCs), tribes, and small businesses in a broad range of matters, including company formation and governance, shareholder meetings and proxy solicitations, employment law, and economic development, including compliance with the regulations governing the Small Business Administration's (SBA) Section 8(a) Business Development Program.

Robert's experience includes providing advice and guidance on government contracting matters, including compliance with the Federal Acquisition Regulation (FAR), bid protests, and claims and appeals arising under the Contract Disputes Act.

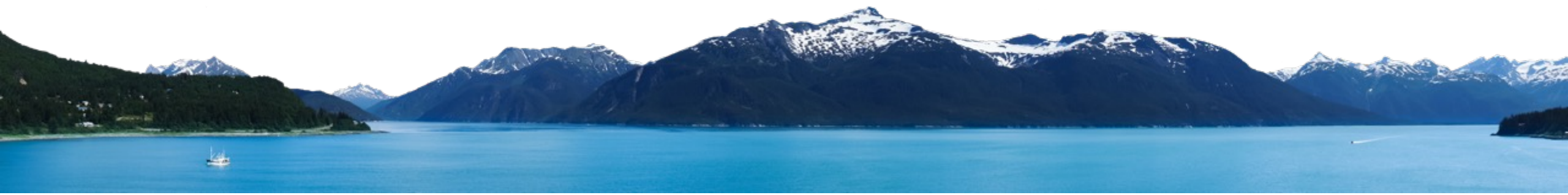


## INDUSTRY FOCUS

Indian Country and Alaska Native Corporations  
Natural Resources

REPRESENTING

**Schwabe**



# CHRISTOPHER SLOTTEE

## Shareholder

Chris has over 15 years of experience handling complex litigation matters, specifically working with Alaska Native Corporations, settlement trusts, and tribal governments.

Chris's previous experience as Vice President and General Counsel for an ANC gives him an invaluable understanding of the inner workings of ANCs and the unique challenges they face. He is well-versed in issues of corporate governance, legal and risk management, government contracting, corporate transactions, mergers and acquisitions, land use, and real estate matters.

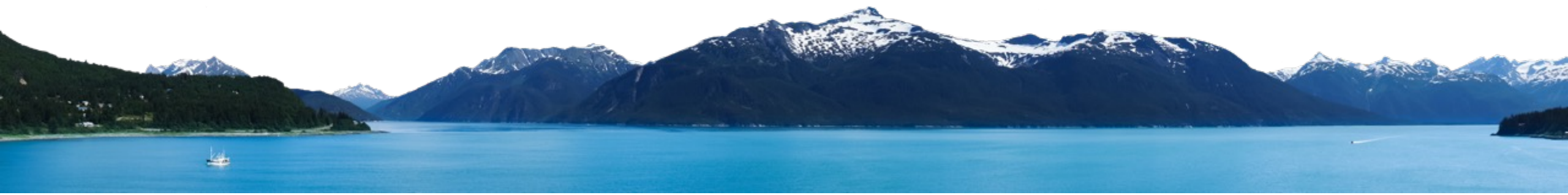


## INDUSTRY FOCUS

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# AFFILIATION AND SMALL BUSINESS SIZE STANDARDS

- Small businesses must not exceed the applicable size standard based on NAICS code
- Size standards described in 13 C.F.R. §121.201 apply to all SBA programs unless otherwise specified
- 13 C.F.R. §121.201 and SBA Table of Size Standards
- Applies to eligibility to enter into 8(a) program and eligibility for small business set asides



U.S. Small Business  
Administration

## **U. S. Small Business Administration**

**Table of Small Business Size Standards  
Matched to  
North American Industry Classification System Codes**

# AFFILIATION AND SMALL BUSINESS SIZE STANDARDS

- Expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified.
- Employees - “the average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon number of employees for each of the pay periods for the preceding completed 12 calendar months.”
  - Part and full time employees included
- Receipts: “The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.”
  - Five year average

Sector 22 - Utilities			
NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
221111	Hydroelectric Power Generation		500
221112	Fossil Fuel Electric Power Generation		750
221113	Nuclear Electric Power Generation		750
221114	Solar Electric Power Generation		250
221115	Wind Electric Power Generation		250
221116	Geothermal Electric Power Generation		250
221117	Biomass Electric Power Generation		250
221118	Other Electric Power Generation		250
221121	Electric Bulk Power Transmission and Control		500
221122	Electric Power Distribution		1,000
221210	Natural Gas Distribution		1,000
221310	Water Supply and Irrigation Systems	\$30.0	
221320	Sewage Treatment Facilities	\$22.0	
221330	Steam and Air-Conditioning Supply	\$16.5	



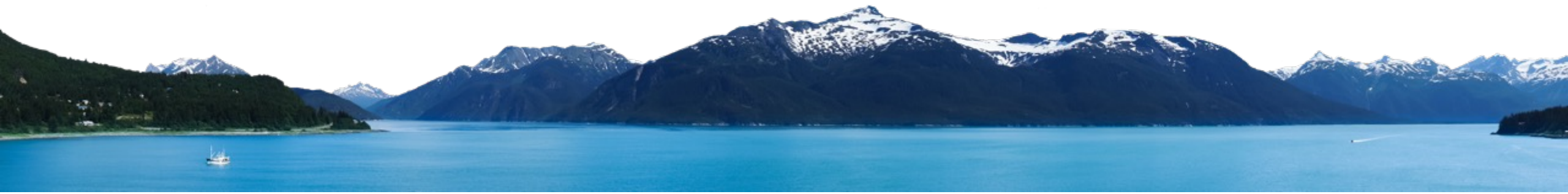


# AFFILIATION AND SMALL BUSINESS SIZE STANDARDS

- Footnotes may be relevant and material
- Example: Dredging requires 40% of volume dredged to be done using equipment owned by the small business or another small business

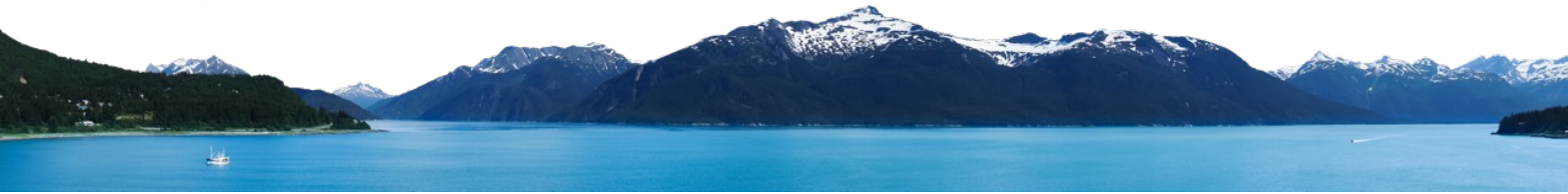
## Footnotes

1. [Reserved].
2. NAICS code 237990 – Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.
3. NAICS code 311421 – For purposes of Government procurement for food canning and preserving, the standard of 1,000 employees excludes agricultural labor as defined in section 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).
4. NAICS code 324110 – To qualify as small for purposes of Government procurement, the petroleum refiner, including its affiliates, must be a concern that has either no more than 1,500 employees or no more than 200,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes all domestic and foreign affiliates, all owned or leased facilities, and all facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. To qualify under the capacity size standard, the firm, together with its affiliates, must be primarily engaged in refining crude petroleum into refined petroleum products. A firm’s “primary industry” is determined in accordance with 13 CFR § 121.107.



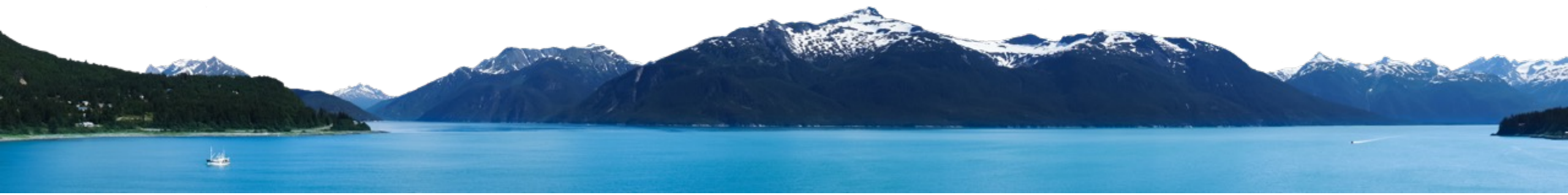
# AFFILIATION AND SMALL BUSINESS SIZE STANDARDS

- The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.
  - “In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.”
    - 13 CFR 121.103(a)(6)



# AFFILIATION AND SMALL BUSINESS SIZE STANDARDS

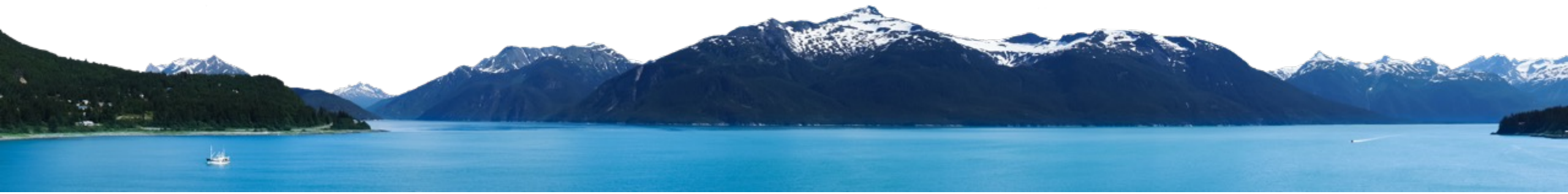
- Affiliation can be
  - “general” - meaning two entities are subject to common control all the time, or
  - “contract specific” - meaning two entities are affiliated based on their relationship on a specific contract or proposal
- SBA can consider the totality of the circumstances, not just one single factor, in determining whether affiliation exists





