

EVOLUTION OF THE 8(A) PROGRAM AND WHAT LIES AHEAD

Presented by

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TOPICS

- Evolution of the 8(a) Business Development Program
 - Timeline of the 8(a) Program
 - 8(a) Business Development Program Criteria
 - 8(a) Continuing Eligibility – Maintaining Compliance
- What Lies Ahead
 - Impact of new all small Mentor-Protégé program for 8(a) firms
 - Similarly situated entities
 - NDAA 2017
 - President Trump's Impact on Government Contracting

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TIMELINE OF THE 8(A) BUSINESS DEVELOPMENT PROGRAM

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2002 – SBA “Native 8(a)”

- Native Hawaiian Organization (NHO) incorporated in Hawaii
- Native community controlled

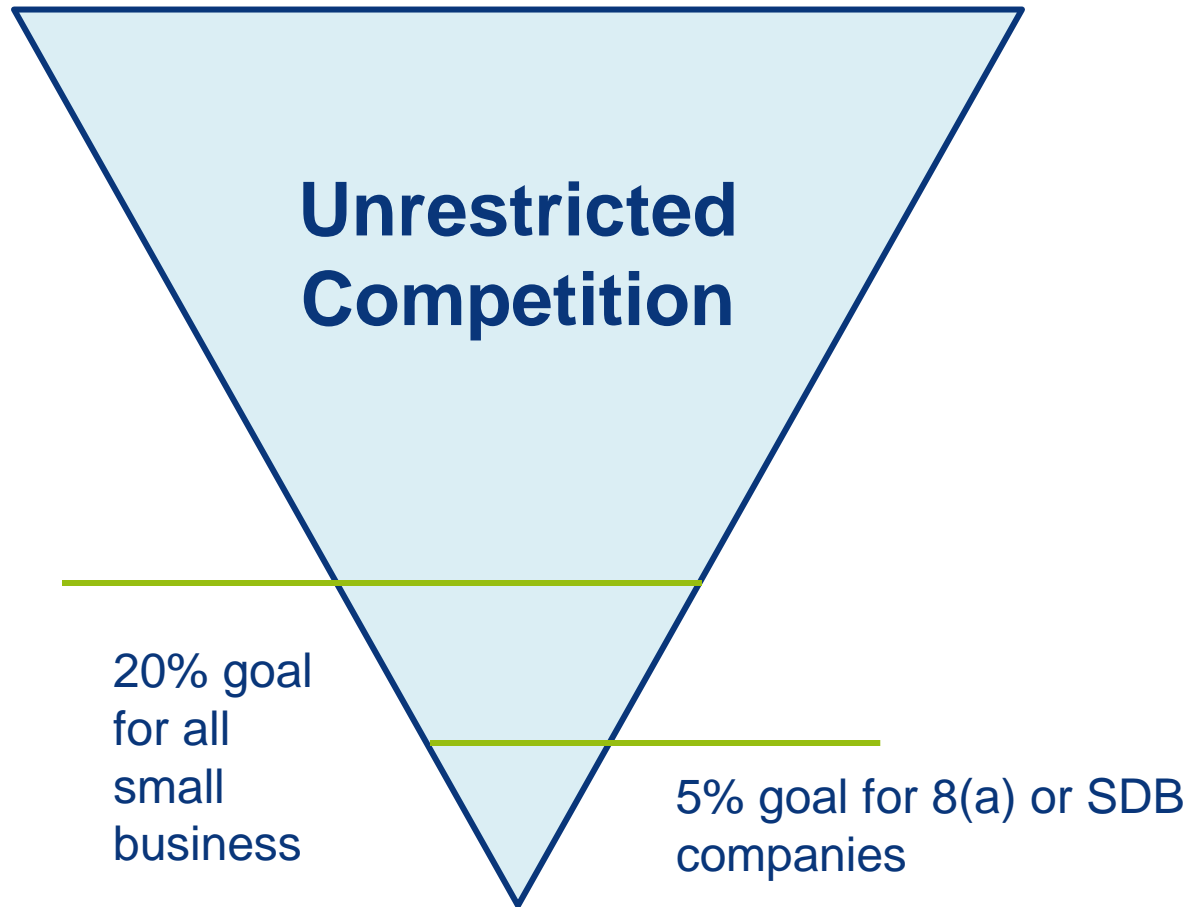
INTENT OF 8(A) PROGRAM

- Economic program result of Civil Rights Era
- Increases the number of vendors for the government
- **Minority/ Disadvantaged 8(a) Firm** promotes individual business success
 - Economic business development program targeted at “disadvantaged populations”
- **Tribal / Native Community Enterprise 8(a) Firm** promotes business success for entire community
 - Diversify resources to address the socio economic status of entire groups of Native peoples by encouraging community investment and self sufficiency

