



# Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities

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## Summary

The widely reported increase in federal contract dollars awarded to Alaska Native Corporations (ANCs) and their subsidiaries in recent years has generated congressional and public interest in the legal authorities that govern contracting with these entities. Currently, federal agencies may contract with ANCs or their subsidiaries under several different statutory authorities. These include (1) the Armed Services Procurement Act (ASPA) and the Federal Property and Administrative Services Act (FPASA); (2) Section 8(a) of the Small Business Act; and (3) Section 15 of the Small Business Act. The identity of the procuring agency and the size of the ANC or ANC-owned firm, in part, determine which authority is used in particular circumstances.

ASPA and FPASA, for example, generally give defense and civilian agencies, respectively, broad authority to contract with any qualified, responsible source, including ANCs and their subsidiaries. Contractors do not need to be “small” in size, or for-profit entities, as they generally must be to receive contracts under the Small Business Act. ASPA and FPASA also authorize agencies to make sole-source awards in certain circumstances (e.g., unusual and compelling urgency), although such awards must be justified in writing and approved by agency officials.

Two sections of the Small Business Act also permit contracts with certain ANCs or their subsidiaries. Section 8(a) of the act authorizes agencies to contract with small businesses owned and controlled by socially and economically disadvantaged individuals or groups participating in the “8(a) Program.” ANCs are deemed to be socially and economically disadvantaged, and ANC-owned firms may participate in the 8(a) Program. Under Section 8(a), agencies may conduct competitions in which only 8(a) firms may compete (i.e., set-asides), as well as make sole-source awards in circumstances where such awards would not be permitted under ASPA or FPASA. 8(a) contracts valued in excess of \$4 million (\$6.5 million for manufacturing contracts) must generally be competed among 8(a) firms. However, Section 8(a) authorizes sole-source awards of such contracts to 8(a) firms if (1) the contracting officer does not reasonably expect that at least two 8(a) firms will submit offers at a fair market price; or (2) the Small Business Administration accepts the requirement on behalf of an 8(a) firm owned by an ANC or other disadvantaged group. Sole-source contracts under the authority of Section 8(a) historically did not need to be justified or approved. However, since 2009, agencies have been required to justify and obtain approval for sole-source 8(a) contracts valued in excess of \$20 million (base plus options). Section 15 of the Small Business Act also authorizes set-asides (but not sole-source awards) for various types of small businesses. ANC-owned small businesses not participating in the 8(a) Program could receive awards under the authority of Section 15.

In addition, several other statutes create incentives for agencies to contract with ANCs or their subsidiaries by, for example, allowing contracts with “large” ANCs to count toward federal prime contractors’ goals for subcontracting with small businesses. Similarly, various appropriations riders permit the Department of Defense to contract out functions performed by government employees to ANCs without going through the customary competitive sourcing process.

Members of the 112<sup>th</sup> Congress have introduced legislation (H.R. 598, S. 236) that would generally subject ANC-owned firms participating in the 8(a) Program to the same treatment as individually owned firms. Among other things, this legislation would limit the circumstances in which ANC-owned firms could receive sole-source awards valued in excess of \$4 million (\$6.5 million for manufacturing contracts) under the authority of Section 8(a) of the Small Business Act.

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## Introduction

The widely reported increase in federal contract dollars awarded to Alaska Native Corporations (ANCs) and their subsidiaries in recent years has generated congressional and public interest in the legal authorities governing contracting with these entities. Of particular interest are the authorities creating the alleged “special procurement advantages” that ANC subsidiaries enjoy in contracting under the Small Business Administration’s Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program).<sup>1</sup>

According to some reports, federal contract dollars awarded to ANCs and their subsidiaries increased by 916% between FY2000 and FY2008, going from \$508.4 million to \$5.2 billion.<sup>2</sup> The dollars awarded to ANC-owned firms through the 8(a) Program, in particular, reportedly tripled between FY2004 (\$1.1 billion) and FY2008 (\$3.9 billion).<sup>3</sup> Critics are concerned about the impact of these increases on other minority-owned businesses participating in the 8(a) Program,<sup>4</sup> as well as the potential for fraud, waste, and abuse when agencies make sole-source awards to ANCs or their subsidiaries.<sup>5</sup> However, supporters of contracting programs for ANCs point out that, even with the recent increases, contracting with ANCs and their subsidiaries represents a small percentage of federal contract dollars.<sup>6</sup> They also note that profits from federal contracts are vital to improving the economic well-being of Alaska Natives.<sup>7</sup>