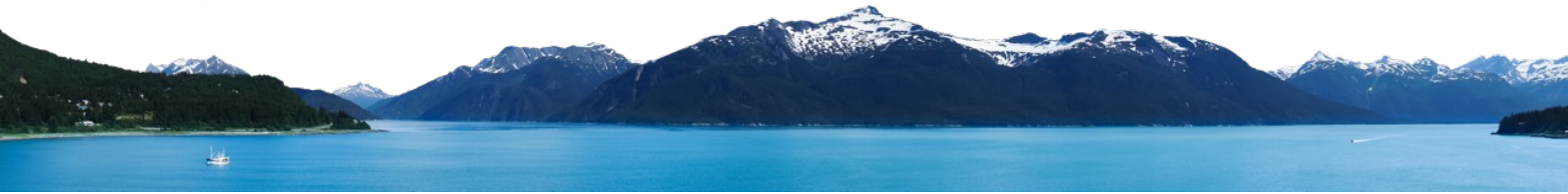
# AFFILIATION GENERAL PRINCIPLES

- 13 CFR § 121.103(a)1):
- Concerns and entities are affiliated with each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether the control is exercised, so long as the power to control exists.
- SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.
- Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.
- Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.
- In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.



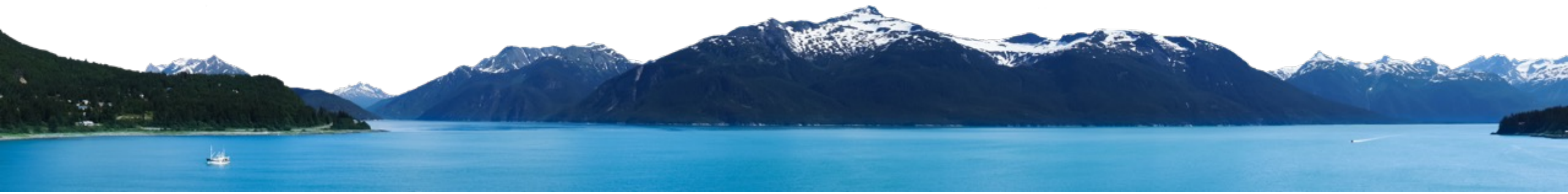
# AFFILIATION BASED ON STOCK OWNERSHIP

- Ownership of 50% or more of an entity's stock or voting power = affiliation
- 13 CFR 121.103(c)
  - A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.
- Power to control may be based on the aggregation of minority ownership positions held by multiple individuals - rebuttable
- If stock is widely held and no single block has control, the Board of Directors and CEO/President are deemed to have the power to control



# AFFILIATION ARISING UNDER STOCK OPTIONS, CONVERTIBLE SECURITIES, AND AGREEMENTS TO MERGE

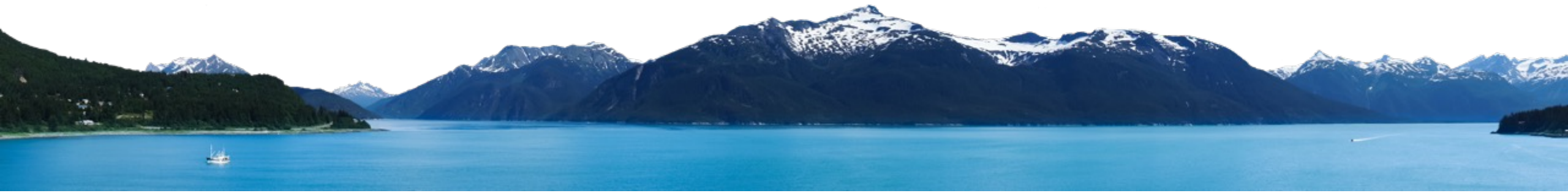
- SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.
- 13 CFR 121.103(d)
- Execution of Letter of Intent to acquire may be sufficient to result in a finding of affiliation depending on specificity and binding nature of letter
  - “Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered “agreements in principle” and are thus not given present effect.”





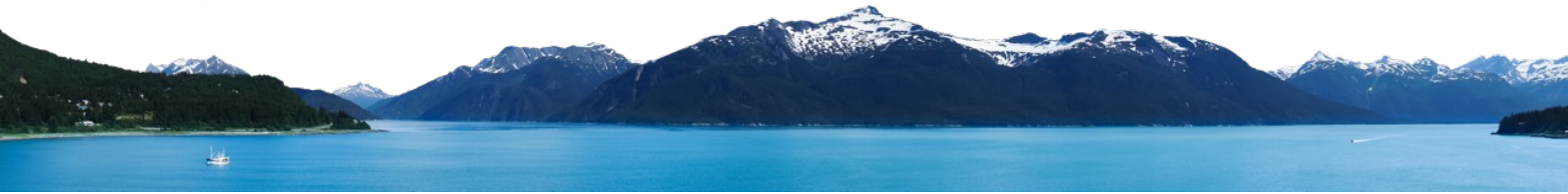
# AFFILIATION BASED ON COMMON MANAGEMENT

- Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.
- 13 CFR 121.103(e)
- Control can be broadly defined
- Interlocking boards/management committees can result in a finding of affiliation
- Managers of entities may cause affiliation with third party based on manager's role with third party, even if unrelated to their position with the small business subcontractor



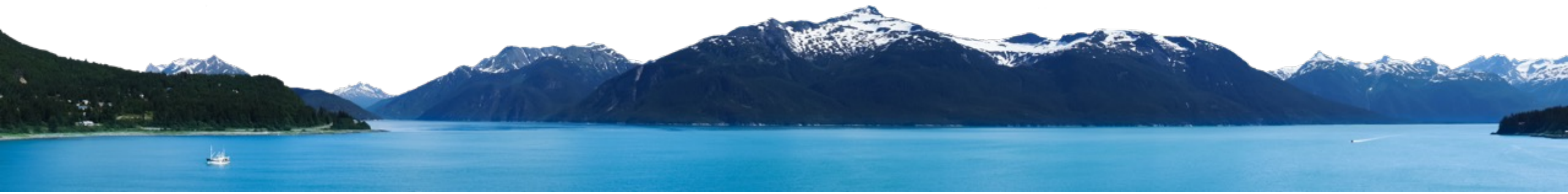
# AFFILIATION BASED ON IDENTITY OF INTEREST

- Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.
- 13 CFR 121.103(f)
- Firms owned or controlled by married couples or immediate family members are deemed to be affiliated if they conduct business with each other or share resources (loans, equipment, etc.)
- SBA may presume an identity of interest (and thus affiliation) if a small business derived 70% of its revenue from one concern over the prior 3 years
  - Native Corporations, Tribes, and NHOs are exempt from this 70% over 3 years presumption



# AFFILIATION BASED ON NEW ORGANIZED CONCERN

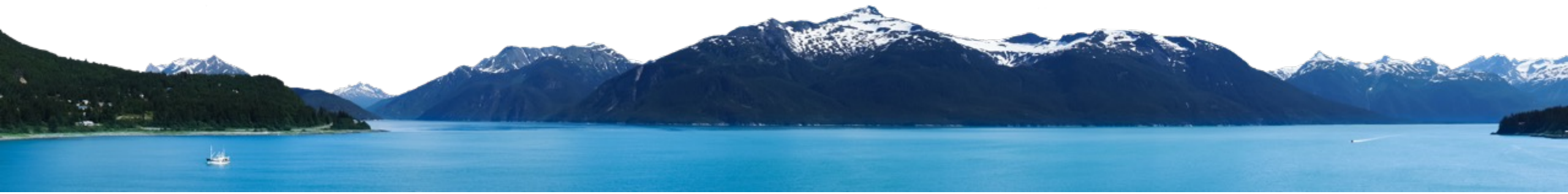
- Affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise.
- 13 CFR 121.103(g)
  - May be rebutted by “demonstrating a clear line of fracture between the two concerns.”
  - Key employee = “an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern”





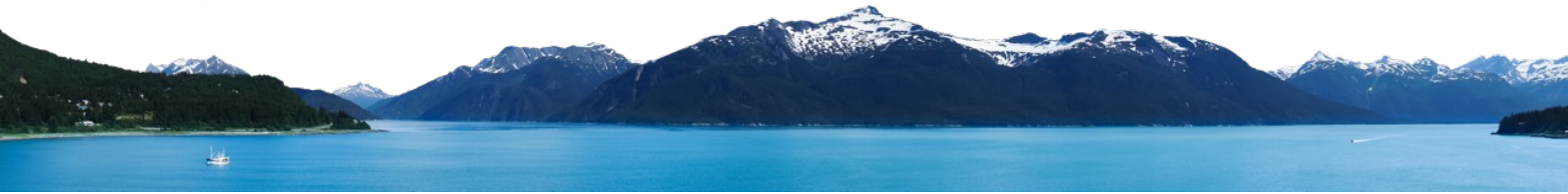
# AFFILIATION BASED ON OSTENSIBLE SUBCONTRACTOR RULE

- Affiliation can arise in a contract-specific way if the small business or 8(a) is too reliant on its non-small partner.
- SBA may 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. 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.
  - All aspects of the relationship between the prime contractor and the subcontractor are considered
  - Analysis is for a specific procurement and as of a specific point in time (generally the date of the last proposal revision)
  - For construction contracts, the key issue is whether the prime contractor retains management of the contract
  - The primary and vital requirements are those associated with the principal purpose of the acquisition/procurement
- “Joint ventures” are deemed to be affiliated. (13 C.F.R. 121.103(h))



