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Past is Present: Government Getting More Favorable Decisions on Cost and Pricing Issues?

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Past is Present: Government Getting More Favorable Decisions on Cost and Pricing Issues?

Updates Suggesting Maybe So

- What costs are "expressly unallowable."
  - *Raytheon Co. v. Sec'y of Def.*, 940 F.3d 1310 (Fed. Cir. 2019)
- Offsetting Cost Impacts
  - *The Boeing Co. v. United States*, 143 Fed. Cl. 298 (2019) and 2020 Fed. Cir. decision
- Reasonableness of Severance Pay
  - *DynCorp Int'l LLC*, ASBCA No. 61950 (Sept. 29, 2020)

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Past is Present: Government Getting More Favorable Decisions on Cost and Pricing Issues?

Updates that Give Hope Otherwise

- Calculating Post-Retirement Benefits
  - *Sec'y of Def. v. Northrop Grumman Corp.*, 942 F.3d 1134 (Fed. Cir. 2019)
- Unabsorbed Overhead Claims
  - *Kudsk Constr., Inc. v. U.S.*, 144 Fed. Cl. 446 (2019)
- CAS Board Moving Towards GAAP

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Updates Suggesting Maybe So

The Expansion of Expressly Unallowable Costs:
Raytheon v. Sec'y of Def., 940 F.3d 1310 (Fed. Cir. 2019)

- Established Legal Test:
  - FAR defines "expressly unallowable cost" as "a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is ***specifically named and stated to be unallowable***." FAR § 31.001; CAS 405-30(a)(2)

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Raytheon "Expansion" (cont.)

- Established Legal Test (Cont):
  - ASBCA has long held that the Government bears difficult burden of proof:
    - "Congress adopted the 'expressly unallowable' standard to make it clear that a penalty should not be assessed where there were reasonable differences of opinion about the allowability of costs" so the "Government must show that it was unreasonable under all the circumstances for a person in the contractor's position to conclude that the costs were allowable." See e.g., General Dynamics Corp., ASBCA No. 49372, 02-2 BCA ¶ 31,888, rev'd in part on other grounds, Rumsfeld v. General Dynamics Corp., 365 F.3d 1380 (Fed. Cir. 2004)

Raytheon "Expansion" (Cont.)

- Established Legal Test (Cont.):
  - DCMA determined that Raytheon's cost proposal included, among other expressly unallowable costs, over $220,000 of expressly unallowable lobbying salary costs in the form of salaries paid to executives who performed some lobbying.
  - CO demanded repayment; assessed penalties and interest against Raytheon under FAR 42.709-1.
  - After losing at the ASBCA, Raytheon appealed to the Federal Circuit

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Raytheon "Expansion" (Cont.)

- Established Legal Test (Cont.):
  - Federal Circuit Affirmed:
    - Salaries were "of a type" that were expressly unallowable.
    - Costs "associated with" certain types of identified lobbying activities are stated to be unallowable under FAR 31.205-22.
    - Ignored the requirement that the costs be "named" under FAR 31.205-22. The cost principle, however, does not explicitly state or name compensation or salary costs as unallowable.

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FAR v. CAS: Round One

Boeing Co. v. United States, 143 Fed. Cl. 298 (2019)

Background: Offsetting Impact of Cost Accounting Practice Changes

- CAS mandates compliance with its rules for covered contractors.
- When a change in a contractor's accounting practice results in increased costs in the "aggregate" to be paid by the Government, the CAS statute calls for a price adjustment to the contract. 41 U.S.C. § 1503(b).

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FAR v. CAS: Round One (Cont.)

Boeing Co. v. United States, 143 Fed. Cl. 298 (2019)

- CAS statute also provides that the price adjustment "may not result in a windfall" for either the contractor or the Government unless the contractor should have been aware of the change at the time of price negotiation and failed to disclose the change.
- FAR 30.606 went into effect in April 2005 and prohibits contractors from combining the cost impact of multiple accounting practice changes. Offsets only allowed for changes that are favorable to the USG.
- ASBCA precedence: no offset for changes that are favorable to the contractor.

Round 1: Boeing Co.

Background:

- Boeing entered into the contract at issue in December 2008
- The contract did not incorporate FAR 30.606 by reference or full text
- In January 2011, one of Boeing's business segments simultaneously implemented eight cost accounting changes

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Round 1: Boeing Co. (Cont.)

