



SBA 8(a) AND GOVERNMENT CONTRACTS TRAINING FOR ANCs, TRIBES, AND NHOs

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What this Presentation Covers

- » Part 1: ANC and Tribal 8(a) Program Requirements
 - 8(a) and Special Government Contracts Programs for ANCs and Tribes
 - Key SBA Eligibility Requirements
 - SBA's Evolving Expectations (NAICS, BAT and SSE's)
 - Bids and Proposals, including Use of Sister Company Resources
 - Compliance Issues – Mentor-Protégé and other emerging risks
- » Part 2: Structuring and Strategic Considerations
 - Structuring Considerations



PART 1 – TRIBAL, ANC, AND NHO 8(a) AND SMALL BUSINESS PROGRAM REQUIREMENTS



**SUBPART 1 – 8(a) AND OTHER
GOVERNMENT CONTRACTING
PROGRAMS FOR TRIBES, ANCs,
AND NHOs**

SBA's 8(a) Business Development Program

- » The 8(a) Program helps small “socially and economically disadvantaged” businesses compete for federal contracts
- » Available to small businesses owned by socially and 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 (cont'd)

- » 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 businesses

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
 - 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 \$22 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
- » Each of these topics is discussed in more detail below

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

Other Contracting Preferences Based on Native Ownership and Control

- » The Buy Indian Act
- » Department of Defense – Indian Incentive Program
- » Native Preference under ISDEAA

HUBZone Program

- » “Historically Underutilized Business Zones” program provides contracting opportunities to small businesses located in areas with low income, high poverty, or high unemployment
- » To participate, must be:
 - (1) small;
 - (2) at least 51% owned by U.S. citizens, a CDC, an agricultural cooperative, or a Tribe;
 - (3) principal office must be located in an area designated a HUBZone; and
 - (4) at least 35% of company employees must reside in HUBZone.
- » Benefits of participation include:
 - Potential sole-source awards;
 - Potential set-asides; and
 - Potential price preference in procurements awarded through full and open competition.



**SUBPART 2 – KEY 8(a) AND SMALL
BUSINESS ELIGIBILITY
REQUIREMENTS AND EVOLVING
EXPECTATIONS**

Key Eligibility Requirements – Small Business and 8(a)

- » Tribally-owned concerns can qualify as “small businesses”
- » They 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 and 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 - Small Business

- » 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 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 has stated it will not implement this new law immediately but that it plans to go through a rule-making process (which could take years)
- » 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

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 three (five?) 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.

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).

8(a) Eligibility - Subsidiaries Must be Small Businesses

- » Each 8(a) subsidiary must be “small”
 - SBA defines “small” differently for different industries based on the economics of those industries
 - Generally, manufacturing businesses are subject to an employee-based size standard; service contracts, including construction, are subject to total receipts-based size standards
 - For Tribally-owned concerns, 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”

(More on this below)

8(a) Eligibility – Social and Economic Disadvantage

- » Tribes (including ANCs and NHOs) are deemed to be socially disadvantaged and do not need to prove this further (individuals applying to the program do). 13 CFR 124.109(b).
- » ANCs are deemed to be economically disadvantaged. 13 CFR 124.109(a)(2).
- » Tribes must demonstrate economic disadvantage in their first 8(a) application. 13 CFR 124.109(b)(2).

Tribal Eligibility – A Legal Entity Susceptible to Suit

- » The applicant concern must be a legal business entity organized for profit and susceptible to suit. 13 CFR 124.109(c)(1).
 - SBA prescribes specific sovereign immunity waiver language which must be included in the applicant's organizational documents
 - ANCs generally do not have immunity and therefore this requirement is not relevant to them

Eligibility – Potential for Success

- » Generally the applicant concern (not the parent) must have been in business for two (2) years and have proof of operations (financials, tax returns, contracts, etc.)
- » Possible to obtain a waiver of the two (2) year requirement
- » 8(a)s have one-time eligibility – assets of a current or previous 8(a) participant may not be used in some cases

New 8(a) Subsidiaries

- » A Tribe may demonstrate a subsidiary has the potential for success by any of the following:
 - It has been in business for at least two (2) years;
 - The individual(s) who will manage and control daily business operations has substantial technical and management experience, the applicant has a record of successful performance in its primary industry category, and applicant has adequate capital; or
 - The parent has made a firm written commitment to support the operations of the applicant concern and has the financial ability to do so

Preparing for the 8(a) Program

- » A company has to apply to SBA to be admitted to the 8(a) Program
- » Entity-Owned Firms (Tribes, ANCs, NHOs, and CDCs) have their own special applications and processes
- » Effective 11/15/17, all new 8(a) applications must be completed online at certify.sba.gov
 - Review the entity-owned guidelines
 - No paper documents are to be submitted to SBA
 - Use the appropriate checklists as a tool to prepare your company before applying, along with the 8(a) regulations, etc.