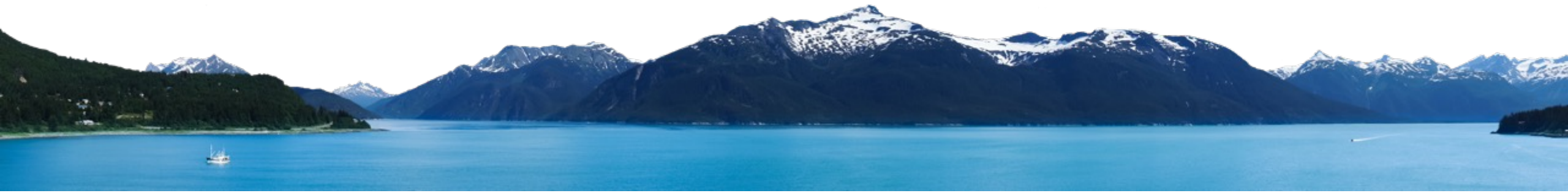
# AFFILIATION BASED ON OSTENSIBLE SUBCONTRACTOR RULE

- Ostensible subcontractor red flags:
  - Subcontracting with existing incumbent in connection with a re-compete
  - Subcontractor having control over proposal preparation process and pricing
  - Subcontractor employees supervision contract administration
  - 51/49 work share splits are permissible but can drive closer scrutiny
  - Heavy reliance on subcontractor's past performance (can the prime perform independently from the subcontractor)
  - Project manager is a subcontractor employee or hired from subcontractor
  - Key personnel are subcontractor employees or hired from the subcontractor



# AFFILIATION EXEMPTIONS

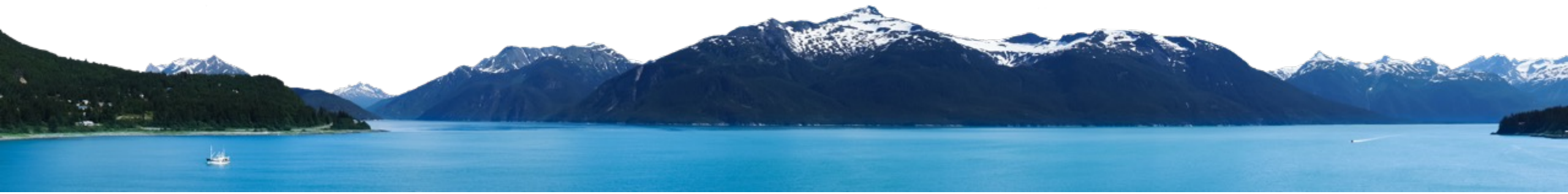
- Native Corporations have certain exemptions from the general affiliation rules
  - These exceptions only apply to the Native Corporation and other entities owned by the particular Native Corporation (i.e. sister subsidiaries, parent companies, holding companies)
  - They do not create any exception for affiliation with third parties
  - Other government contracting requirements may apply





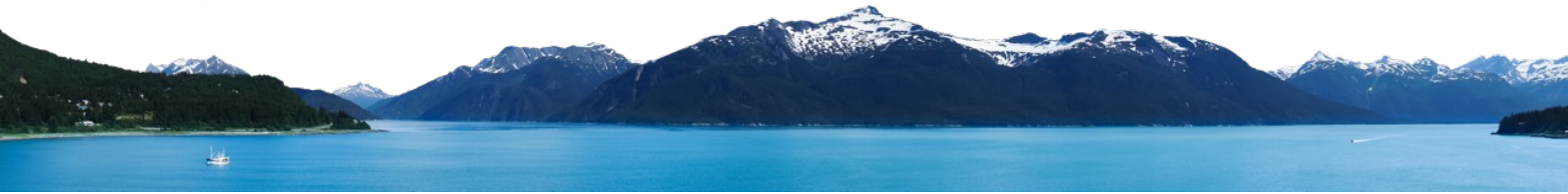
# AFFILIATION EXEMPTIONS

- For 8(a) application and for 8(a) contract eligibility, subsidiaries of Native Corporations 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).
  - In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be 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. 13 CFR 124.109(c)(2)(iii).
- This includes sister companies and holding companies.
- This exemption is very broad and clear for purposes of 8(a) program and 8(a) set-aside contract eligibility
- Native Corporations and their subsidiaries do not have any exemption from affiliation with third parties.



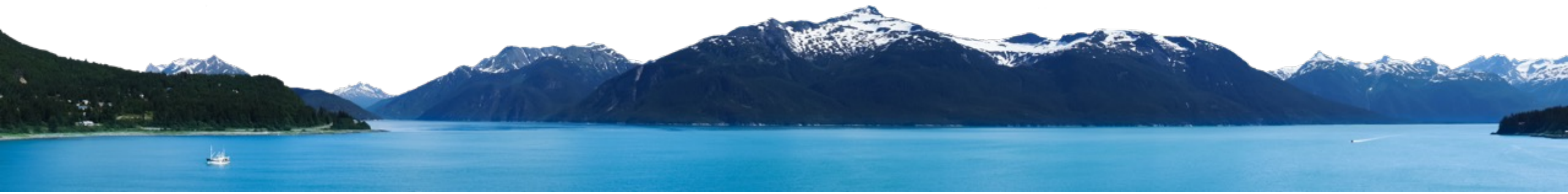
# AFFILIATION EXEMPTIONS

- There is a different exemption from general affiliation for non-8(a) set-aside procurements (i.e., small business set-asides or HUBZone set-asides).
- “Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, 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.”



# AFFILIATION EXEMPTIONS

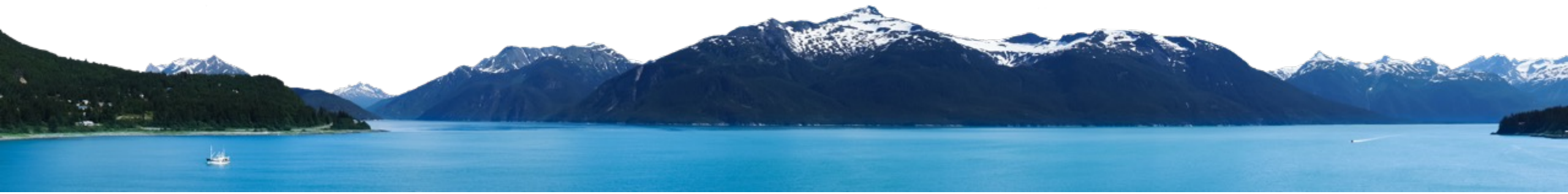
- For small business set-asides, the Native Corporation affiliation exemption only allows for
  - common ownership,
  - common management, and
  - common administrative services, provided “adequate payment” is received for those services.
- The SBA regulations note that affiliation between ANC subsidiaries can be found for “other reasons” in the context of small business status.
- Common management and ownership exemptions provide a great deal of latitude.





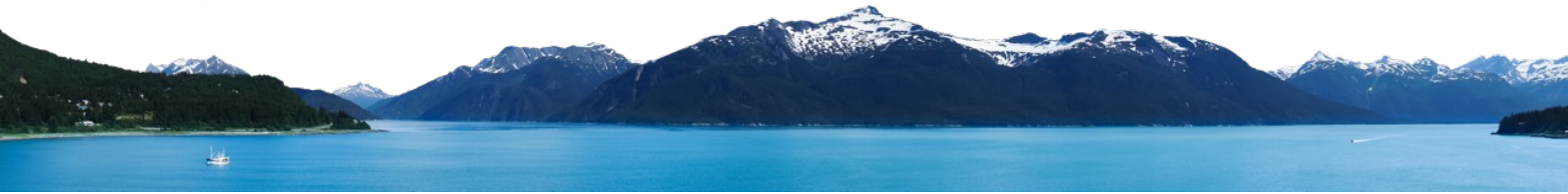
# GAO EXAMPLE

- “In alleging that Appellant has relied upon its parent company's employees and experience to obtain this contract, the Area Office has essentially alleged that Appellant should be considered affiliated with its parent due to common ownership/management. Thus, this arrangement does not appear to be a violation of the applicable affiliation regulations due to the broad ANC exemptions outlined above.”
- Size Appeal of Alutiiq International Solutions, LLC, SBA No. SIZ-5098 (2009).