Background *(Cont)*:

- Two of those changes increased the Government's costs by approximately $1 million
- But the impact of all eight changes decreased the Government's costs by nearly $1.5 million

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Round 1: Boeing Co. (Cont.)

- Boeing: No price adjustment was necessary because there was no "*aggregate* increased cost" to the Government
- DCMA: Boeing owed the Government approximately $1 million because of the two accounting changes that increased costs
- Final decision ignored the significant Government savings from other six changes

Round 1: Boeing Co. (Cont.)

- Boeing filed suit in the COFC alleging
  - (1) breach of contract because the Government's application of FAR 30.606 violated the CAS statute, and, in the alternative,
  - (2) the Government's demand for payment was an illegal exaction.
- COFC Decision: Did not reach the central issue of FAR 30.606
- COFC denied appeal based on other grounds (Waiver by Failure to bid protest; Illegal Exaction)

Round 2: Hold On There a Minute!

Boeing v. United States, 968 F.3d 1371 (Fed. Cir. 2020)

- On August 10, 2020, the Federal Circuit reversed and remanded the COFC's decision
- Federal Circuit revives the question of whether the FAR 33.606 requirement that the measurement of the dollar impact of multiple unilateral CAS changes exclude contractor offsets takes precedence over CAS requirements that this measurement must be made in the "aggregate" and avoid windfalls

Round 2: Hold On There a Minute! (Cont.)

Boeing v. United States, 968 F.3d 1371 (Fed. Cir. 2020)

- Opens the door for decision on FAR-CAS inconsistency with regard to the use of offsets and the propriety of FAR 30.606(a)(3)(ii)

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020)

- CEO's 2010 employment agreement included "severance" payment "equal to two (2) times the sum of the Base Salary and Bonus at Target."
- Agreement provided for a base salary of $2,000,000 and target bonus of 130 percent of base salary ($2,600,000).
  - Statutory cap on comp. ranged from $693,951 in 2010 to $1,144,888 in 2014. CEO's base salary of $2,000,000 exceeded the statutory cap all four years of the agreement.
- Former CEO received severance of $4,983,333 (CY 2015) and $3,066,667 (CY 2016), totaling $8,050,000.

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020) (Cont.)

- DCAA's Audit noted that it "reviewed employment agreements for other former CEOs at DI and CEOs of similar defense contractors and found the *severance terms* of twice a CEO's salary plus bonus to be reasonable in comparison."
- However, DCAA questioned the severance pay *amount* as unreasonable
  - Amount exceeded the compensation cap in FAR 31.205-6(p).
- DCMA's COFD denied the costs based on arguments that:
  - Per FAR 31.205-6(g) definition of severance, the cost is a "compensation" cost limited by the compensation caps
  - Severance is a cost "directly associated" with compensation and, therefore, unallowable because it exceeds compensation caps

It's reasonableness Dude:

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020)

- Contractor has burden of proof as to specific reasonableness of compensation and general cost reasonableness.
- Holding: DynCorp won the battle, but lost the war
  - Board: Agreed that severance payments are not "compensation" under the FAR.
  - BUT, found that severance amounts were unreasonable in view of "[t]he contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large." FAR 31.201-3(b)(3).

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It's reasonableness Dude: (Cont.)

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020)

- Even though FAR 31.205-6(p), addressing compensation reasonableness, does not govern severance payments, it was unreasonable to use salary and bonus amounts that exceeded the statutory caps to calculate the severance payment.
- "This conclusion is just common sense."

Updates that Give Hope Otherwise

The "No Harm, No Foul" Rule

Sec'y of Def. v. Northrop Grumman Corp., 942 F.3d 1134 (Fed. Cir. 2019)

- DCMA disallowed Post Retirement Benefit ("PRB") costs arguing that Northrop failed to properly calculate those costs using accounting method effective from 1995-2006.
- After switching to the appropriate accounting method (FAS 106) in 2006, Northrop included a "transition obligation" for the $253 million difference between the accounting method it used before 2006 and what it would have had under FAS 106.

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The "No Harm, No Foul" Rule (Cont.)

Sec'y of Def. v. Northrop Grumman Corp., 942 F.3d 1134 (Fed. Cir. 2019)

- Northrop also amended its PRB plans, capping the amount it would contribute for future healthcare costs and thereby reducing its obligation by $307 million.
- ASBCA found that Northrop never incurred the disallowed costs and that the Government had not paid, and would never pay, "excess" resulting from the improper accounting.
- On appeal, the Federal Circuit upheld the ASBCA's decision.