SBA 8(a) Business Development Program Length

- » Tribes/ANCs/NHOs may own multiple 8(a)s so long as each is a separate entity, each is small, and each is in a different industry classification as the others owned by the Tribe/ANC/NHO
- » Industry classification of the entity based on NAICS Code may change during life of the entity's participation in the program
- » Maintaining separate status of each entity is crucial, but collaboration is allowed in many respects

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)

Tribal Eligibility - Management

» For Tribes (but not ANCs):

- *(4) Control and management. (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern.*

» The regulations go on to provide...

Tribal Eligibility – Management (cont'd)

- » (A) Management may be provided by committees, teams, or boards of directors which are controlled by one or more members of an economically disadvantaged tribe, or
- » (B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.

Tribal Eligibility – Limitation on Outside Activity

- » (ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

Tribal Eligibility – Limits on Management Individuals

- » The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program participants at the same time
- » This applies to ANCs as well (but not NHOs)

(More on this below)

Tribal Eligibility – Management

- » (A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.
- » (B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program participant firms.

Control & Management – Key Takeaways

- » ANCs are not required to utilize shareholders or tribal members for management positions, as noted above
- » However, both ANCs and Tribes are limited in the number of 8(a) entities (two) an individual manager can manage on a day-to-day basis by statute
- » SBA looks beyond corporate formalities to determine whether the designated individual actually manages the daily operations of the 8(a)

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 different entities
- » Once an 8(a) participant graduates, there is a 2-year waiting period before another 8(a) applicant may use the same primary NAICS Code

Tribal Eligibility Requirements – Recap of Key Points

- » The ANC/Tribe's subsidiaries (not the ANC/Tribe itself) are eligible to be admitted to the 8(a) program.
- » Subsidiaries are NOT “ANCs” or “Tribes”; 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.
- » As noted above, an individual is only allowed to manage the day-to-day operations of no more than two 8(a) subsidiaries at a time. This requirement is statutory and cannot be waived.

AFFILIATION

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. 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.
 - More on the ostensible subcontractor rule below.
- » By regulation, “joint ventures” are deemed to be affiliated. 13 C.F.R. 121.103(h).

Affiliation Exemptions Applicable to Tribes and ANCs

- » Tribes and 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 Tribe or ANC and other entities owned by the particular 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)
- » NOTE: Tribes and their subsidiaries do not have any particular exemption from affiliation based on relationships with third parties.
 - In addition, managers of tribal subsidiaries can cause affiliation issues based on their other business interests!

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.

SBA Case Law Interpreting the Tribal Affiliation Exemption for Small Business Set-Asides

- » There have been several SBA Office of Hearings and Appeals (OHA) cases interpreting and applying the Tribal Affiliation exemptions.
- » OHA has generally interpreted the “management” exemption quite broadly.

Common Management Exemption

- » “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).

Common Management vs. “Identity of Interest”

- » “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).

Common Management – Transfer of Employees

- » “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).

Common Administrative Services

- » Common Ownership and 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 (cont'd)

- » 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 Administration 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 (cont'd)

- » 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 (cont'd)

- » 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 (cont'd)

- » 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 - 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



**SUBPART 2 – KEY 8(a) AND SMALL
BUSINESS ELIGIBILITY
REQUIREMENTS AND EVOLVING
EXPECTATIONS**

SBA's Evolving Expectations

- » Sole Source Awards and Follow On Contracts
- » Primary NAICS Code Issues
- » Clarification on Management
- » Business Activity Targets
- » Limitation on Subcontracting



SOLE SOURCE AWARDS AND FOLLOW-ON CONTRACTS

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?



PRIMARY NAICS CHANGES 8(a) PROGRAM

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.