THE EARLY DAYS OF THE 8(A) PROGRAM

- No time limits
- No restrictions on Sole Source awards (all self marketing)
- No business mix restrictions
- No restrictions on selling 8(a) companies

THE EARLY DAYS



THE CURRENT CLIMATE – SET-ASIDE GOALS



- Increased competition for Set-Aside dollars
- Generally parity among the programs

DISTINGUISHING FACTORS FOR THE 8(A) PROGRAM

- It's a business development program
- Nine year maximum participation term
- Highly regulated – certification required plus annual reviews
- Sole source awards are available below the competitive threshold
 - Currently: \$6.5 million – manufacturing
\$4.0 million – all others

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8(A) BUSINESS DEVELOPMENT PROGRAM CRITERIA

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MAKE SURE YOU MEET THE ELIGIBILITY CRITERIA!

- Must be a SMALL business in primary industry
 - Size of a firm includes any affiliates
 - Multiple ways that affiliation can arise
 - Key is when one firm controls or has the power to control the other, or a third party or parties control or have the power to control both, even if this control is not exercised (13 C.F.R. § 121.103)
- Special affiliation rules for Tribes and Native-owned concerns

8(A) ELIGIBILITY CRITERIA

- Must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are U.S. citizens of good character
 - Firms owned by Tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations are also eligible to participate in the 8(a) Program
- Must possess potential for success

SOCIAL DISADVANTAGE

- Individuals in the following groups are “presumed” to be socially disadvantaged:
 - Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans
 - Tribes, ANCs, NHOs, and CDCs are presumed to be socially disadvantaged
- Individual is presumed socially disadvantaged if holds himself or herself out as a member of a presumed group and is currently identified by others as a member of the presumed group

ECONOMIC DISADVANTAGE

- For initial 8(a) eligibility, the personal net worth (PNW) of a disadvantaged individual must be less than \$250,000, and average income over past three years must be less than \$250,000
- PNW excludes ownership interest in firm and equity in primary residence, except SBA can include these when looking at the applicant's total assets; total fair market value of all assets may not exceed \$4 million for applicants, and \$6 million for participants
- Firms owned by Tribes, ANCs, NHOs, or CDCs have different rules for economic disadvantage

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8(A) CONTINUING ELIGIBILITY – MAINTAINING COMPLIANCE

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FOR A FIRM TO REMAIN ELIGIBLE FOR 8(A) PROGRAM PARTICIPATION, IT MUST:

- Continue to meet all eligibility criteria
- Inform SBA of any changes in circumstances
- Make annual submissions supporting continued eligibility
- Maintain a balance between commercial and government business
- Limit on the total dollar value of sole-source contracts that may be received while in Program

ANNUAL REVIEWS

- Participants must annually submit information to servicing district office to support continued 8(a) Program participation
- At a minimum, annual review submissions include:
 - Certification that eligibility requirements are met
 - Certification that there are no changed circumstances which could adversely affect eligibility
 - Personal financial information for each disadvantaged owner
 - A record of all payments, compensation, and distributions made to each owner, officer or director
 - A listing of any fees paid to agents or representatives for assistance in obtaining (or seeking to obtain) a Federal contract

ELIGIBILITY REVIEWS

- SBA will review a firm's eligibility for continued participation
- Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include:
 - Excessive withdrawals of funds or other assets
 - Substantial personal assets, income or net worth

EXCESSIVE WITHDRAWALS

- What are withdrawals?
 - Cash dividends, distributions in excess of amounts needed to pay taxes of pass-through entities; cash and property withdrawals; payments to immediate family members not employed by the participant; bonuses to officers; and investments on behalf of an owner
 - Officer salaries are generally not considered withdrawals
- When are withdrawals excessive?
 - > \$250,000 (sales up to \$1 million)
 - > \$300,000 (sales between \$1 million and \$2 million)
 - > \$400,000 (sales exceeding \$2 million)

EXCESSIVE WITHDRAWALS

- Potential consequences of excessive withdrawals include:
 - Initiation of termination proceedings
 - Initiation of early graduation proceedings
 - An appropriate reinvestment of funds or other assets as a condition of continued 8(a) Program eligibility

REMAINING ECONOMICALLY DISADVANTAGED

- Economic disadvantage factors and thresholds for continued eligibility:
 - Net Worth – Personal net worth of \$750,000
 - Personal Income – Three-year average adjusted gross income of \$350,000
 - Total Assets – Fair market value of assets of \$6 million
- No economic disadvantage = early graduation