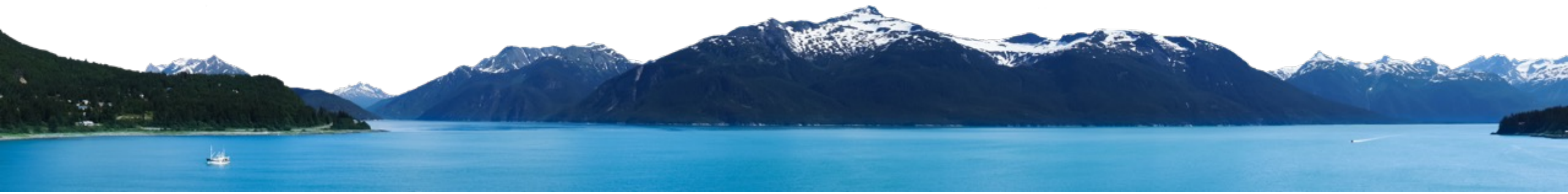
# GAO EXAMPLE

- “Here, the Area Office found that Appellant and CMS have the same location, the same key employees, bid on medical services contracts, and operate under identical NAICS codes, and nearly all of Appellant's revenue comes from CMS subcontracts. The Area Office thus found Appellant and CMS affiliated under the identity of interest rule. However, the first four factors here do not lead to a finding of identity of interest based upon economic dependence. The two concerns do have common management and common ownership, both of which grounds for affiliation cannot be considered here. Concerns owned by the same Indian tribe will always share economic interests based on their common management and ownership.”
- Size Appeal of: Cherokee Nation Healthcare Servs., Inc., SBA No. SIZ-5343 (2012).



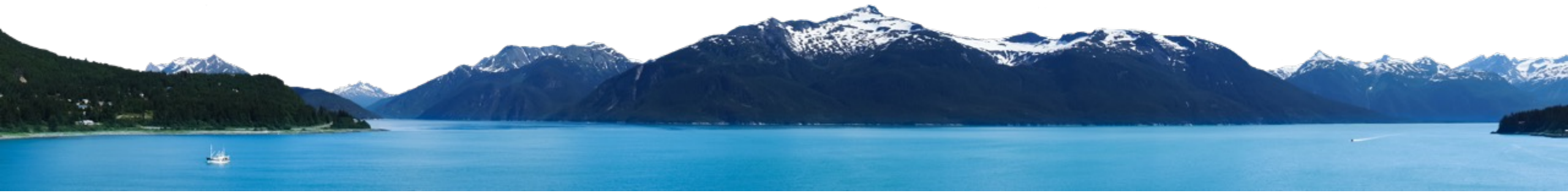
# GAO EXAMPLE

- “Although the practice of reassigning employees from one Tepas subsidiary to another is perhaps somewhat unconventional, it is nevertheless directly attributable to the common management of the firms by Tepas. Appellant, though, is exempt from any finding of affiliation due to common management with other tribal concerns. 13 C.F.R. § 121.103(b)(2). Thus, the reassignment of personnel from Tepas EC to Appellant does not create affiliation between the firms, under the newly organized concern rule or otherwise.” Size Appeal of: Roundhouse Pbn, LLC, SBA No. SIZ-5383 (2012)
- Such transfers should be documented and costs allocated accordingly.



# GAO EXAMPLE

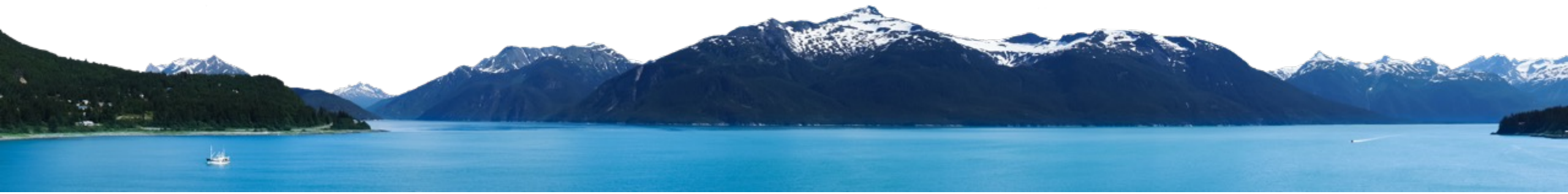
- SBA has defined “common administrative services” for purposes of affiliation outside of the SBA 8(a) program -
- Common administrative services which are subject to the exception from affiliation include bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties 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





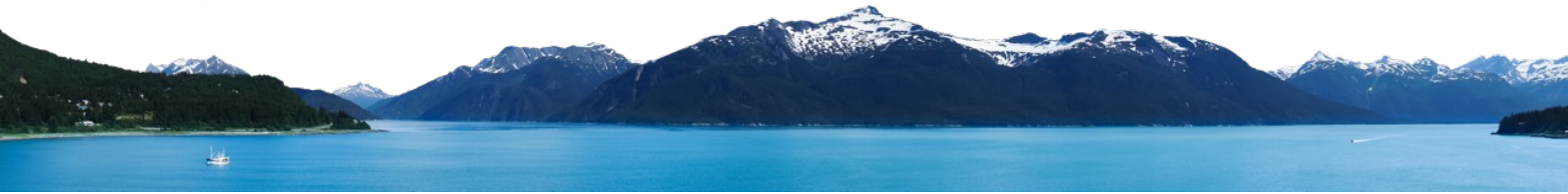
# CONTRACT ADMINISTRATION SERVICES

- The regulations also define “contract administration services” (i.e., services related to a particular contract)
- Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.
- Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (e.g., employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.



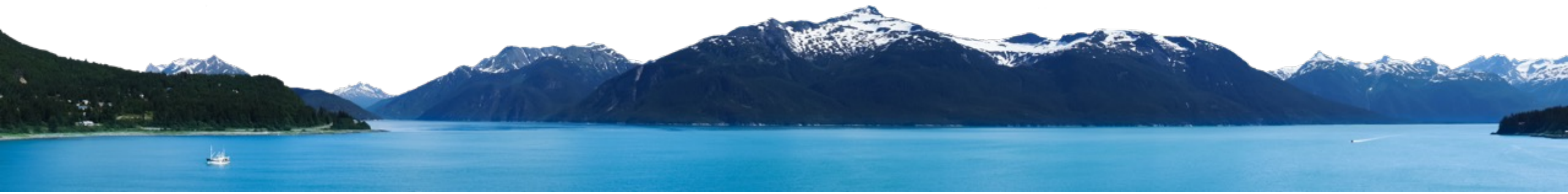
# CONTRACT ADMINISTRATION SERVICES

- Contract administration services that are not common administrative services:
  - negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications,
  - project scheduling,
  - hiring and firing employees,
  - overall responsibility for the day-to-day and overall project and contract completion
- Contract administration services that do NOT qualify as common administrative services generally must be performed by the subsidiary's employees/management.



# CONTRACT ADMINISTRATION SERVICES

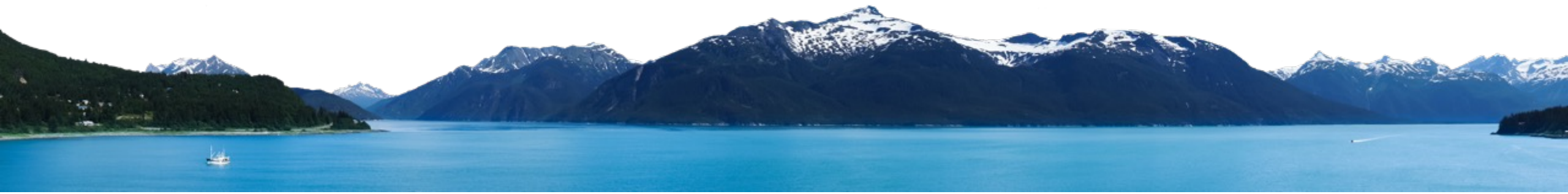
- Contract-related services that are administrative in nature and might constitute “administrative services” covered by the affiliation exception include:
  - Record retention not related to a specific contract (e.g., employee time and attendance records - SBA’s example)
  - Maintenance of databases 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



# BUSINESS DEVELOPMENT SERVICES

Business development may include both services that could be considered “common administrative services” under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered “common administrative services” under the exception to affiliation. However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity.

At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.



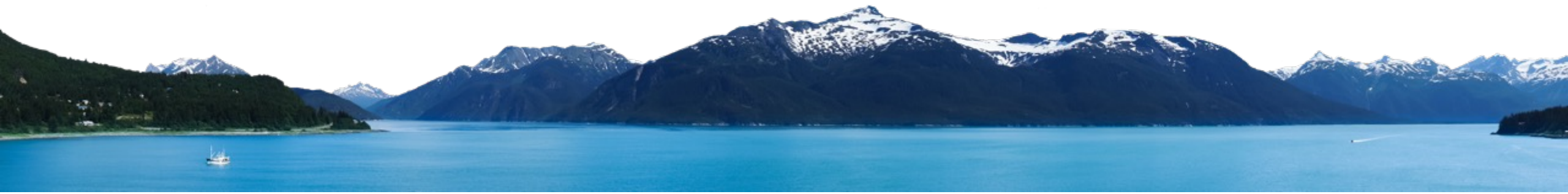


# Business Development Services

Business development may include both services that could be considered “common administrative services” under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered “common administrative services” under the exception to affiliation. However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer.