Members of the 112<sup>th</sup> Congress have introduced legislation (H.R. 598, S. 236) that would generally subject ANC-owned firms participating in the 8(a) Program to the same treatment as individually owned firms. Among other things, this legislation would preclude ANC-owned firms from receiving sole-source awards valued in excess of \$4 million (\$6.5 million for manufacturing contracts) under the authority of Section 8(a) of the Small Business Act. Also, in 2011, SBA

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<sup>1</sup> Office of the Inspector General, U.S. Small Business Administration, Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations, at 2 (July 10, 2009), available at [http://www.sba.gov/sites/default/files/oig\\_reptbydate\\_july9-15\\_0.pdf](http://www.sba.gov/sites/default/files/oig_reptbydate_july9-15_0.pdf).

<sup>2</sup> U.S. Senate, Committee on Homeland Security & Governmental Affairs, Subcommittee on Contracting Oversight, Majority Staff, New Information about Contracting Preferences for Alaska Native Corporations (Part I), at 1 (2009), available at <http://www.hsgac.senate.gov/imo/media/doc/SubcommitteeMajorityStaffAnalysisofPubliclyAvailableANCDATA62309.pdf?attempt=2>.

<sup>3</sup> Participation in the 8(a) Program, *supra* note 1, at 4. More recently, the Government Accountability Office (GAO) has reported that the dollars obligated to “tribal 8(a) firms,” which include ANC-owned 8(a) firms, increased from \$2.1 billion in FY2005 to \$5.5 billion in FY2010, and that such firms got nearly one-third of all 8(a) obligations, although they constituted only 6.2% of 8(a) firms. See Gov’t Accountability Office, Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention, GAO-12-84 (Jan. 2012), available at <http://www.gao.gov/products/GAO-12-84>.

<sup>4</sup> See, e.g., *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations: Joint Hearing Before the Committee on Government Reform and the Committee on Small Business, House of Representatives, 109<sup>th</sup> Cong., 2d Sess.*, at 173-74 (2006) (statement of Harry Alford, President and CEO, National Black Chamber of Commerce) (characterizing ANCs as “predators on the minority business community”).

<sup>5</sup> See, e.g., *id.* at 161 (statement of Representative Henry A. Waxman).

<sup>6</sup> See, e.g., Native American Contractors Association, Native American Contracting under Section 8(a) of the Small Business Act: Economic, Social, and Cultural Implications, at 3 (October 2007) (copy on file with the authors) (noting that, in FY2005, contracts with ANCs represented less than 1% of all federal contracts, less than 2% of all sole-source contracts, less than 3% of all small business contracts, and less than 20% of all 8(a) contracts).

<sup>7</sup> *Id.* at 11-12 (discussing the dividends paid and job opportunities provided by ANCs, among other things).

promulgated regulations that seek to address alleged issues regarding ANCs' participation in the 8(a) Program (e.g., requiring annual reporting on ANCs' benefits to Alaska Natives).

## **The History of Contracting Programs for ANCs**

### **Alaska Native Claims Settlement Act and ANCs**

The Small Business Administration's (SBA's) 8(a) minority contracting program slightly predates the creation of Alaska Native Corporations. The 8(a) minority contracting program dates from the late 1960s, when it was created administratively.<sup>8</sup> The SBA considered Indian tribes eligible for the 8(a) minority contracting program, as indicated by a September 1970 SBA pamphlet encouraging Indian tribes and individuals to participate in the 8(a) Program.<sup>9</sup>

### **Creation of Alaska Native Corporations**

ANCs were created under the authority of the Alaska Native Claims Settlement Act (ANCSA),<sup>10</sup> enacted in 1971 to settle Alaska Natives' aboriginal land claims to most of Alaska. Congress's stated intent in passing ANCSA—shared by Alaska Native organizations and the state of Alaska—was to settle the claims

without establishing any permanent racially defined institutions ... without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges.<sup>11</sup>

To carry out this intention, Congress authorized Native corporations, not tribes, to receive the lands and monies awarded in the settlement. Unlike Indian trust lands, the corporations' lands would be held in fee simple and could be developed without federal approval.<sup>12</sup>

Congress intended ANCs to be vehicles for the economic development of Alaska Natives. The conference report on ANCSA stated that

the Regional Corporations shall be organized as business for profit corporations.... [T]he investment functions to be carried out by the [state-wide] Alaska Native Investment Corporation [under the Senate version] have been assigned ... to the Regional Corporations.<sup>13</sup>

The intended functions of this state-wide Investment Corporation, according to the earlier Senate committee report on its bill, were to:

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<sup>8</sup> See CRS Report R40744, *The "8(a) Program" for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by Kate M. Manuel and John R. Luckey.