Primary NAICS Analysis

- » SBA reviews primary NAICS as part of annual review
 - Critical that we conduct our own analysis
 - Determine if operating revenues have migrated to a NAICS other than a primary
 - SBA could withhold award of an 8(a) contract
- » Business plan updates are no longer optional
- » Must develop each 8(a) participant to have their own service lines/unique niche
 - Most difficult during Development years



SBA'S RECENT POSITIONS ON 8(a) AND SISTER COMPANY MANAGEMENT

Limitations on Day-to-Day Managers of Entity-Owned Concerns

- » As discussed above, SBA has identified limitations on day-to-day managers of entity-owned concerns
 - SBA has stated that for 8(a) eligibility purposes, an individual may not be responsible for day-to-day management of more than two concerns in the 8(a) program.
 - Language supporting this limitation already appears in the Small Business Act but did not appear in the SBA regulations; SBA has now added this provision to the regulations.
- » SBA has been challenging managers of two-plus subsidiaries on practical grounds as well, even of non-8(a) companies.



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
- » 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.

BAT Strategy (cont'd)

- » Removal from remedial status is the goal:
 - If after the 5th year the participant has not met the 15% BAT goal, the participant can attempt to obtain non-8(a) work in the next 6 months of the 6th year. However, after the 6th month has passed, the participant will need to meet the 6th year goal of 25%.
 - Notify SBA as soon as a non-8(a) contract award is received that meets BAT. Participant doesn't have to wait for the revenue to be booked to satisfy SBA.

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

Eligibility Tracking Overview and 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

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)



**LIMITATION ON
SUBCONTRACTING
AND
WORK PERFORMANCE
REQUIREMENTS**

Contract Performance and Limitations on Subcontracting


- » The FAR and SBA regulations require that the awardee performance specify percentages of work on set-aside contracts they are awarded
 - FAR 52.219-14
 - SBA: 13 CFR 125.6
- » Current Rule: The prime contractor/awardee generally must 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, but those changes are not effective yet.
- » CHECK YOUR CONTRACT TO UNDERSTAND YOUR OBLIGATIONS!

Similarly Situated Entities

- » Congress has directed SBA and the FAR Council to adopt a new approach that includes:
 - Similarly Situated Entities (SSEs) – subcontracts to entities that meet the same size and SBA requirements are not counted against the limit (i.e., they are counted as if performed by the prime)
 - The analysis will shift from the “cost” of the contract performance to the “receipts” the party receives
 - Reporting on percentage of work performed will be more rigorous, and SBA is considering whether to create uniform requirements for all contracting officers

SSE Status

- » SBA has approved the changes to its regulations (13 CFR 125.6) and has proposed some tweaks to them in a new rule-making
- » The FAR Council has issued a proposed rule to implement these changes to FAR Part 19 and 52.219-14 (the FAR contract clause) – comments were due on February 4, 2019
- » 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
- » Civilian Agencies have not yet done so
- » Only once revised contract clauses are included in your contracts will the new rules govern



MULTIPLE SUBSIDIARIES: ISSUES IN BIDS, PROPOSALS AND PROTESTS

- » Identity of the Offeror
- » Ostensible Subcontractor Rule
- » Sister Company Past Performance and experience

IDENTITY OF THE OFFEROR

Bids, Proposals and Protests

- » An offeror, as an entity, must have sufficient experience, resources and past performance to meet the requirements of the RFP
- » 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
- » Be careful about using “Team X” approach

Bids, Proposals and Protests (cont'd)

- » The legal entity that is the offeror must be clearly identified in the proposal
- » Ambiguity as to the offeror entity can lead to the proposal being rejected
- » In addition, substituting one entity for another, in the proposal or post-award, can also cause the proposal to be rejected or the contract to be voided

Bids, Proposals and Protests (cont'd)

- » Uncertainty as to the identity of the bidder is a circumstance that renders a bid nonresponsive, since ambiguity as to the offeror's identity could result in there being no party that is bound to perform the obligations of the contract
- » Again, be careful of using "Team X" throughout as this may obscure which party is being proposed

- » 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's quotation listed one CAGE Code that was consistent with the CAGE Code in its DD-254 as having FCL. GSA FSS Contract had different CAGE Code that did not have FCL.
- » During evaluation process, Protester stated its subsidiary had FCL clearance.
- » GAO upheld agency's rejection of proposal that used subsidiary CAGE Code to satisfy FCL requirements.