CHANGES OF OWNERSHIP

- Changes of ownership or business structure permitted only where:
 - Disadvantaged individual(s) own and control the participant after the change; and
 - SBA approves the transaction in writing prior to the change
- No prior SBA approval = termination
- Limited instances where prior SBA approval not required

STAYING SMALL

- A firm must remain small for its primary industry
- SBA may initiate early graduation proceedings where a firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive 8(a) Program years, unless:
 - Primary industry is changing to a related secondary NAICS code
 - The firm's business plan contains specific targets, objectives, and goals for its continued growth and development under its new primary industry



MENTOR-PROTÉGÉ PROGRAM

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POLICY CHANGES TO SBA MENTOR-PROTÉGÉ

- Final rule implements 2010 Small Business Jobs Act and 2013 National Defense Authorization Act (NDAA)
- One for 8(a) and one for all other small businesses
- All Mentors must
 - Demonstrate it can fulfill its mentor protégé obligations
 - Be for-profit
- 8(a) Protégé may:
 - Transfer to all small MP after graduation
 - Have 2 mentors in its lifetime in any program

THE NEW SBA MENTOR-PROTÉGÉ PROGRAM

- Available to all small businesses, including SDVOSBs, HUBZones, WOSBs, and 8(a)s
- Patterned on existing 8(a) Mentor-Protégé program
- Allows all small business protégés to joint venture with their large business mentors
- Mentor can own up to 40% of the protégé
- Exception to affiliation

BENEFITS

- M-P joint ventures may qualify as a small business for any federal government contract or subcontract where the protégé qualifies as small for the size standard assigned to the procurement
 - Why joint venture?
 - Does 3-in-2 rule still apply?
- Protégé firm can raise capital without fear of affiliation
 - Any limitations?
- Significant subcontracting work to protégé = potential incentives from procuring activities during contract evaluation

MENTOR ELIGIBILITY

- For-profit entity that demonstrates commitment and ability to assist small business concerns
 - Possesses “good character”
 - Not suspended or debarred
 - Can impart value to protégé
 - Demonstrates that it can meet the obligations outlined in the mentor-protégé agreement
- May generally have no more than one protégé at a time
 - May seek approval for up to three protégés as long as the additional relationships do not adversely affect the development of any of the protégé firms
- Firms can be both mentors and protégés

PROTÉGÉ ELIGIBILITY

- Must be small under its primary NAICS code or seeking assistance in secondary NAICS code under which it is small
 - Size determination required?
- Protégé not limited to a single mentor
- Importance of ensuring protégé qualifies as an SDVOSB/HUBZone/WOSB/8(a) firm

HOW TO APPLY

- Online application available at www.certify.sba.gov
- All applicants must execute and submit a Mentor-Protégé Agreement
 - Detailing needs, assistance, timeline, and success measurement is critical
- Other requirements besides a Mentor-Protégé Agreement?
- If interested in the new M-P Program, apply NOW



WHAT LIES AHEAD



POSSIBLE IMPACT OF NEW ALL SMALL MENTOR-PROTÉGÉ PROGRAM

- More opportunities for joint venturing with large business mentor for all small businesses (not just 8(a) firms)
- Creates opportunities for 8(a) graduates to be protégés no more than two times
- Creates opportunities for 8(a) firms or graduates to mentor and be protégés

USE OF SIMILARLY SITUATED ENTITIES

- Work performed by Similarly Situated Entities may count towards the applicable limitations on subcontracting
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- What is a “Similarly Situated Entity”?
 - Subcontractor that has same small business program status as the prime contractor
 - Small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform
- How much work can be subcontracted to a Similarly Situated Entity?
 - To count, work must be self-performed by subcontractor

NDAA 2017

- VA Secretary's authority curtailed
 - VA prohibited from issuing regulations regarding ownership, control and size status of an SDVOSB or VOSB
 - VA required to use SBA regulations which will apply to both VA and SBA's self-certification SDVOSB programs
 - VA will continue to verify status, but using SBA regulations

NDAA 2017

- New verification appeals process for SDVOSBs
 - SBA OHA will have authority to hear appeals from any small business denied verification by the VA
 - OHA will have jurisdiction if interested party challenges the inclusion in the VetBiz database of an SDVOSB or VOSB
 - Unclear if OHA will hear protest of verification as an SDVOSB or VOSB generally

PRESIDENT TRUMP'S IMPACT ON GOVERNMENT CONTRACTING

- President Trump's Procurement Policies
 - Increased outsourcing of government services?
 - Increased infrastructure spending?
 - Emphasis on Commercial Items acquisitions
 - Emphasis on "Buy American"
 - Less LPTA procurements
 - NDAA for 2017 already limits for DOD

QUESTIONS?

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