<sup>9</sup> U.S. Small Business Administration, *Developing Indian Owned Businesses Through the Assistance of the 8(a) Program of the Small Business Administration* (September 1970).

<sup>10</sup> P.L. 92-203, 85 Stat. 688 (codified, as amended, at 43 U.S.C. §§1601-1629h).

<sup>11</sup> *Id.* at §2(b); 43 U.S.C. §1601(b).

<sup>12</sup> Robert D. Arnold, with Janet Archibald et al., *Alaska Native Land Claims* 106, 120, 274-76 (1976).

<sup>13</sup> U.S. Congress, House Conference Committee, *Alaska Native Claims Settlement Act: Conference Report to Accompany H.R. 10367, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess.*, at 41-42 (1971).

conduct business for profit activities and to provide a long-range return through dividends to its Native stockholders. The Investment Corporation thus is intended to act as a prudent businessman would, and to administer the Natives' funds with the object of maximizing the value of their stock and their future unrestricted income.<sup>14</sup>

ANCSA created four types of ANCs, all to be incorporated under state law:

- 12 regional corporations, based on the regions of 12 specified Alaska Native associations, covering the entire state (plus a 13<sup>th</sup> regional corporation for Alaska Natives permanently residing outside Alaska);
- village corporations, for Alaska Native communities with populations of 25 or more Natives;
- group corporations, for Alaska Native communities with populations of fewer than 25 Natives in which Natives constituted a majority; and
- urban corporations, for urban Alaska Native communities.

An Alaska Native could become a voting shareholder in both the local regional corporation and the local village, group, or urban corporation.

As compensation for settling the land claims, ANCSA provided for the conveyance of some 40 million acres (including subsurface rights) and \$962.5 million to the ANCs, chiefly to the 12 regional corporations and the village corporations. The settlement lands were to be divided among the 12 regional corporations based on the acreage of their regions and among the village corporations based chiefly on their populations. Group and urban corporations were to receive a set number of acres apiece. (Conveyance of title to the ANCs is the responsibility of the Bureau of Land Management, which reported in its FY2013 budget justifications that 59% of the lands to be conveyed had been surveyed and patented to the ANCs.)<sup>15</sup> The settlement funds were to be paid out over a number of years and divided among the regional corporations (including the 13<sup>th</sup> corporation) based on their population. Each regional corporation was to distribute at least half of its share of these funds to the village corporations in its region.

As noted above, the ANCs were to hold their ANCSA lands in private fee title, not in the trust title usual for Indian lands, and subject to federal, state, and local taxation in specified circumstances. The regional corporations were to operate as for-profit entities, and the village corporations as either for-profit or non-profit entities. Their revenues from investment of their settlement funds were to be subject to taxation.

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<sup>14</sup> U.S. Congress, Senate Interior and Insular Affairs Committee, *Alaska Native Claims Settlement Act of 1971: Report to Accompany S. 35, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess.*, at 105 (1971). See also Arnold et al., *supra* note 12, at 281.

<sup>15</sup> U.S. Dep't of the Interior, Budget Justifications and Performance Information, Fiscal Year 2013, Bureau of Land Management, at VIII-138 (2012), available at [http://www.doi.gov/budget/appropriations/2013/upload/FY2013\\_BLM\\_Greenbook.pdf](http://www.doi.gov/budget/appropriations/2013/upload/FY2013_BLM_Greenbook.pdf).