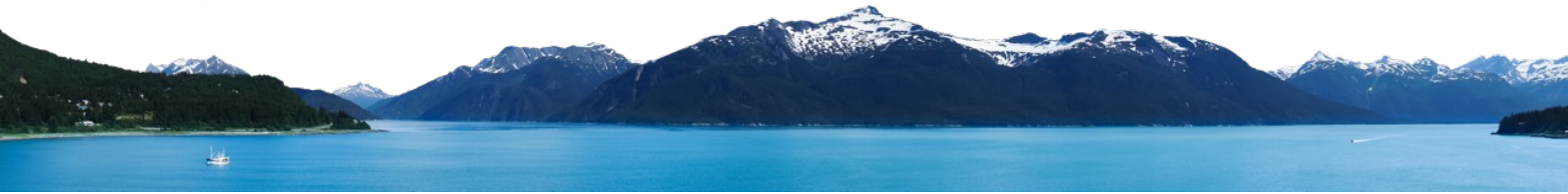
They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.

- 13 CFR 121.103(b)(2)(C).
- SBA 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

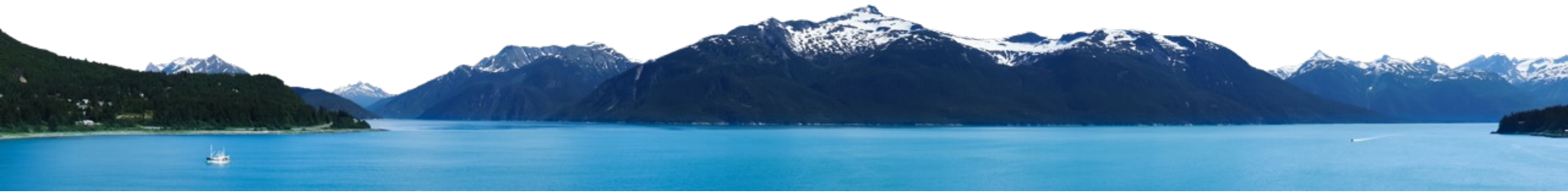


# BUSINESS DEVELOPMENT SERVICES

- 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)



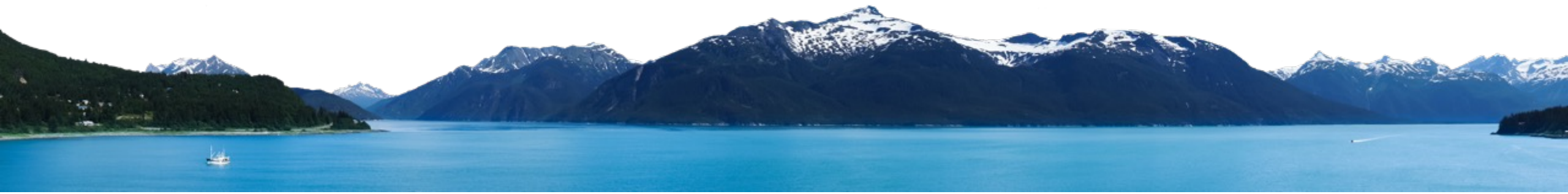
# BURDENS OF AFFILIATION



# COMPLIANCE OBLIGATIONS

Need to monitor and examine what may find a basis for affiliation

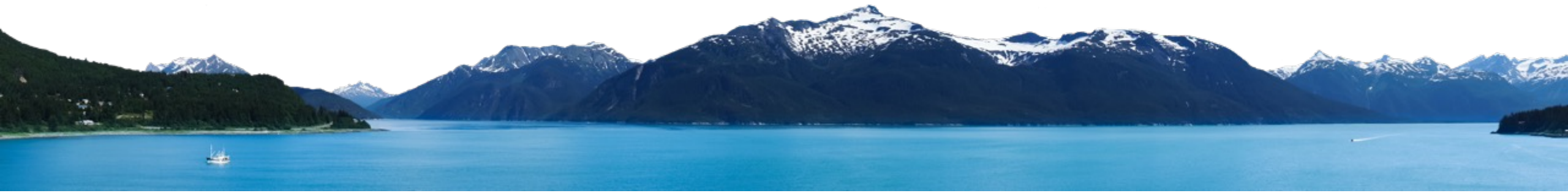
- Joint venture agreements - amount and timing
- Management personnel holding ownership or management positions in other entities
- Reliance on a single third party for revenue or work
- Maintaining corporate form within the family of companies
- Properly allocating revenue from joint ventures when calculating average annual revenue for revenue based size standards





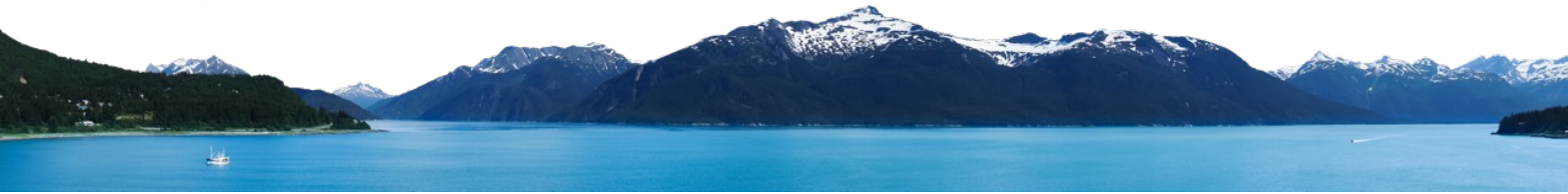
# FALSE CLAIMS

- A finding of affiliation could result in a claim that you falsely certified your status as a small business to win a small business set aside contract
- Civil or criminal proceedings could result
- Loss of contract
- False Claims Act exposure/criminal exposure
- Potential suspension and debarment



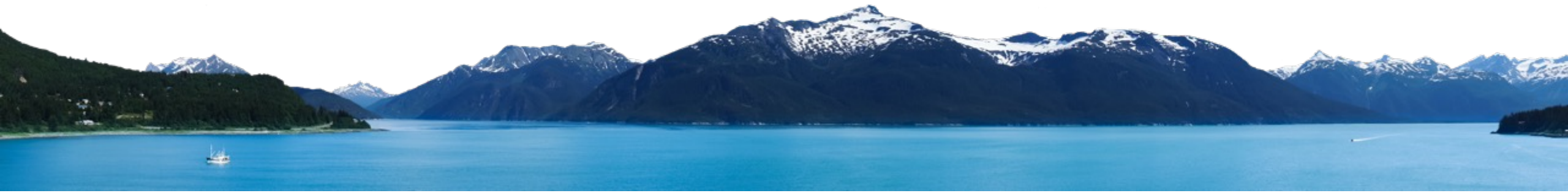
# GRADUATION FROM 8(A) PROGRAM

- Eligibility for the 8(a) program is based on your continued status as a small business for your primary NAICS code
- An affiliation finding by SBA could cause you to be “other than small” and require early graduation from the 8(a) program



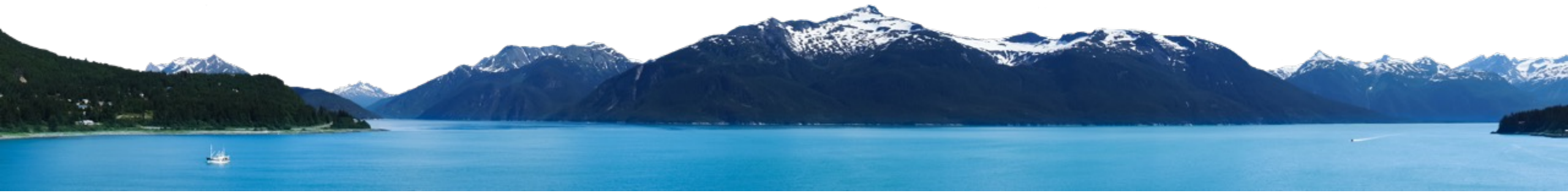
# BID PROTESTS

- Size protests could challenge your status as a small business for a small business set-aside
- Size protest may be based on things such as LinkedIn profiles of management or shared office addresses
- Finding of affiliation could result in your ineligibility for award of small business contract



# RECERTIFICATION

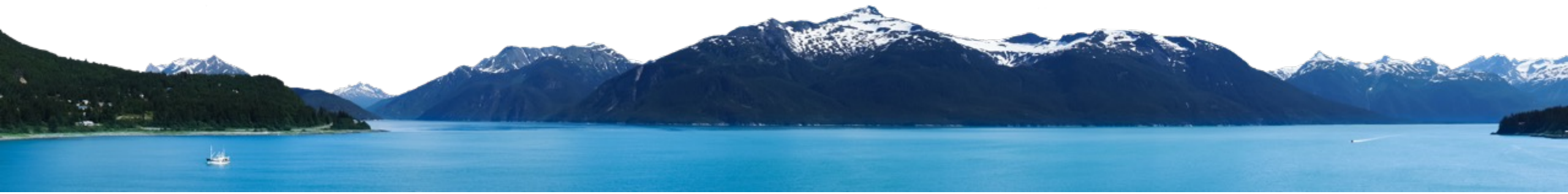
- Some IDIQ/MAC contracts may require you to certify as a small business during the life of the contract
- Affiliation finding could result in you being “other than small” and therefore not eligible for new task awards during the remainder of the IDIQ/MAC





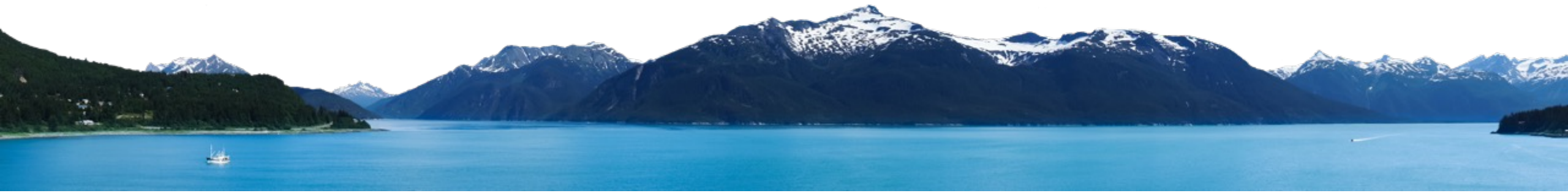
# JOINT VENTURES

- For joint ventures between small businesses, you may need to create a new JV entity if you continue to want to partner
- Once a small business joint venture is awarded a contract, it can submit additional offers/proposals for two years from the date of that award
- After two years, the small business entities will need to establish a new joint venture and “each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates”
- There is no explicit limitation on the number of successive joint ventures that may be created by small businesses, but:
  - At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. 13 CFR 121.103(h).