- » After BDO's first protest, no offerors were acceptable.
- » Agency cancelled Solicitation before reissuing without revision.
- » BDO's new quotation clarified that it was one single entity with two CAGE Codes. One CAGE Code had FCL, other CAGE Code did not.
- » Agency found BDO unacceptable after determining it had to award contract to the CAGE Code associated with BDO's GSA Contract, which did not have FCL.
- » GAO sustained protest after concluding that the Agency failed to account for the fact that one offeror could have multiple CAGE Codes.



THE OSTENSIBLE SUBCONTRACTOR RULE

Ostensible Subcontractor Rule

- » “The ostensible subcontractor rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, *or the prime contractor is unusually reliant on the subcontractor*, the two firms are found to be engaged in a joint venture, and thus affiliated.”
13 C.F.R. 121.103(h)(4)

Ostensible Subcontractor Rule (cont'd)

- » “The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA’s size requirements.”
- » The SBA Area Office “evaluates ‘all aspects’ of the relationship between the two concerns to determine whether the ostensible subcontractor rule applies.”

Ostensible Subcontractor Rule (cont'd)

» Factors to consider:

- Key personnel (program managers, etc.)
- Primary and vital contract tasks
 - “The ‘primary and vital’ language in the regulation allows this to be measured by either quantity or quality.”
- Profit sharing
- Other factors
 - Under the teaming agreement, does the subcontractor have a direct line of communication with the government?
 - Was the prime forced to rely on the sub’s past performance?
 - Did the sub primarily write the proposal?

Ostensible Subcontractor Rule (cont'd)

» Additional factors:

- Percentage of subcontracted work
- Did the subcontractor provide bonding assistance?
- Is the subcontractor the incumbent and ineligible to submit a proposal because it exceeds the applicable size standard for the solicitation?

Ostensible Subcontractor Rule (cont'd)

» Construction context

- “[U]nder OHA precedent, compliance with the ostensible subcontractor rule is analyzed somewhat differently in the context of construction procurements as opposed to ordinary service procurements.”
- “[S]ubcontractors often perform a majority of the actual construction work, because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines.”
- “Accordingly, ‘the primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.’”
- “Stated differently, a small business prime contractor on a construction project may delegate a large portion of the construction work to its subcontractors without contravening the ostensible subcontractor rule, *provided that the prime contractor retains management of the contract.*”

Ostensible Subcontractor Rule (cont'd)

- » Ostensible subcontractor rule inapplicable where parent company was not a “subcontractor.”
 - Reliance on parent company employees and past experience fell within affiliation exception found in 13 CFR 121.103(b)(2). *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5098 (2009).
- » “Tepa may shift personnel among its various subsidiaries, thereby providing a mechanism for Appellant to draw upon the resources and capabilities of its sister companies without necessarily engaging them as subcontractors.” *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012).



USING SISTER COMPANY PAST PERFORMANCE AND 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.” Protest of 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)



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

Recent Developments in the FCA's Application

- » “Escobar” Case (*Universal Health Services v. US ex rel. Escobar*, 136 S. Ct. 1989 (2016))
 - Implied certification
 - Medicaid payments to a mental health clinic where a patient died from reaction to medication and where clinic personnel were not properly licensed.
 - Still viable, but higher scrutiny re:
 - Materiality – whether the implied certification was material to the government’s decision to pay
 - “We emphasize ... that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.”
 - Impacting many FCA cases
- » Recent changes to the penalty amounts – now indexed annually
- » SBA “Presumed Loss” Rule - SBA rule changes setting forth “deemed damages” at total contract value
- » Enhanced Whistleblower protections

Recent Trends – Fallout from the Escobar Decision

- » The case law applying the U.S. Supreme Court’s decision in *U.S. ex rel Escobar* “implied certification” and “materiality” provisions has evolved.
- » Some notable cases:
 - Government’s nonrenewal of a contract and DOJ’s intervention in a case were evidence of materiality. (4th Circuit; May 2017)
 - Whistleblower couldn’t show failure to submit safety information was relevant to government payment; DOJ non-intervention helps show non-material violations. (3rd Circuit; May 2017)
 - Government “complacency” in face of contractor practices “very strong evidence” the violations were minor. (D.Ct. Utah; April 2017)
 - Specific Representations (in this case Trade Agreements Act and Buy American Act) not required to trigger FCA liability; contractors failure to keep records demonstrating TAA and BAA compliance create presumption against contractor. (D.C. D.Ct.; April 2017)

Additional Considerations for Government Contractors

- » Recent Trends: *Escobar* fallout for Small Business
- » Ethics and Compliance Programs are Essential
- » The Mandatory Disclosure Rule and its relation to the FCA
- » Whistleblower Protections



**SBA'S REGULATIONS ADDRESSING
MISREPRESENTATION OF SIZE
13 C.F.R. 121.108**

§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

» 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.**

- » (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.