## Definition of ANCs as Tribes

### The Indian Self-Determination and Education Assistance Act of 1975

Congress has taken several steps to assist ANCs. An important step in relation to the 8(a) Program came in 1975, when Congress included regional and village ANCs in the definition of “Indian tribe” in a major Indian law, the Indian Self-Determination and Education Assistance Act of 1975:

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.<sup>16</sup>

### 8(a) Definition of Tribes

This 1975 definition of “Indian tribe” was used in two later amendments to the Small Business Act. First, in 1978, the definition was incorporated by reference in an amendment specifying that small businesses wholly owned by Indian tribes were eligible for the loan program implemented under the authority of Section 7(a) of the act.<sup>17</sup> Second, 1986 amendments to the Small Business Act used the language of the 1975 definition when making “economically disadvantaged” Indian tribes and ANCs eligible for the 8(a) Program.<sup>18</sup> These 1978 and 1986 amendments to the Small Business Act were each added after Indian tribes complained about SBA officials’ varying opinions as to whether Indian tribes were eligible for the 7(a) and 8(a) Programs.<sup>19</sup>

## ANCs Deemed Economically Disadvantaged

The 1986 amendments meant that tribes and ANCs still had to prove they were economically disadvantaged to be eligible for the 8(a) Program. In 1988, ANCSA was amended to specify that “Native Corporations” (ANCs) were to be considered “minority business enterprises” for all purposes of federal law.<sup>20</sup> Designation as minority business enterprises did not, however, lead the SBA to deem ANCs to be economically as well as socially disadvantaged. According to 1991 testimony of the Alaska Federation of Natives,

[w]hen the ANCSA amendments of 1987 [P.L. 100-241] were being legislated, the parties involved agreed to include an amendment that would make it clear that Alaska Native

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<sup>16</sup> P.L. 93-638, §4(e), 88 Stat. 2204 (codified, as amended, at 25 U.S.C. §450b(e)) (January 4, 1975). Inclusion as Indian tribes made ANCs eligible for contracts and grants to operate Bureau of Indian Affairs and the Indian Health Service programs under this act.

<sup>17</sup> P.L. 95-507, §231, 92 Stat. 1772 (October 24, 1978); 15 U.S.C. §636(a).

<sup>18</sup> Consolidated Omnibus Budget Reconciliation Act, P.L. 99-272, §18015, 100 Stat. 370-71 (April 7, 1986); 15 U.S.C. §637(a).

<sup>19</sup> See, e.g., U.S. Congress, Senate Small Business Committee, *S. 1022, A Bill to Make Small Businesses Owned by American Indian Tribes Eligible for the SBA 8(a) Program: Hearings, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess.*, at 28 (1983) (discussing the Section 7(a) loan program); U.S. Congress, Senate Small Business Committee, *Amending Section 8(a) of the Small Business Act: Report to Accompany S. 1022, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess.*, at 4-5 (1983) (discussing the 8(a) Program).

<sup>20</sup> P.L. 100-241, §15, 101 Stat. 1812 (February 3, 1988) (amending Section 29 of ANCSA, codified at 43 U.S.C. §1626(e)(1)).

corporations were eligible for SBA minority programs. At that time, congressional staff relied on the fact that “disadvantaged business enterprises” (called DBE’s), were a subset of “minority business enterprises” (called MBE’s), and would thus be covered by the explicit inclusion of Native corporations and specified affiliates as MBE’s.... Since then, we have found that SBA is distinguishing disadvantaged business enterprises from minority business enterprises, saying that a statutory definition as an MBE does not qualify Native corporations as DBE’s for purposes of SBA programs.<sup>21</sup>

In 1992, Congress further amended ANCSA to clarify that Native Corporations were to be considered “economically disadvantaged” for all purposes of federal law.<sup>22</sup> Since 1988, according to Government Accountability Office (GAO) figures, ANCs have consistently increased their involvement in the 8(a) Program, as measured by the number of ANCs owning subsidiaries that participate in the 8(a) Program.<sup>23</sup>

### **ANCs’ Economic Performance**

ANCs were to be ANCSA’s vehicles—the “engines,” as it were—for the economic development of Alaska Natives. However, the variation among regions and villages in acreage and population meant that ANCs differed widely in their shares of the \$962.5 million settlement fund and the 40 million acres to be conveyed. The 12 land-based regional corporations, which together cover the entire state of Alaska, also varied not only in the size of their regions but in their regions’ economic resources and activities. Likewise, the village, group, and urban corporations, which are scattered unevenly across the 12 regions, varied in their degree of isolation and the economic activity of their surroundings. Hence, ANCs differed widely in their initial ANCSA funding, the land-based resources they received, and their opportunities for economic development.

Since 1971, the ANCs have also differed widely in their business success, growth, income, and losses, but an overall pattern of loss, recovery, and gradual expansion has been suggested by several observers.