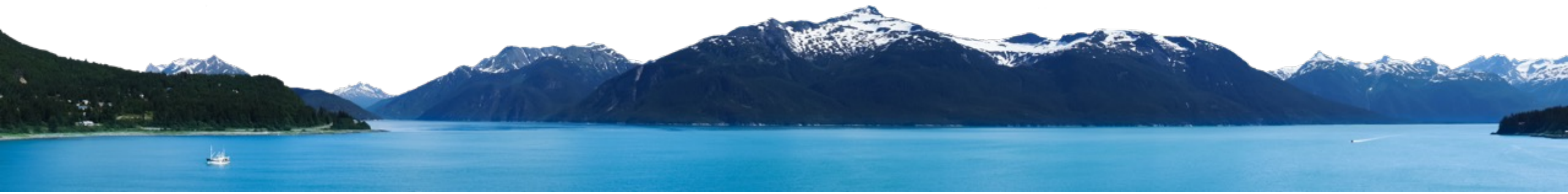
# EMPLOYEE SHARING

- If you have a multiple subsidiaries (ANC/Tribal/NHO context) that are small businesses, you need to document the sharing of employees
  - Employees can be transferred from one sister company to another sister company without that transfer, in and of itself, necessarily generating a finding of affiliation
  - You should document the transfer of employees
  - Employees of a sister company should not bill to the contract of the sister company without having a subcontract in place between sister companies
  - Management of one subsidiary should not make contract or management decisions for a sister subsidiary unless there are an officer of the sister company

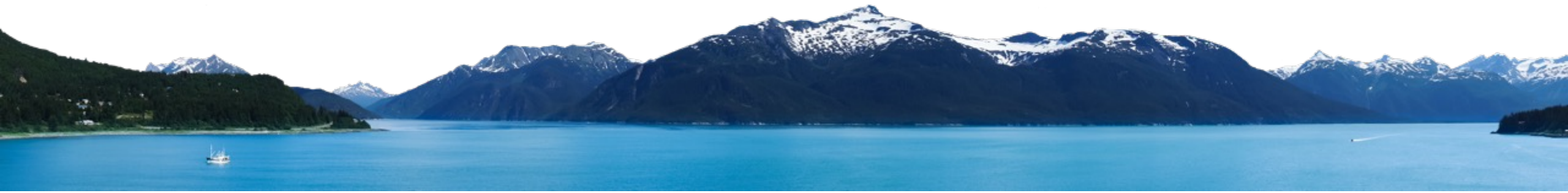


# HOLDING COMPANY CONTROL

- If you have a holding company (ANC/Tribal/NHO context) that owns small businesses, you need to be careful regarding how much control of the day-to-day operations is exerted
  - Management of the holding company should not be signing contracts on behalf of subsidiary (unless they are also an officer of the subsidiary)
    - Contract administrator employed by holding company
  - Can provide business development assistance and proposal writing, but subsidiary should be final decision maker regarding pricing and content



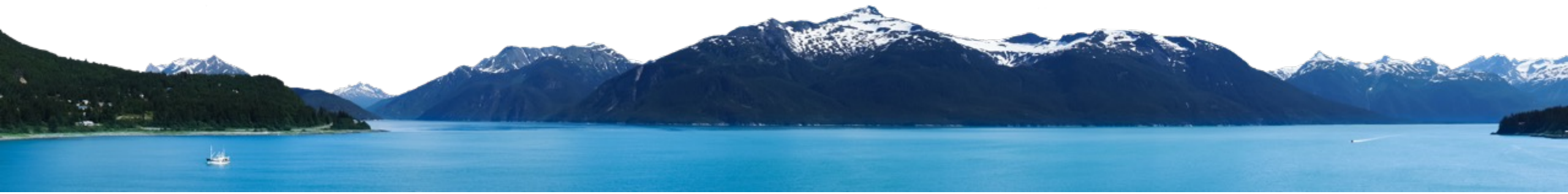
# USING AFFILIATE PAST PERFORMANCE





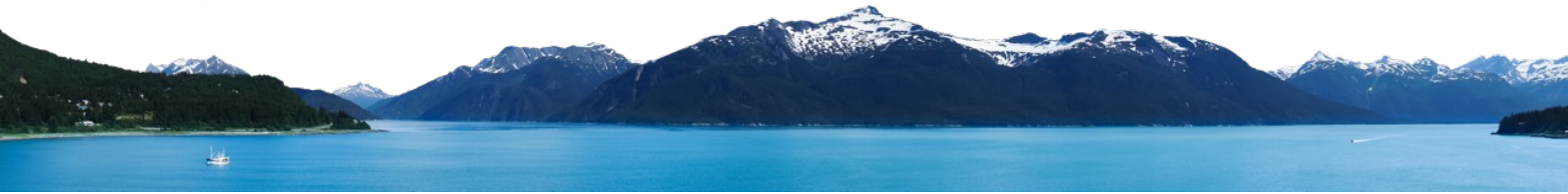
# BIDS, PROPOSALS AND PROTESTS

- An offeror, as an entity, must have sufficient experience, resources and past performance to meet the requirements of the solicitation
- For set-aside procurements, the entity must meet those specific requirements (8(a), SB-SA) without being unduly reliant on its partners and be able to perform the primary and vital contract requirements
- This must be evidenced in the proposal
- Past performance of subcontractors and joint venture partners can often be critical to the success of a proposal



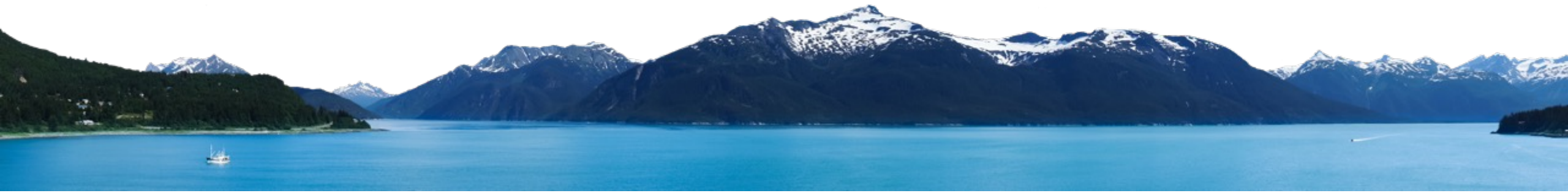
# BIDS, PROPOSALS AND PROTESTS

- The legal entity that is the offeror must be clearly identified in the proposal
  - RFQ required offerors to have and maintain a valid Facility Clearance (FCL) at the Secret level or higher, as indicated on a DD-254, at time of quotation submissions
  - Protester listed its CAGE Code in its quotation, and its subsidiary's CAGE Code in its DD-254
  - Protester's subsidiary had FCL clearance
  - GAO upheld agency's rejection of proposal that used subsidiary CAGE Code to satisfy FCL requirements
- Ambiguity as to the offeror entity can lead to the proposal being rejected
- Substituting one entity for another can cause a proposal to be rejected or the contract to be voided



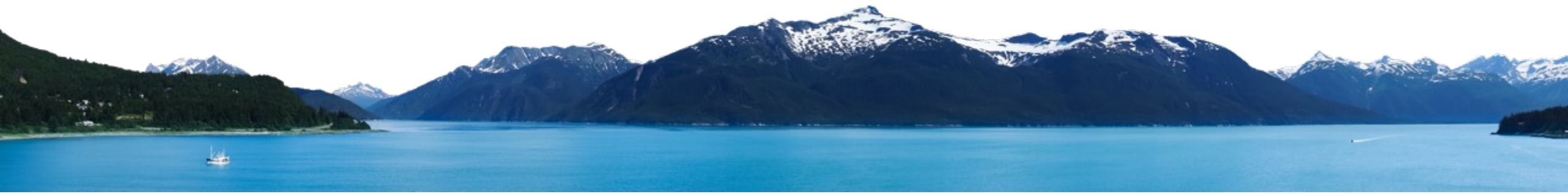
# PAST PERFORMANCE CONSIDERATIONS

- FAR 42.1501(a):
- Conforming to requirements and to standards of good workmanship
- Forecasting and controlling costs
- Adherence to schedules, including the administrative aspects of performance
- Reasonable and cooperative behavior and commitment to customer satisfaction
- Reporting into databases
- Integrity and business ethics
- Business-like concern for the interest of the customer