Creates 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?



**THE FUTURE OF THE ASMP
PROGRAM --
WHAT COULD POSSIBLY GO
WRONG?**

What's Coming Next?

- » SBA applied some lessons learned from the 8(a) mentor-protégé program in crafting the ASMP program.
- » Even then, there will be participants who break the rules and imbalance of benefits can lead to deals that appear to abuse the SBA procurement programs.
- » Now that M-P Arrangements are maturing expect:
 - Compliance and Enforcement Actions
 - Disputes between Mentors and Protégés
 - Oversight
 - More scrutiny of Applications and Annual Updates
 - Protests

How Issues and Disputes Can Arise

- » Experience in the 8(a) MP showed issues and disputes arose for many reasons, including
 - Mentors only interested in JVs and exploiting the protégé's status
 - Protégés failing to live up to their end of the bargain, or worse, threatening their mentors
 - Good old fashioned business disputes
- » Oversight and Compliance issues stemmed from these disputes but also
 - Optics of mentors receiving large set-aside awards through JVs
 - Impact on agency small business goaling
 - Protests
 - Whistleblower Reports

Traps for the Unwary – Case Study No. 1

» Case Study:

- A Mentor-Protégé agreement calls for the mentor to provide technical assistance, BD assistance, and management assistance.
- During the course of performance of a contract by the MP JV, the protégé informs the mentor that it cannot make payroll and asks the mentor for a loan.
- The mentor, concerned about the impact on the JV's contract performance and wanting to “do the right thing” makes a loan to the protégé.
- What's wrong with this scenario?

It Gets Worse....

Case Study No. 1 (cont'd)

- The protégé asks for more loans from the mentor, and the mentor initially obliges, but then the mentor puts its foot down and demands repayment of the loan or alternatively that its loans be converted to an equity interest in the protégé.
- The protégé threatens to go to SBA and expose the mentor for “abusing” the protégé.
- The Mentor-Protégé Agreement makes no provision for loans or financial assistance (affiliation!).
- What should the mentor do?

Case Study No. 2

- » SBA approves a MP Agreement between a mentor which is part of a large conglomerate and a small business protégé.
- » In the course of performance, the protégé discovers that its mentor has a sister company which has three other protégés.
- » The protégé is concerned that the mentor is directing opportunities to its affiliate and its protégés.
- » What should the protégé do?
- » Query: Is a Mentor-Protégé Agreement enforceable in court as between the parties (i.e., outside of SBA's administrative oversight purview)?

Strategic Considerations - Redux

- » Again, key things to consider in pursuing a Mentor-Protégé Relationship:
 - What are your goals from the relationship?
 - What characteristics are you looking for in a partner?
 - Is the mentor ready, willing and able to provide the assistance promised?
 - Is the protégé ready, willing and able to accept the assistance provided?
 - Have you worked together before? (usually a good idea)
 - Have you included all anticipated forms of assistance in your MP agreement and timely notified SBA of any proposed changes?

Oversight and Enforcement Rumblings

- » Scrutiny of Mentor-Protégé and JVs is starting to emerge. Lines of Inquiry include
 - Secondment of Mentor personnel to Protégé
 - Fee splitting as disguised profit allocation in excess of MP requirements
 - Mentor paying fees for training, licenses, etc., beyond the terms of the Mentor-Protégé agreement
 - Bona Fide Offices (presenting the Mentor's office as a Protégé office)
- » Several cases are focusing on Administrative Services and Financial Support (but not necessarily ANCs):
 - California Settlement for \$5.7 million: [Click Here](#)

Management and Structuring Considerations

- » Common Administrative Services – how far can this go?
- » Managing subsidiaries' BD efforts
- » Compliance Programs
- » Investigations and Disclosures
- » Ensuring Accurate Size and Other Certifications
- » Security Clearance Considerations



