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SMALL BIZ BASICS

Session 5: Small Biz Graduation

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Session 5: Roadmap

- Navigating the transition from small to large business
- Competing against all interested companies
- 8(a) required transition periods
- Tips and strategies to consider
- Future contractual relationships
- Sale of a small business
 - Mergers and acquisitions
 - Questions to consider in advance of related discussions

Navigating from small to large

- Companies need to know their primary NAICS Code's threshold.
 - Thresholds are available: <https://www.sba.gov/document/support-table-size-standards>
 - Monitor how close company is getting to the threshold
- Not an overnight process
 - Because the SBA uses a 5-year revenue or a 2-year headcount average, companies know when they are nearing.
- May remain a small business in other NAICS Codes
 - Primary NAICS is always the Code under which the company earns its majority of its revenue
 - Some firms find it advantageous to identify and market as small – fine so long as clear about the Primary NAICS.
 - Some firms will begin performing work in a related but secondary NAICS Code with a higher threshold.
- Some firms will “sell off” contracts/work that has lower profit to clear bandwidth
 - In some instances, the buyer may be able to take credit for past performance

Competing against all interested companies

- Transition to Full and Open Competition (FAR Subpart 6.1)
 - "Full and open competition" means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement. It is the preferred form of contracting and includes contracting by sealed bids, negotiation, and other procedures (FAR Subpart 2.1)
- Practically-speaking:
 - No longer competing against like-sized companies
 - Now competing against all companies
- No longer have benefit of a federal policy favoring the company
- Key areas of challenge – key personnel, past performance, Government-approved systems (accounting, purchasing, etc.)
- Strategies (later slide)

8(a) Required Transition Periods

- Use the 8(a) as an example. Note that 8(a) transitions are mandatory only for 8(a) program.
- 8(a) Quick refresher:
 - 8(a) Business Development Program is for small disadvantaged businesses.
 - Business must be owned and controlled by socially and economically disadvantaged individuals.
 - Efficiently compete and receive set-aside and sole-source contracts
 - \$7m – Manufacturing NAICS
 - \$4.5m – all other acquisitions
 - May require a Justification and Approval (J&A) if more than \$25M (or \$100M for ANC 8(a))
 - Receive one-on-one business development assistance for their nine-year term from dedicated Business Opportunity Specialists focused on helping firms grow and accomplish their business objectives
 - Pursue opportunity for mentorship from experienced and technically capable firms through the SBA Mentor-Protégé program
 - Connect with procurement and compliance experts who understand regulations in the context of business growth, finance, and government contracting
 - Pursue joint ventures with established businesses to increase capacity
- Only about 35% of 8(a) companies graduate from the program
 - Voluntary withdraw or early graduation (13 C.F.R. 124.301)
 - Resignation

8(a) Required Transition Periods

- 8(a) Program is 9 years. (Exceptions for pandemic have expired)
- 13 C.F.R. 124.404 – divides the 8(a) participation into 2 stages:
 - #1: Development (Years 1-4)

13 C.F.R. 124.404(b) ***Developmental stage of program participation.*** A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:

 - (1) Sole source and competitive 8(a) contract support;
 - (2) Financial assistance pursuant to § 120.375 of this title;
 - (3) The transfer of technology or surplus property owned by the United States pursuant to § 124.405; and
 - (4) Training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.

8(a) Required Transition Periods

- #2 Transitional (Years 5-9)

13 C.F.R. 124.404(c) ***Transitional stage of program participation.*** A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:

- (1) The same assistance as that provided to Participants in the developmental stage;
- (2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and
- (3) Training and technical assistance in transitional business planning.

8(a) Required Transition Periods

- 13 C.F.R. 124.509:
 - Ensure there isn't an unreasonable reliance on 8(a) awards
 - Must make good faith efforts to obtain business outside of 8(a)
 - Can be for other federal contracts or commercial, as measured by revenue
 - Develop a reasonable marketing strategy
 - Using the 8(a) to strengthen
 - In a perfect world, 8(a) gives shelter while developing past performance capabilities, developing the business acumen and processes, etc.
 - Set targets for Non-8(a) Revenue (next slide)
 - Reporting:
 - 8(a) files financial reports annually, and
 - 8(a) files contract reports for each program year

8(a) Required Transition Periods

- 13 C.F.R. 124.509 (b)(2):
 - Set targets for Non-8(a) Revenue
- “Unofficial”