# PAST PERFORMANCE CONSIDERATIONS

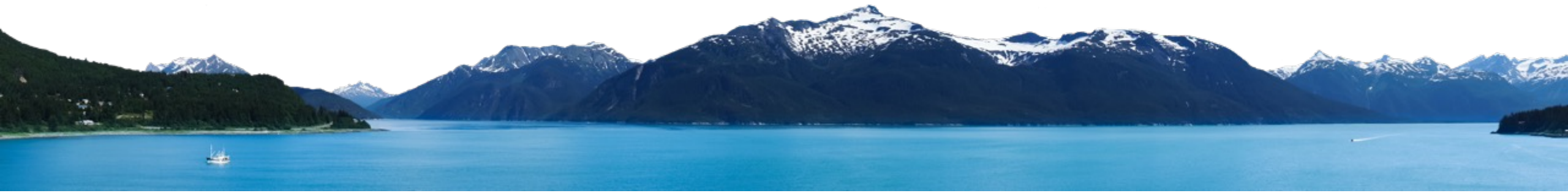
- The objective of most source selections are to select the proposal that represents the “best value.” FAR 15.302
- Source Selection Authority has “broad discretion” in determining evaluation factors. FAR 15.304.
- FAR 15.304(c)(3):
  - (i) Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.
  - (ii) For solicitations that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).
  - Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition.





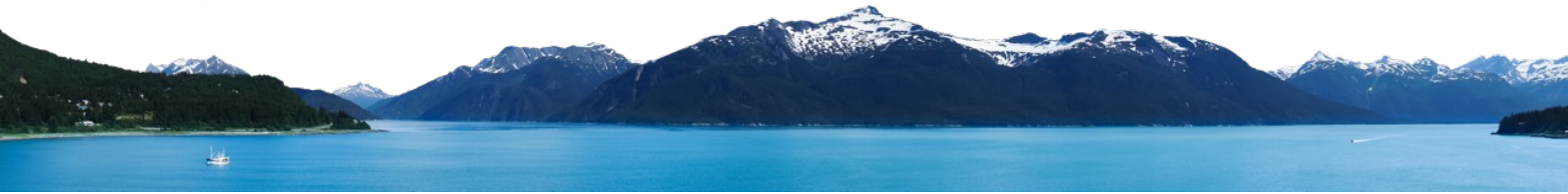
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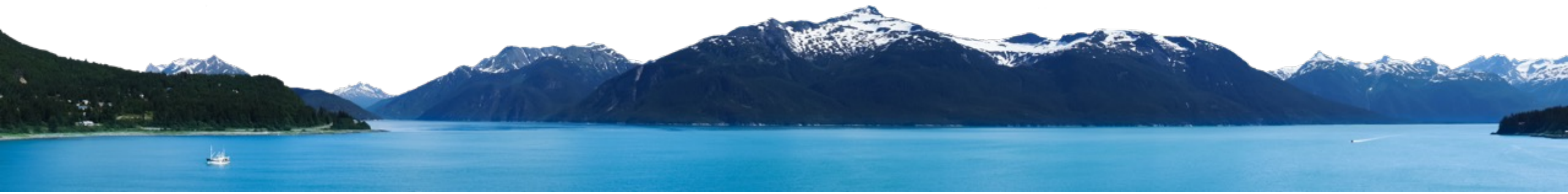
# SUBCONTRACTORS - NON-SMALL BUSINESS

- Offerors may be able utilize the past performance of subcontractors
  - 48 CFR 13.305(2)(iii):
    - The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.
- Use of the word “should” mean that FAR 15.305 “permits, but does not require, procuring agencies to consider the experience and past performance of these additional entities and personnel in evaluating an offeror’s past performance.” MW-All Star Joint Venture, B-291170.4, August 4, 2003.
- If the solicitation is unclear as to your ability to use subcontractor past performance, seek clarification prior to submission of a proposal



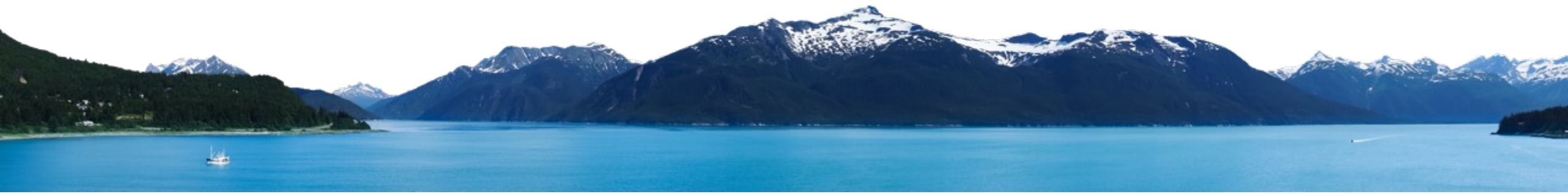
# SUBCONTRACTORS - SMALL BUSINESS

- The SBA's regulations require procuring agencies to consider subcontractors' past performance in limited cases.
- 13 C.F.R. 125.2:
  - When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.
- This is a limited exception that only applies when:
  - the prospective prime contractor is a small business;
  - the prospective prime does not independently demonstrate the past performance "necessary for award";
  - the subcontractor is a first-tier sub; and
  - the subcontractor is itself a small business.



# JOINT VENTURES

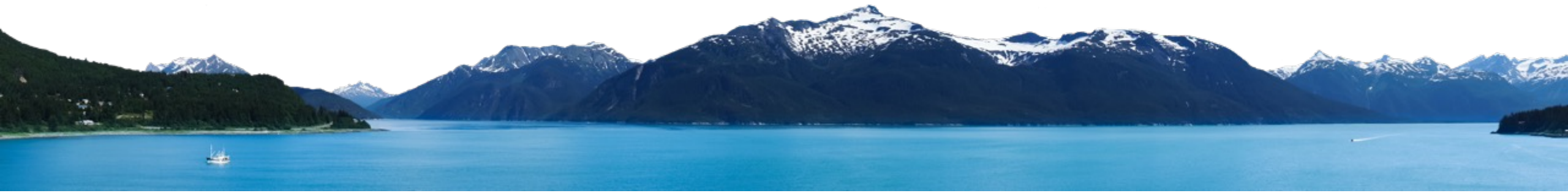
- Joint ventures can utilize the past performance of both members
  - 13 CFR 125.8(e):
    - When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture 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.
- Attempts by a solicitation to restrict the use of joint venture partner's past performance can be protested





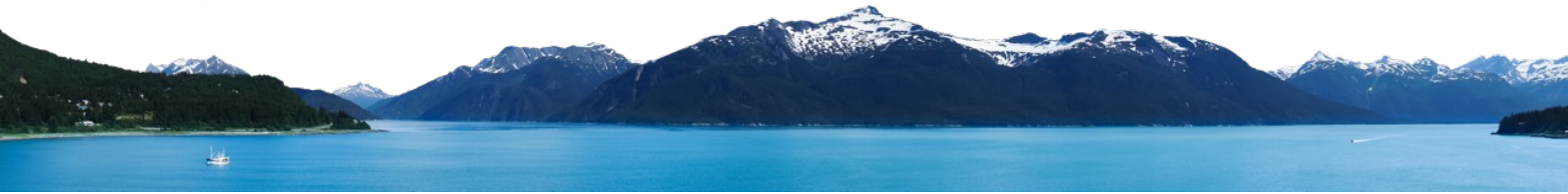
# AFFILIATES

- A solicitation may allow an offeror to rely on affiliates, subsidiaries, key personnel, etc., to meet the solicitation requirements (FAR 15.305), but
- the ostensible subcontractor rule may apply; and
- The proposal must be clear that the affiliate resources will actually be made available for contract performance
  - Affiliate resources:
    - Key personnel
    - Equipment
    - Policies and procedures/standard operating procedures
    - Forms/systems
    - Subject matter experts



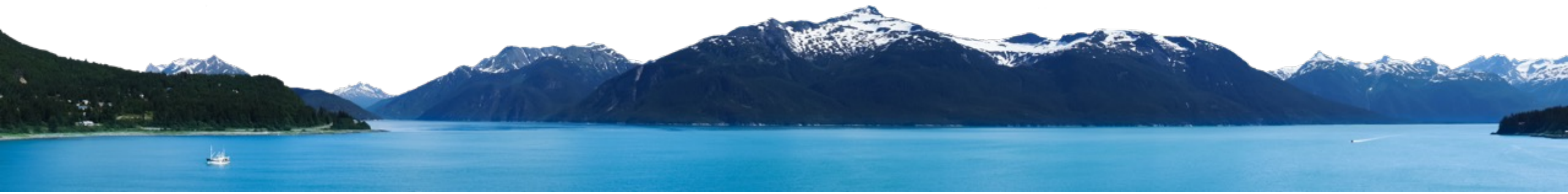
# GAO EXAMPLE

- “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).