PART 2 – STRUCTURING CONSIDERATIONS FOR ANCS

Structuring and Strategic Considerations

- » Choice of Entity
- » Holding Companies
 - ANCs
 - Tribes – Section 17s, etc.
- » Management Structuring and Organization
- » Shared Services
- » Reporting (internal and external)
- » Key Governance Issues

Overview

- » Options and requirements for structuring tribal and ANC business enterprises
- » Options include: Section 17 corporations, tribal or state law LLCs, and other entity forms
- » Goals include: maximizing net revenues, promoting good governance, protecting tribal assets
- » Considerations include: ease of formation, limitation of liability, tribal tax immunity, and federal contracting program compliance

Limited Liability Companies (LLCs) - Overview

- » Formation
- » Governance
- » Tax Treatment
- » Sovereign Immunity and Limitation of Liability

- » Easy to form so long as Tribe has authority under its laws to do so
 - Generally, Tribe should adopt an LLC Code, rather than use charters
 - LLC Code can be modeled after state LLC code (home state or Delaware) or the uniform model LLC code
 - File Articles of Organization with specified Tribal government official or office and adopt an LLC Operating Agreement
- » Easy to form under state laws as well (the option for ANCs)

LLCs - Governance

- » Governance depends on whether the LLC is Member-managed or Manager-managed
- » A Member-managed LLC will generally have a Member representative or Board of Managers appointed by “the Member” (if member is a Tribe, you have to decide what body of Tribe appoints the Board)
- » A Manager-managed LLC will generally be governed by one or more Managers or a Management Committee, with less on-going oversight by the Member
 - *Caution: A manager-managed LLC could be viewed as not operating as an arm of the Tribe if the Tribe through its elected representatives does not exercise sufficient governance control and financial oversight*

LLCs – Tax Treatment

- » Under IRS regulations, a single member LLC is generally disregarded as a separate entity for federal income tax purposes
 - Net effect if Tribe is LLC's single member: No federal income tax liability
 - ANCs are subject to state and federal taxation so their LLC income is taxed at the corporate member-level
- » State taxation generally follows federal - at least for income tax purposes
- » But some states have special taxes that apply to LLCs at the entity level (e.g., gross receipts taxes)

LLCs – Limitation of Liability and Sovereign Immunity

- » If properly structured, the Tribe's liability for LLC activities is limited to the amount of the LLC's net worth
- » Sovereign immunity of a tribally-owned LLC can add further protection, and will depend on whether the multi-factor arm of Tribe test is satisfied
- » If LLC is formed under state law, it generally will not be treated as an arm of the Tribe
- » But even if formed under tribal law, a tribally-owned LLC will not automatically retain immunity if (a) it is operated too independently, or (b) it waives immunity

Other Options for Tribal Business Ventures

- » Tribally-chartered corporations
- » Tribal economic development authorities (organized as instrumentalities or political subdivisions of the Tribe)
- » General or limited partnerships (if Tribe is not the sole owner)
- » S Corporations/State law corporations

Tribally-Chartered Corporations

- » Since issuing Rev. Rul. 94-16, IRS has implicitly raised the specter that tribally-chartered corporations might not be immune from income tax
- » IRS has an on-going regulations project on the “integral part” status of wholly-owned corporations with no visible signs of progress
- » Other cons—such corporations tend to be one-off creations with little or no consistency (e.g., charters not backed up by a corporate code)
- » Sovereign immunity depends on satisfying the arm-of-Tribe test

Tribal Authorities

- » Tribal Authorities are often used as holding companies for certain tribal business operations, including tribal member housing and utilities
- » Tribal Authorities can be organized as either unincorporated instrumentalities or as political subdivisions of the tribal government
- » Unincorporated instrumentalities generally possess sovereign immunity, but their ability to effectively limit ascending liability is questionable
- » Political subdivisions exercise sovereign powers, and may obtain an IRS ruling on their tax treatment and ability to issue tax-exempt debt

General or Limited Partnerships


- » Limited partners are at risk only for the amount of their capital contributions, while general partners have liability for the partnership as a whole
- » Can only be used for entities that are owned by two (2) or more persons
- » Partnership entities not wholly-owned by Tribe are not likely to be regarded as partaking in Tribe's sovereign immunity
- » Most tribal partnerships are not formed under tribal law, but state law

State Law Corporations (including S Corporations)

- » State law corporations are subject to federal and applicable state income taxes
- » State law corporations not generally immune from suit
- » State law corporations can elect to be treated as pass-throughs (S Corporations), but Tribes are not eligible S Corp shareholders
- » So, why would a Tribe utilize this business form? Because they are acquiring a corporation already established by one or more individuals