Table 1 to Paragraph (b)(2)(i)

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

Table 1 to Paragraph (b)(2)(i)

8(a) Program Year	Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
5	1	15
6	2	25
7	3	30
8	4	40
9	5	50

8(a) Required Transition Periods

- 13 C.F.R. 124.509(d):
- Consequences
- **Consequences of not meeting competitive business mix targets.**
- (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.
- (2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.
- (3) As a condition of eligibility for new 8(a) sole source contracts, SBA may require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.
- (4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year. SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in [paragraphs \(d\)\(4\)\(i\) and \(ii\)](#) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:
 - (i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or
 - (ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of [paragraphs \(d\)\(2\)\(ii\)\(A\) or \(B\)](#) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.
- (A) To qualify for reinstatement during the first six months of the current program year (*i.e.*, at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.
- (B) To qualify for reinstatement during the last six months of the current program year (*i.e.*, at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.
- (e) **Waiver of sole source prohibition.**
- (1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.
- (2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.
- (3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.
- (4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

Tips/Strategies

- Strategies:
 - Pitching to customers
 - teaming and partnering:
 - Prime and Subcontractor opportunities
 - mentoring a Protégé,
 - niche work
- Diversify contract portfolio
- Non-federal socioeconomic opportunities
 - State and local governments (MBE/WBE)

Future Contractual Relationships

- If a now-large business enters into a teaming agreement, it could trigger AFFILIATION
- If the now-large business was used to being the prime, may now be the subcontractor
- Mentors can only have one (or no more than three in limited circumstances) protégé at a time

Sale of a small business

Questions to consider in advance of related discussions:

- How is the company currently owned and controlled?
 - What is the proposed ownership and control structure?
- What is the proposed deal structure:
 - Are all the assets (and liabilities) for a company selling?
 - Is it a stock transaction?
- Is a novation required? (next slide)
- Does the company have small business or socioeconomic status?
 - What will the sale do to those statuses?
- What Intellectual Property Assets (later slide)
 - What IP does your company OWN?
 - What IP does your company have USE rights?
- Is the company in compliance with all FAR & Supplement clauses?
 - Can the deal be underwritten (i.e. insured with reps and warranties)?
- What type of data does the company access?
 - CMMC, Export Control, other

Sale of a small business (cont.)

Questions to consider in advance of related discussions:

- Is there an organizational conflict of interest (OCI) created by the sale?
- Do the current contracts government property?
- Have completed contracts been closed-out (formally with the USG)?
- Are there any disputes, claims, REAs, etc.?
- What does the CPARS look like?
 - Are there show cause/cure notices?
 - Terminations?
 - Suspensions? / Debarments?
- Results of any Audits/Investigations
 - Any violations or findings?
- Any specialty compliance requirements for this company?
 - Buy America / Trade Agreements
 - Environmental
 - Services Contract Act/Davis-Bacon Wage Determination
- GSA Schedule?

Sale of a small business

- Mergers and acquisitions
- Anti-Assignment Act: Federal law prohibits contractors from assigning contracts with limited exceptions for:
 - Assignments made with the consent of the Contracting Officer, such as a Novation.
 - Novations take place when, through merger or acquisition of ALL assets of the first contractor, the acquiring contractor assumes ALL the obligations of the first contractor.
 - Assignments of contract receivables to a bona fide banking institution as security for a loan or credit line.

Sale of a small business

- What Intellectual Property Assets
 - What IP does your company OWN?
 - What IP does your company have USE rights?
- Technical Data
 - Includes all recorded information in any form, including computer software and documentation
 - Allocation of rights between government and contractor
 - FAR: Unlimited, Limited, or Restricted Rights
 - DFARS: Unlimited Rights, Government Purpose Rights, Limited Rights, Specifically Negotiated License Rights, SBIR Rights
 - Assertion and marking requirements to preserve rights
 - Follow the money!
- Patent Rights
 - Allocation of rights between inventor/patent owner and third parties
 - Generally allows contractors to retain ownership in subject inventions while granting Gov't a license
 - Subject inventions are those conceived or reduced to practice in performance of the Gov't contract
 - Strict deadlines for notification and reporting of subject inventions and prosecution of patent application process
 - Failure to comply may result in Government ownership with no license to the contractor

QUESTIONS?

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