As (almost) Always It Depends:

Kudsk Constr., Inc. v. U.S., 144 Fed. Cl. 446 (2019)

- Plausible claim for unabsorbed overhead costs existed even though notice to proceed not issued
  - Kudsk filed a claim for administrative and overhead costs incurred while waiting for a NTP following competitor bid protest
  - Government moved to dismiss for failure to state a claim, arguing that Kudsk did not meet the prerequisites for an award of unabsorbed overhead as stated in *Nicon* case
  - COFC denied Government's motion
    - *Nicon* does not categorically bar claims for unabsorbed overhead based on delays that occur prior to issuance of NTP
    - Thus, the complaint contained a plausible unabsorbed overhead claim under *Nicon*

CAS Board (Slowly) Moving Towards GAAP

- Cost Accounting Standards Board ("Board") Meeting Recent Legislative Requirements to Conform with Generally Accepted Accounting Principles ("GAAP")
  - On Sept. 2020, the Board issued notice in the Fed. Reg. and published a Staff Discussion Paper on possibly conforming CAS 404, Capitalization of Tangible Assets, and CAS 411, CAS Accounting for Acquisition Costs of Material, to GAAP.
  - The Board previously announced its intent to focus on the seven standards regarding cost measurement and assignment to accounting periods first, as those standards have the most potential overlap with GAAP.

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CAS Board (Slowly) Moving Towards GAAP (Cont.)

- CAS Board Issues NPRM on November 5, 2020. 85 Fed. Reg. 70572
  - Seeking input for Conforming CAS with GAAP for:
    - Operating revenue
    - Lease accounting

CLE Code: 2020-147

M&A and Small Business Developments – Ramping Up or Off?

John Jensen

Robert Starling

M&A and Small Business Developments – *Ramping Up or Off?*

- SBA Rule Changes & Clarifications
- Survey of Small Business MACs

SBA Rule Changes & Clarifications

- Overview
  - Small Business Administration Final Rule (85 FR 66146)
  - Effective Date: November 16, 2020
  - "Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments"
  - Rule changes go well beyond consolidation of the MP programs
  - Changes affect small business development and have a number of M&A ramifications

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SBA Rule Changes & Clarifications

- Mentor-Protégé Program
  - Merges the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program
  - Refresher:
    - Authorizes mentoring and provides a waiver of affiliation
    - Potential 6-year life to a MP relationship
    - Most notably permits joint ventures between mentor and protégé
    - Rigorous requirements for joint venture agreements

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SBA Rule Changes & Clarifications

- Mentor-Protégé Program Changes
  - Adds an 18-month termination rule
  - Authorizes SBA intervention
  - Allows for substitution of a mentor
  - Fleshes out the “no prior experience” limitation on MP approval

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SBA Rule Changes & Clarifications

- Refresher – The General Size Rule
  - A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract.
  - Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business.

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SBA Rule Changes & Clarifications

- Recertification exception --
  - Except that a required recertification changes the firm's status for future options and orders.
- Recertification events:
  - Merger or acquisition
  - If a contract extends past 5 years
  - If requested by a contracting officer

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SBA Rule Changes & Clarifications

- Impact of M&A on Pending Proposals
  - Previous Rule: If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.

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SBA Rule Changes & Clarifications

- Impact of M&A on Pending Proposals
  - New Rule: If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principle) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principle) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

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SBA Rule Changes & Clarifications

- New Recertification Rule for Unrestricted MACs
  - Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business, a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.

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SBA Rule Changes & Clarifications

- Joint Ventures – Generally:
  - Facility Clearance. Allows that individual partners, rather than the JV entity, may hold the FCL
  - New Two-Year Rule. Replaces the "3-in-2" rule with a rule that joint ventures have a two-year time limit starting from the date of its first award/novation
  - No SBA Approval. Eliminates the requirement that SBA approve a joint venture before it may be awarded an 8(a) contract

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SBA Rule Changes & Clarifications

- Joint Ventures – All Small Businesses – Recertification
  - **Previous Rule:** 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.

