Recent Developments related to the 8(a) BD Program

Congressional and Regulatory Actions

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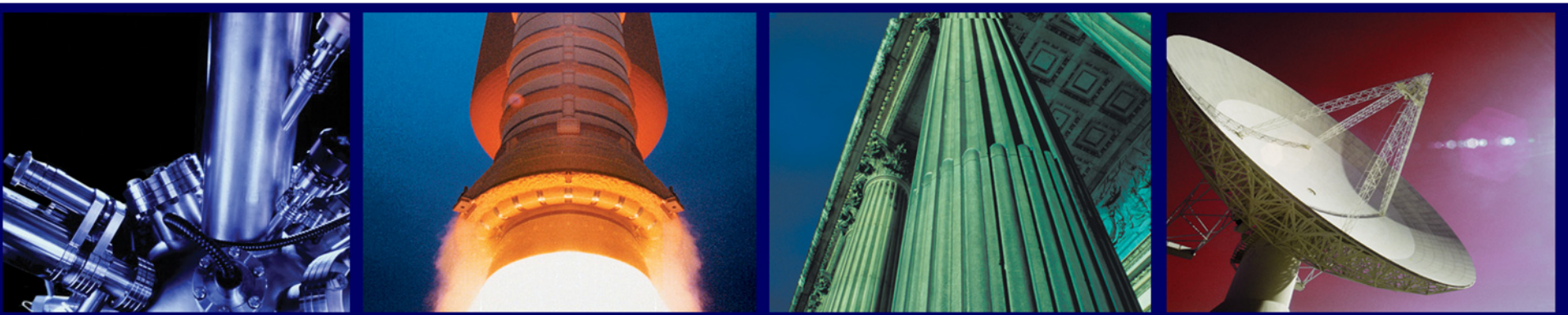

Presentation Overview

- Background on the 8(a) Program
- Special Rules for Tribes, including ANCs
- Recent oversight and concerns about the Program
- SBA's Rule-making process
- Summary of Proposed Changes

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Background on the 8(a) Program

- The Federal Government spends more than $500 billion a year to buy goods and services from contractors.
- Under the Competition in Contracting Act there is a presumption for competition in awarding those contracts but there are many exceptions.
- One of these exceptions allows the Government to “set aside” contract opportunities for small, disadvantaged businesses (the “8(a) program” covers a portion of this group).
- Contracts may be issued as “competitive set-aside” where only 8(a) businesses can compete, and in some cases they may be “sole sourced” to an 8(a) business with no competition at all.
- The Government also has a goal of awarding a certain percentage of contracts to “small” business (23%), and 3% to 8(a) businesses.
- Competitive set-asides and sole source contracts are a primary tool for agencies to meet their 8(a) goals.

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Special Rules for Tribes, including ANCs

- Businesses owned by economically disadvantaged Indian tribes were included under the 8(a) program in the 1980's.
- ANC's are considered as tribes for purposes of the program, and have some special benefits beyond tribes.
- In recognition that tribes and ANCs serve broader populations and not individual owners, they have special rules, including two key benefits:
  - They may receive sole source contracts of any value (individually-owned 8(a)'s are capped at $5.5 million for manufacturing contracts and $3.5 million for all others).
  - They may have multiple 8(a) subsidiaries (eligible individuals have one-time eligibility) subject to certain limitations:
    - That the businesses are "small"
    - That the 8(a)'s be in separate lines of business
- ANC's have special benefits over Tribes
  - They do not have to prove "economic disadvantage"
  - They may have non-disadvantaged individuals manage their 8(a)'s

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What is a “small” business?

- 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; services contracts, including construction, are subject to total receipts based size standards.
- The different industries are broken down by the North American Industrial Classification System (NAICS) Codes, and each NAICS Code has its own size standard.
- 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.)

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Recent oversight and concerns about the Program – Reports

Key investigations and reports include:

- 2005 GAO Investigation
- 2006 GAO Report to Congress
- On-going: SBA "Inspector General" Investigations (at least 3)
- Senator McCaskill Senate Hearing, July 2009

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Recent oversight – major issues identified for reform

- Most issues stem from the GAO Report.
- GAO made no finding of fraud, but found "potential" for abuse and administrative deficiencies by SBA.
- Areas of concern
  - ANCs with multiple 8(a)'s in the same industry
  - Failure to ensure partnerships between 8(a) and other firms were in compliance with the rules (joint ventures and mentor-protégé relationships)
  - Failure to track benefits from the program to ANCs
  - Failure to ensure other small and 8(a) businesses are not adversely impacted by ANC awards
  - ANC 8(a)'s may be gaining an "unfair competitive advantage" over other 8(a) and small business firms

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SBA's Response

- SBA has made numerous adjustments to its practices over the past several years in response to the GAO report, including:
  - Imposing additional reporting requirements for ANC 8(a) concerns
  - Increasing oversight of "mentor-protégé" relationships and "joint ventures" involving ANC 8(a)s
  - Revising its Standard Operating Procedures
  - Putting together this proposed rule making

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About the Rule-Making Process Generally

- Generally before any federal regulation (rule) can become effective, the agency issuing it must go through a "public notice and comment" process.
- To meet this requirement, agencies generally must print their proposed rule in the "Federal Register" and invite public comments to be submitted within a certain period (usually 30 days or more).
- The agency then reviews and considers those comments before making the rule "final."
- The agency may: issue the final rule, making additional changes to the proposed rule, or not proceed further with the rule-making.