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<sup>21</sup> U.S. Congress, Senate Energy and Natural Resources Committee, Subcommittee on Public Lands, National Parks, & Forests, *Alaska Land Status Technical Corrections Act of 1991: Hearing on S. 1625, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess.*, at 25 (1992) (prepared statement of Julie Kitka, President, Alaska Federation of Natives).

<sup>22</sup> P.L. 102-415, §10, 106 Stat. 2115 (October 14, 1992); 43 U.S.C. §1626(e)(1). The House committee report on the bill stated that it was amending Section 29 of ANCSA

to clarify that Alaska Native corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs. Section 15(e) of the 1987 Amendments to ANCSA (P.L. 100-241) provided that Alaska Native corporations shall be defined as minority business enterprises for as long as a majority of both the total equity and total voting power of the corporation is held by holders of Settlement Common Stock and by Natives and descendants of Natives. This section would further clarify that Alaska Native corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for the purposes of qualifying for participation in Federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program.... While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their ‘economic’ disadvantage the corporations would still be required to meet size requirements as small businesses.

U.S. Congress, House Interior and Insular Affairs Committee, *Settlement of Certain Claims Under the Alaska Native Claims Settlement Act: Report to Accompany H.R. 3157, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess.*, at 19 (1992).

<sup>23</sup> Government Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations’ Special 8(a) Provisions Calls for Tailored Oversight*, GAO-06-399, at 26 (April 2006), *available at* <http://www.gao.gov/products/GAO-06-399>.



## Loss

In the 1970s, ANCs organized themselves, made their land selections, and received their ANCSA payments. The last major ANCSA payments to regional ANCs were made in 1980.<sup>24</sup> In the 1970s and 1980s, the ANCs invested in a wide variety of business operations, such as hotels, seafood processing, shipping, oilfield services, and construction, as well as in natural resources. Their businesses and investments were chiefly in Alaska. However, as a group, regional ANCs lost substantial amounts of money in the period of 1971-1985, especially in non-resource business operations. “The [regional] corporations altogether lost money on business operations every year except 1974 and 1985,” according to economist Steve Colt.<sup>25</sup> The same analyst later stated,

the consolidated financial performance of the Alaska Native corporations over their first two decades was surprisingly poor. The twelve regional corporations lost about \$380 million—more than three quarters of their original cash endowment—in business operations between 1973 and 1993.<sup>26</sup>

At the same time, the ANCs struggled with the significant financial costs of litigation to determine how ANCSA was to be applied and interpreted. There was “heavy litigation”<sup>27</sup> over land selections, Native village and group eligibility, individual Natives’ enrollment, ANC elections and corporate governance, revenue-sharing among regional ANCs and with village ANCs,<sup>28</sup> and other issues.<sup>29</sup>

During this period, ANCs reportedly had little or no involvement in the SBA’s 8(a) Program.<sup>30</sup>

## Recovery

What allowed the ANCs to recover, apparently, was their brief, unique opportunity to sell net operating losses (NOLs)<sup>31</sup> to other U.S. companies between 1986 and 1988. The ANCs’ sale of

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<sup>24</sup> Steve Colt, Financial Performance of Native Regional Corporations, 28 *Alaska Rev. of Soc. & Econ. Conditions* 9-10 (1991).

<sup>25</sup> *Id.* at 3.

<sup>26</sup> Steve Colt, *Alaska Natives and the “New Harpoon”: Economic Performance of the ANCSA Regional Corporations*, at 3 (February 2, 2001), available at [http://www.iser.uaa.alaska.edu/Publications/colt\\_newharpoon2.pdf](http://www.iser.uaa.alaska.edu/Publications/colt_newharpoon2.pdf).

<sup>27</sup> James D. Linxwiler, The Alaska Native Claims Settlement Act at 35: Delivering on the Promise, *Proceedings of the 53<sup>rd</sup> Annual Rocky Mountain Mineral Law Institute*, at 4 (2007), available at [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/e-book%20layout/C/C.1/ANCSA%20at%2035%20Delivering%20on%20the%20Promise.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/e-book%20layout/C/C.1/ANCSA%20at%2035%20Delivering%20on%20the%20Promise.pdf).

<sup>28</sup> Section 7(i) of ANCSA, codified at 43 U.S.C. §1606(i), provides for the distribution of 70% of a land-based regional ANC’s net revenues from its timber and subsurface resources among the other land-based regional ANCs, with some limitations. Section 7(j), codified at 43 U.S.C. §1606(j), provides for the further distribution of some of the timber and subsurface income from regional ANCs to village ANCs and certain shareholders.