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SBA Rule Changes & Clarifications

- Joint Ventures – All Small Businesses -- Recertification
  - **New Rule:** In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

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SBA Rule Changes & Clarifications

- Joint Ventures – Mentor-Protégé
  - **New language on control:** The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

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SBA Rule Changes & Clarifications

- Joint Ventures – Mentor-Protégé
  - Application of the Similarly Situated Firms rule:
    - 50% JV Performance Requirement/Limitation on Subcontracting
      - Similarly situated firms – **Yes**
    - 40% Protégé Performance Requirement
      - Similarly situated firms – **No**

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Survey of Small Business MACs

Survey of Small Business MACs

- Contractors are required to recertify size status after an M&A event.
- Many MACs contain contract provisions that specifically address the impact of losing small business status due to an M&A event.
- After an M&A event where the contractor loses its small business status, some MACs allow contractors to continue performance or even compete for new task orders, while other MACs require a contractor to be immediately off-ramped.

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SBA Regulations

General Rule – 13 C.F.R. §121.404(g)

- Under this general rule, a concern that qualifies small under a contract remains small for each task order issued under that contract.
  - Unless the Contracting Officer requests a new size certification at the task order level. 13 C.F.R. §121.404(g)
- Even after a concern becomes other than small (organic growth), if it obtained a contract as a small business, the concern can continue competing for task orders under that contract, and the Agency can claim Small Business credit for awarding task orders to that concern.

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SBA Regulations *(cont.)*

- However, if a concern is involved in a "merger, sale, or acquisition," it must recertify its status within 30 days of the transaction becoming final. 13 C.F.R. §121.404(g)(1)-(4); FAR §52.219-28.
- After the concern recertifies as "other than small," agencies can no longer claim Small Business credit. 13 C.F.R. §121.404(g)(1)-(4).
- Agencies still can (subject to the terms of the contract):
  - Award new task orders to that concern;
  - Issue amendments and modifications;
  - Exercise options.

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Losing Small Business Status

- The following slides discuss provisions in some of the more popular MACs.
- The slides do not address what an agency's policy or practice is following an M&A event, the slides only address the specific contract language of a MAC.

MACs Without Relevant SB Provisions

- The following MACs do not specifically address what happens when a contractor loses its small business status:
  - **SEWP** – Solutions for Enterprise-Wide Procurement – NASA
  - **CIO-SP3** – Chief Information Officer–Solutions and Partners 3 – NIH
  - **RS3** – Responsive Strategic Sourcing for Services – Army
  - **E-SITE** – Enhanced Solutions for Information Technology Enterprise – DIA
  - **ITES-3S** – Information Technology Enterprise Solutions – 3 Services – Army

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OASIS SB – GSA

- After an M&A event, if the Contractor's socioeconomic status changes, the Contractor is not eligible to receive set-aside task orders in the socioeconomic categories for which the Contractor no longer qualifies.
- If the Contractor's size standard changes from a small business to other than a small business and the Contractor has active task orders, the Contractor shall be placed in Dormant Status, meaning the Contractor shall not be eligible to participate or compete in any subsequent task order solicitations.
- After all the active task orders are closed out, the Contractor shall be Off-Ramped and the Contractor shall not be eligible to transfer into another pool.
- Upon a novation, merger, or acquisition, if the successor Contractor's size standard remains a small business concern, the successor Contractor will automatically inherit the duties and responsibilities of the predecessor Contractor under the NAICS code assigned to the Pool(s) that corresponds to the Contractor's respective OASIS SB Multiple Award Contract Number(s).

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8(a) STARS II – GSA

- The ordering period for the 8(a) STARS II GWAC ends August 30, 2021. Orders awarded on or before June 30, 2020, may continue performance through August 30, 2024. Orders awarded on or after July 1, 2020 must be complete by June 30, 2022.
- If a firm is no longer small as a result of organic growth, GSA would consider allowing the firm to retain their STARS II contract pursuant to the 8(a) program framework which permits this.
- If a firm has been through a merger or acquisition with a non8(a) organization, and is no longer a small business concern, that firm has responsibilities to coordinate with the SBA regarding continued 8(a) eligibility. In such an instance, GSA would request SBA to render an 8(a) eligibility determination for the new organization. SBA's determination would determine continued eligibility under STARS II.

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8(a) STARS III – GSA

- Solicitation closed on August 26, 2020. Awards are planned for Spring 2021.
- Contractor required to notify and provide certain details to the STARS III PCO relating to a novation, or merger and acquisition. The Contractor must present an approved SBA waiver per 13 CFR 124.515 for the ownership change to be considered.
- OCOs have the discretion to require a re-representation of the Contractor's size status as a condition of competitive order award.