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About the current SBA Rule-Making process

- SBA published the Notice of Proposed Rule Making in the Federal Register on October 27, 2009.
- Comments were initially to be due December 28, 2009
- Effective December 9, 2009, the comment period has been extended to January 28, 2009
- SBA is holding several "public meetings" starting December 10 and 11 with meetings in Washington, DC.
- Two of these meetings will be "tribal consultations"
  - December 16 in Seattle (registration deadline is December 10!)
  - January 14 in Albuquerque (registration deadline is January 8)
- Written and/or oral testimony may be provided at these consultations.
- Providing testimony does <u>not</u> preclude filing comments on the proposed rule.

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Strategic Question: How best to use the tribal consultation process?

- Consider the consultations as primarily an information gathering event to better prepare for filing written comments on the proposed rule.
- Consider making general statements of support/concern in the consultations.
- Consider "grass roots" efforts aimed at generating a high volume of additional written testimony and comments offering general support for the ANC/Tribal 8(a) program.
- Consider carefully the strategic and substantive issues in the proposed rule and seek assistance in peparing testimony and filing comments.

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Overview of the Proposed Rules

- Some (most) are really in force now
- Some address individuals or technical changes (limited relevance to ANCs)
- A good number have material impacts on ANCs and their 8(a)s

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Specific Changes Proposed

- The key areas of importance for ANCs include, but are not limited to:
  - Tightening requirements on having 8(a)'s in the same line of business, through re-designation of Primary NAICS Codes, Limitation on operating in secondary NAICS Codes where a sister company has that NAICS Code as its primary industry, and early graduation where an 8(a) exceeds the size standard for its primary NAICS Code for two years.

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Joint Ventures/Affiliation

- There are numerous changes to joint venture affiliation exception, including:
  - Clarifying that an 8(a) joint venture may be awarded up to 3 contracts in a two-year period ("3-in-2 rule")(vs submitting only 3 proposals).
  - Clarifies the time at which the 3-in-2 rule is applied.
  - Clarifies that parties may form multiple 8(a) joint ventures subject to the 3-in-2 rule, but that in time this may create an affiliation.

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Other Joint Venture issues

- SBA is clarifying that all 8(a) joint venture agreements must contain the substantive terms required in 13 CFR 124.513, even when only pursuing a small business set-aside contract.
- SBA is defining the amount of work the 8(a) must perform in a joint venture (40% of the joint venture's work, vs. a mere "significant" portion)
- SBA proposes to preclude the non-8(a) joint venture partner from being a subcontractor to the joint venture in sole source contracts.

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Mentor-Protégé Issues

- SBA is narrowing the exception to affiliation for mentors and their protégés so it applies only to SBA's mentor-protégé program, and those programs whose statutory authority provides for an affiliation exception (DoD).
- Clarifying certain eligibility requirements for the mentor-protégé program.
- Expanding requirements for mentor assistance and ensuring that the mentor protégé agreement tracks the 8(a)'s business plan.

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Other Issues

- Other issues include but are not limited to
  - Changes to individual net worth requirements. (exempting retirement accounts)
  - Streamlining the waiver requirements to meet the potential for success rule for ANCs, Tribes and NHOs.
  - Open Question: How to determine tribal economic disadvantage (SBA is resisting a bright line test)
  - Require ANCs, Tribes and NHOs to make annual reports on the benefits received by their shareholders and members by virtue of the 8(a) program
  - And many, many more.

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Recommendations

- Carefully study the proposed rules and seek assistance in interpreting them.
- Consider that most of the proposed changes are really in effect now.
- Strongly consider filing both testimony for the consultations and comments under the NPRM.
- Generate “grass roots” comments to support the ANC 8(a) program.

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Conclusion

- Generally, the rule-making is a very positive step
  - Substantively, it clarifies and corrects some problematic issues.
  - Procedurally, it may help lift the cloud that has been hanging over 8(a) contracting.
  - But groups with interests opposed to ANCs and Tribes are actively campaigning against their participation in the 8(a) program.
  - ANCs and Tribes should use the comment process to make substantive suggestions about the proposed changes, but also as a means of showing the importance of the program to their communities and constituents.

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