



# MERGERS AND ACQUISITIONS: A QUICK PRIMER FOR §(a)

Basic Regulatory Overview and Cautionary Tales



# Your Presenters

## **John Klein, Associate General Counsel for Procurement Law, U.S. Small Business Administration:**

John is the principal legal advisor to senior Agency officials and their staffs with respect to the 8(a) Business Development program; the Agency's Government Contracting programs, including the small business set-aside, subcontracting and Certificate of Competency programs; the HUBZone program; the Small Business Innovation Research program; the Size Standards program; the Service Disabled Veteran-Owned Small Business program; and SBA's internal contracting procedures. Mr. Klein has been a lawyer in SBA's Office of General Counsel since 1983. Suspension and Debarment Official.



# Your Presenters

Christine is an adjunct law professor on government contracting at Seattle University School of Law's Alaska Campus, as well as an adjunct master's instructor on government contracting and the 8(a) Program at Alaska Pacific University. She concentrates her practice on Government Contracting from counseling on qualifications and administration to disputes and companies in crisis. She represents clients in defending against federal investigations, including investigations/reports by the Office of the Inspector General, the Department of Justice, and the GAO. Christine also counsels companies on the procurement and administration of government contracts across all agencies. She has especially deep experience in the SBA and Section 8(a) Programs. Prior to Outlook Law, Christine was vice president and general council for a large Alaska Native Regional Corporation. She was also partner with Davis Wright Tremaine, Perkins Coie, and an attorney at Patton Boggs.



# Some of Your Due Diligence

- Due diligence checklist
- Small business under SBA
- What type
- What are the most common (top 5/top 10) pitfalls or top 5 risk factors
- What is do you look for in contracts
- Novations?
- Change of Name?
- Merger right after acquisition?
- Do you have an Administrative Contracting Officer?



# Regulations, Regulations, Regulations



Most of the Time I Feel Like. . .



# Straight Government Contracting

- FAR Part 42.12/DFARS 241.12
- FAR Part 52 Notice of Ownership Changes/Price Affected





# 13 CFR 121

- 121 = Small Business
- 124 = 8(a)



# 13 CFR 121.404 When Size is Determined

- (g)(1) (1) Within 30 days of an approved contract novation, a contractor must recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.



# Size and (Re)Certification

- (2)(i) In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.



# Size and (Re)Certification

- (ii) Recertification is required:
  - (A) When a concern acquires or is acquired by another concern;
  - (B) From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and
  - (C) From a joint venture when an acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business.



# Size and (Re)Certification

- (3) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. If the contractor certifies that it is other than small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business prime contracting goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.
- (i) A business concern that certified itself as other than small, either initially or prior to an option being exercised, may recertify itself as small for a subsequent option period if it meets the applicable size standard.
- (ii) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract. However, a contracting officer may require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.
- (iii) A request for a size re-certification shall include the size standard in effect at the time of re-certification that corresponds to the NAICS code that that was initially assigned to the contract.



# New/Clarification Regulation 13 CFR 121.404 (Re)Certification and Size

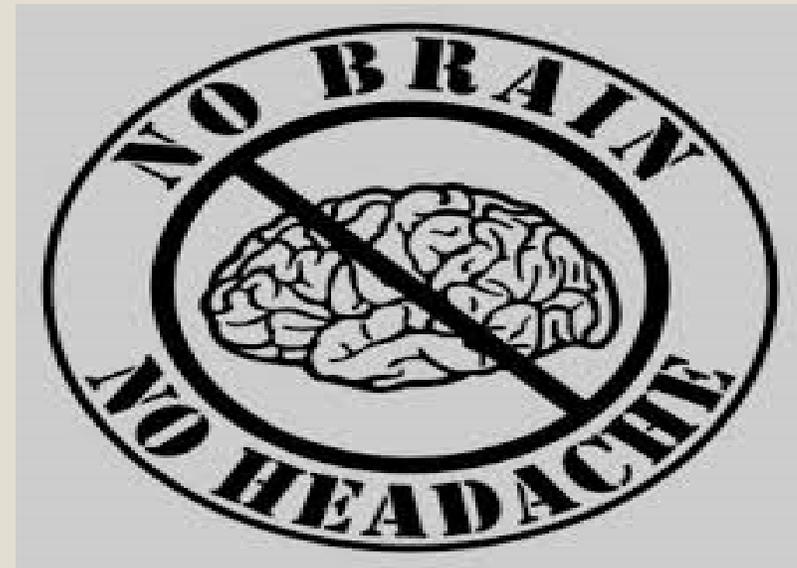
- Clarification that recertification is required following the merger or acquisition of a firm that submitted an offer as a small business concern by adding a paragraph.
- Specifically, the new paragraph clarifies that the SBA requires new small certification for pending contracts when the merger or acquisition occurs after offer but prior to award.



# Now Add 8(a) to the Mix



# 8(a) Crown Jewel Needing Protection or Headache Regulations



# 13 CFR 124.515 Change of Ownership and/or Control and Continual Performance of an 8(a) Contract

Now the real fun begins



# Intense Regulation: Break it Down



# 13 CFR 124.515

- (a) An 8(a) contract must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.



# 13 CFR 124.515

- (1) An 8(a) contract, whether in the base or an option year, must be terminated for the convenience of the Government if:
  - (i) One or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals; or
  - (ii) The contract is transferred or novated for any reason to another firm.
- (2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.



# 13 CFR 124.515

- (b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:
  - (1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;
  - (2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;
  - (3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;
  - (4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or



# 13 CFR 124.515

- (5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if—
  - (i) The concern has graduated from the 8(a) BD program;
  - (ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and
  - (iii) The disadvantaged owners will maintain control of the daily business operations of the concern.



# 13 CFR 124.515

- (c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 days after such occurrence. The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver, and must demonstrate that the proposed transaction would meet such grounds.



# 13 CFR 124.515

- (d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.507(b)(2) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is a responsible and eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring firm must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought.



# 13 CFR 124.515

- (e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.
- (f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:
  - (1) Voluntarily graduates from the 8(a) BD program; and
  - (2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.



# 13 CFR 124.515

- (g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.
- (h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.
- (i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this chapter within 45 days after the contractor receives the Administrator's decision.



# Questions???