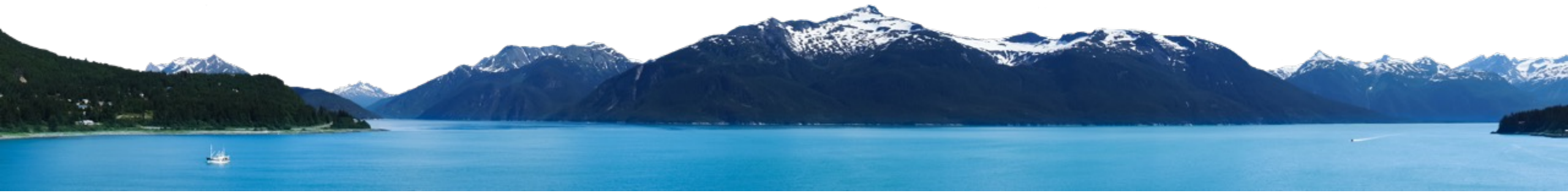
# GAO EXAMPLE

- “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).



# GAO EXAMPLE

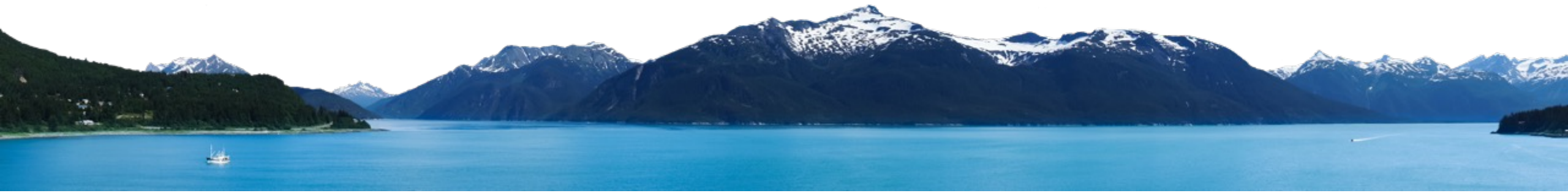
- “In addition, an agency properly may attribute the past performance of an affiliated company to an offeror where the record shows that the resources of the affiliate--for example, using the affiliate’s employees as key personnel--will be provided for performance of the solicited requirement.”
- Protest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





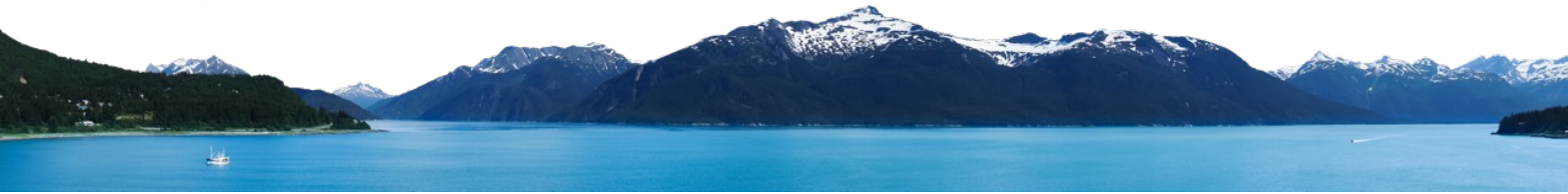
# PRINCIPLES - USE OF AFFILIATE PAST PERFORMANCE

- The Proposal must demonstrate that the resources cited will be used in the performance of the contract
- The Proposal must demonstrate that there is a firm commitment from sister companies to participate meaningfully in the performance of the contract, including but not limited to the provision of key personnel, policies, procedures, and other support
- Generic statements are not sufficient to meet this requirement



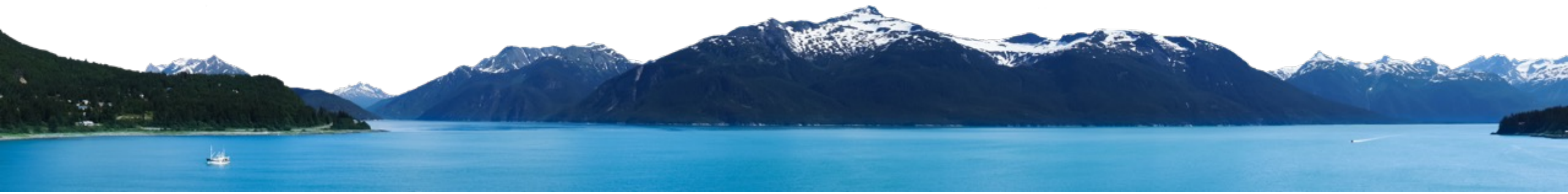
# RESTRICTIONS ON USE OF AFFILIATE PAST PERFORMANCE

- Solicitations may restrict the use of affiliate past performance or not be clear
  - If the solicitation is unclear, ask detailed question to obtain clarification
  - If the solicitation prohibits using affiliate past performance, ask a detailed question to attempt to get the agency to revise the solicitation to permit affiliate past performance
- Solicitation can restrict past performance if not unduly restrictive on competition
  - Iyabak Construction, LLC, B-409196 (February 6, 2014): A solicitation was unduly restrictive of competition when the agency did not make a factual determination explaining explain why the agency's needs could not be satisfied by a less restrictive method of evaluating offerors' past performance and experience, including permitting offerors to rely on affiliate's past performance and experience when those affiliates make a firm commitment to participate meaningfully in the performance of the contract.



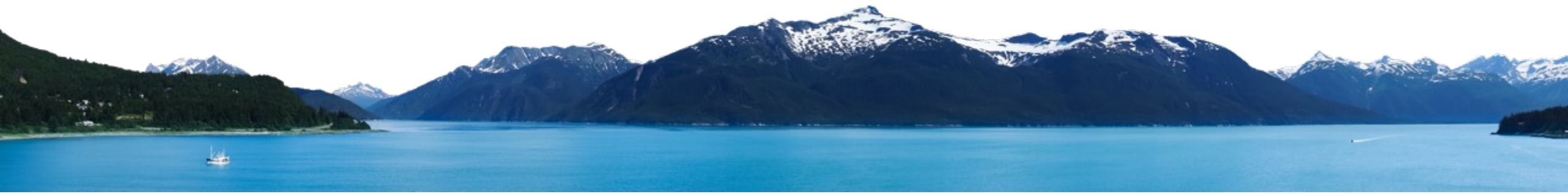
# RESTRICTIONS ON USE OF AFFILIATE PAST PERFORMANCE - TARGETED QUESTION

- The Competition in Contracting Act of 1984 requires that solicitations generally permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(B)(ii). FAR 15.305(a)(2)(iii) states that the past affiliate performance of a offeror should be considered when evaluating the offeror's experience and qualifications.
- The GAO has also stated that an agency may properly attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. See West Sound Servs. Grp., LLC, B-406583.4, B-406583.5, July 9, 2014.
- The GAO has further found that a solicitation is unduly restrictive of competition when the agency has not made a factual determination explaining explain why the agency's needs could not be satisfied by a less restrictive method of evaluating offerors' past performance and experience, including permitting offerors to rely on affiliate's past performance and experience when those affiliates make a firm commitment to participate meaningfully in the performance of the contract. See Iyabak Construction, LLC, B-409196 (February 6, 2014).



# RESTRICTIONS ON USE OF AFFILIATE PAST PERFORMANCE - TARGETED QUESTION

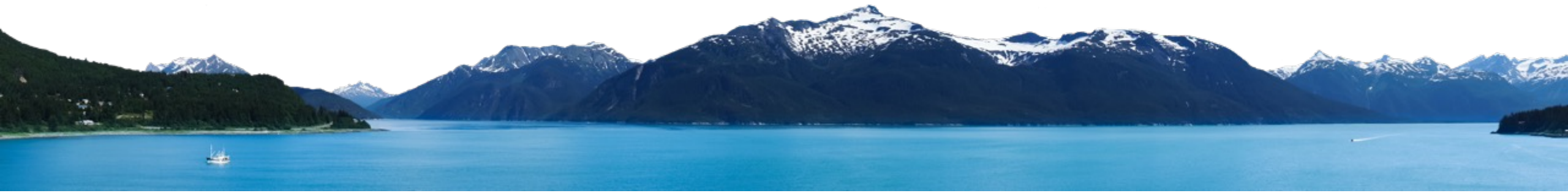
- The Solicitation requires an offeror to demonstrate experience in all areas listed in Corporate Experience. In response to questions, the agency has stated that the offeror cannot rely on subcontractor or affiliate past performance and experience to satisfy the requirement that the offeror have experience in all of those areas. Thus, the offeror itself must have experience in each of the categories described in Corporate Experience.
- When combined with the requirement that the offeror have experience in each of the categories described in Corporate Experience, the exclusion of any consideration of the past performance and experience of an offeror's affiliates will limit competition for this solicitation.
- Accordingly, to insure that there is a full and open competition for this contracting opportunity, will the Government consider affiliate past performance when the offeror is able to demonstrate that the resources of the affiliate will affect the performance of the offeror and the affiliates make a firm commitment to participate meaningfully in the performance of the contract, including but not limited to the provision of key personnel, policies, procedures, and other support?





# RESTRICTIONS ON USE OF AFFILIATE PAST PERFORMANCE

- If a solicitation contains a restriction on the use of affiliate past performance and you cannot get the agency to revise the solicitation and your only ability to qualify is using affiliate past performance, your only real options are to either:
  - Team with someone who has the relevant past performance, or
  - File a pre-award protest challenging the restriction on use of affiliate past performance as unduly restrictive on competition



# THANK YOU



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