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T4NG – VA

- The Transformation Twenty-one Total Technology Next Generation contract (T4NG) with the Department of Veterans Affairs does not definitively state that contractors cannot continue to participate in task order competitions if they are no longer small.
- Instead, the contract states that the Government "may" off-ramp a SDVOSB or VOSB if it is acquired by a non-SDVOSB or non-VOSB, or off-ramp a small business if it is acquired by a large business.
- Contractors are required to notify the Government within 15 days of any change in ownership of the company.

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SETI – DISA

- The Systems Engineering, Technology, and Innovation contract (SETI) with the Defense Information Systems Agency prohibits contractors from participating in new task order competitions if they re-certify as no longer small at the end of the fifth year of the contract.
- Notably, contractors that recertify as no longer small are not moved to the unrestricted pool.
- In the event of a merger or acquisition that changes a small business status to other than small business, the contractor is immediately placed in dormant status and will be off-ramped at the next option period or, if no option periods remain, may be off-ramped through a termination for convenience.

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EAGLE II – DHS

- Enterprise Acquisition Gateway for Leading-Edge Solutions II with the Department of Homeland Security.
- If the size of a contractor changes due to an acquisition or merger at any point during the life of the contract, the Prime contractor must notify the EAGLE II CO within thirty (30) days.
- If the contractor is no longer a small business, they can no longer participate in any future task order competitions under the EAGLE II program, but will be able to complete the work on current task orders.
- Once the current task order(s) are complete, the contractor will be removed from the EAGLE II contract.

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NETCENTS 2 – Air Force

- The Network-Centric Solutions-2 contracts with the Air Force have different requirements for small business that grow naturally and businesses that grow due to merger or acquisition.
- Small business contractors that are unable to recertify as a small business concern based solely on internal growth are eligible for transition to the unrestricted pool.
- Small business contractors unable to recertify as a small business concern because of a merger, acquisition, or any circumstance that requires the execution of a novation agreement under FAR Subpart 42.12 are NOT eligible for transition to the unrestricted pool.

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NETCENTS 2 SBEAS – Air Force

- The Air Force Small Business Enterprise Applications Solutions (SBEAS) is a new vehicle to replace the Application Solutions Small Business currently in use via NETCENTS 2 IDIQ.
- In the case of a merger, sale, 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.

NETCENTS 2 SBEAS – Air Force (cont.)

- Recertification is required:
  - When a concern, or an affiliate of the concern, acquires or is acquired by another concern;
  - From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and
  - 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.
  - If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.

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Seaport NG – Navy

- To be eligible as a Small Business, Service Disabled Veteran Owned Small Business (SDVOSB), Women-Owned Small Business, 8(a) Business, or HubZone Business during the competitive ordering process, the Offeror must have had that status at the time of Task Order proposal submission.
- If a Contractor merges, is acquired, or recognizes a successor in interest to Government contracts when Contractor assets are transferred the Contractor must notify the SeaPort-NxG PCO and provide a copy of the novation or any other agreement that changes the status of the Contractor, including the new DUNS/CAGE code numbers, within thirty (30) days. The Contractor may not submit task order proposals under the new company name until a Contract Modification has made the change effective.

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Seaport NG – Navy (cont.)

- The Contractor, either through its parent, affiliates, subsidiaries, business units, etc. is permitted to hold one SeaPort-NxG Multiple Award Contract (MAC) in total. The MAC is not a tangible item and may not be sold. If two or more MACs are acquired by a single SeaPort-NxG awardee either via a merger or acquisition, the successor in interest will recognize only one existing SeaPort-NxG MAC; all task orders from the acquired MAC shall be novated to the successor in interest; and the additional MAC shall be terminated for convenience at no cost to the Government.

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JETS – DLA (cont.)

- Defense Logistics Agency (DLA) J6 Enterprise Technology Services (JETS) states that all small business contractors that receive IDIQ awards will be authorized to receive small business set-aside task orders for the first five years of the IDIQ performance period.
- 120 days prior to the end of the base period, all small business IDIQ holders will be requested to re-certify to maintain their small business status for the last three years of the IDIQ.

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JETS – DLA (cont.)

- A small business contractor that has lost its small business status after the re-certification process may continue to hold its IDIQ contract but will only be permitted to compete for task orders in the unrestricted group.
- All small business and 8(a) IDIQ holders that lose their small business status following the recertification process, will be required to submit a Contractor Teaming Arrangement (CTA) Plan showing the ability to allocate a minimum of 40% of all task order dollars to small businesses.

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Questions?

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