Alaska Native Corporations – Tax & Legal Status

- » Alaska Native Corporations (including both regional and village corporations) created pursuant to the 1971 Alaska Native Claims Settlement Act (ANCSA)
- » ANCs are state law corporations subject to state and federal taxation (with some exception)
- » ANCs are not tribal governments and therefore not treated the same as lower 48 tribes
 - Among the many differences – ANCs cannot form tribally chartered entities and do not need sovereignty waivers



**FACTORS AND QUESTIONS TO
CONSIDER IN DETERMINING
APPROPRIATE GOVERNANCE
AND MANAGEMENT STRUCTURE
FOR TRIBAL, ANC, AND NHO
BUSINESS SUBSIDIARIES**

Important Questions to Ask in a Restructure

- » Meeting Regulatory Minimums Does Not Mean Business Optimal
 - What management structure will result in greater profits within tolerable risks?
 - What structure will result in subsidiaries best meeting corporate mission, goals and objectives?
 - What structure best fits the history, personnel, and “culture” of your corporation?

Important Factors to Consider in a Restructure

- » Preservation of corporate liability shield
- » Control of subsidiaries
 - Which model will result in greater profitability
 - Which model will result in better compliance with government requirements
 - Which model will result in reduced risks to assets
- » Cost
 - Costs associated with holding meetings
 - Costs resulting from redundant positions and operations
- » Efficient management of operations
 - Which model will result in most efficient attainment of planning objectives?

Why Subsidiaries?

- » Multiple Entities vs. a Single Company With Divisions
 - Why multiple entities?
 - Government program requirements (i.e., SBA 8(a))
 - Risk management (i.e., corporate veil or limited liability for LLCs)

» But ...

- Multiple entities does not mean multiple or duplicative staffs/systems/governing boards
- Business concerns should be addressed first; typically only minor adjustments to structure needed to meet SBA and corporate veil concerns

- » Corporate Veil Considerations Applicable to Subsidiaries
 - Although subsidiaries are separately chartered and, therefore, covered by the corporate “veil”
 - The corporate veil does not insulate ANC parent Boards from negative consequences of lack of compliance by subsidiaries
 - Parent Boards should view the corporate veil as a risk management tool

The Corporate Veil (cont'd)

- » Harm resulting from lack of monitoring of subsidiaries must be balanced against slight erosion of corporate veil resulting from parent involvement in management of subsidiary

- » Parent Board Members Appointed to Subsidiary Boards/Management
 - As means of parent Board control – how effective?
 - As means for parent Board to be informed about subsidiary – how effective?
 - To provide training for new Board members – wise?
 - As means for parent Board to fulfill fiduciary duties – how effective?
 - Unlike shareholders who are not fiduciaries to the company and cannot be held liable for electing a “bad” director, directors and the Board are and can be

Other Issues In Ownership and Control of Subsidiaries

- » The actions of a single subsidiary can be attributed to the parent and its sister companies for purposes of “Suspension and Debarment” proceedings
- » The parent company, as well as its officers and Board of Directors, are well within the reach of federal auditors and investigators

“Control” – The Elephant in the Room

- » Effective oversight vs. “micro-managing”
- » Trust *with* verification vs. blind trust
- » Being informed vs. cumbersome procedures
- » Management efficiency vs. too much manager independence
- » Monitoring results vs. monitoring people
- » Accountability to shareholders vs. “politics”

Acquisition Considerations

» Tribes

- Current structure
- Need or advantageous to convert to alternative structure
- Currently performing government contracts
- Tax consequences

» ANCAs

- Current structure
- Need or advantageous to convert to alternative structure
- Currently performing government contracts
- Tax consequences

Additional Acquisition Considerations

- » Asset or stock purchase?
 - Depends on current contract performance
 - Asset – contract novation required
 - Stock – contract novation not required
- » If the target company is a graduated 8(a)
 - Normal program rule applies – one time eligibility
 - Acquisition does not provide another chance to participate in the program
 - Exceptions
 - If the Buyer changes the entity into a new company containing less than 50% of assets of the former 8(a), or
 - Buyer can invest capital to force the balance and ensure less than 50% of the assets are of the former 8(a)

Questions?



Thank You!

Holland & Knight Offices