<sup>29</sup> See Linxwiler, *supra* note 27.

<sup>30</sup> According to an *Alaska Business* article, a subsidiary of the Arctic Slope Regional Corporation, called Piquik Management Corporation, was the first ANC subsidiary to be 8(a) certified, and it won its first contract in the late 1980s. See Julie Stricker, 8(a) Program Benefits Native Corporations, *Alaska Bus. Monthly*, June 2003, at 63.

<sup>31</sup> Internal Revenue Code §172. NOLs may be deducted from gross income in certain past or future years, thereby reducing tax liability in those years. During the early 1980s, any U.S. corporation with NOLs could sell its NOLs to another corporation. See Colt, *supra* note 26, at 13.

NOLs provided an estimated \$410 million for regional ANCs and \$500 million for village ANCs.<sup>32</sup>

Congress created the ANCs' window of opportunity for NOL sales in 1986 when it added a provision to the Internal Revenue Code that disallowed sales of NOLs by any corporation except ANCs.<sup>33</sup> Two years later Congress repealed the ANC exception.<sup>34</sup>

“For the regional corporations as a group, NOL sales proceeds provided a cash infusion equal (in real dollars) to two thirds of the original ANCSA payments.”<sup>35</sup> ANC income from NOL sales “essentially recapitalized many of the struggling regional corporations, and put them in position to benefit from the economic boom that began in the early 1990s.”<sup>36</sup>

## Expansion

Given the opportunity to start over, ANCs apparently selected investments more wisely and emphasized diversification, especially in businesses outside Alaska, although they also continued “to do what they do well.”<sup>37</sup> ANCs became active and made profitable investments in tourism (including hotels), oilfield services, communications, catering, real estate, construction, and other businesses, as well as in natural resources (timber and mining). In addition, by about 1992, litigation costs were diminishing.<sup>38</sup>

Some ANCs also became active in federal contracting, especially through the SBA's 8(a) Program. As noted above, the first ANC 8(a) contract was awarded in the late 1980s.<sup>39</sup> However, the 8(a) certification process was considered by many ANCs “arduous” until the 1992 amendment to ANCSA, discussed above, that deemed ANCs economically disadvantaged for purposes of the SBA's 8(a) Program and other federal programs.<sup>40</sup>

By 1992, an *Alaska Business* article had mentioned two regional ANCs as having 8(a) contracts.<sup>41</sup> By 1997, two regional ANCs, Aleut Corporation and Chugach Alaska Corporation, got the bulk

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<sup>32</sup> Julie Stricker, The Maturing of the 13 Regional Corporations, *Alaska Bus. Monthly*, March 2001, at 49 (citing Steve Colt).

<sup>33</sup> P.L. 99-514, §1804(e)(4), 100 Stat. 2801 (October 22, 1986); 26 U.S.C. §1504 note. Linxwiler explains: while it was seeking reorganization pursuant to the bankruptcy laws, [regional ANC] Bering Straits Native Corporation (BSNC), along with its advisors, initiated an effort to engage in the sharing of the tax benefits of its NOLs through transactions with profitable companies with large tax liabilities—in essence, the ANCSA corporation “sold” its losses to the profitable company, which used them as deductions to decrease its tax liability. Senator Ted Stevens (R-AK) was instrumental in obtaining the enactment of a series of statutes that clarified the authority of all Native corporations to enter into such transactions and they eventually became widespread among ANCSA corporations until the authority for them was repealed in 1988.

Linxwiler, *supra* note 27, at 23.

<sup>34</sup> P.L. 100-647, §5021, 102 Stat. 3666 (November 10, 1988); 26 U.S.C. §1504 note.

<sup>35</sup> Colt, *supra* note 24, at 13.

<sup>36</sup> Stricker, *supra* note 32, at 49-50.

<sup>37</sup> Jennifer Forker, 25 Years After ANCSA, *Alaska Bus. Monthly*, November 1996, at 58 and following.

<sup>38</sup> Linxwiler, *supra* note 27, at 4.

<sup>39</sup> Stricker, *supra* note 30, at 63.

<sup>40</sup> *Id.* at 63-64.

<sup>41</sup> Clifford Gerhart, ANCSA Corporations, *Alaska Bus. Monthly*, November 1992, at 25-31.

of their revenues and profits from 8(a) contracts.<sup>42</sup> A chart in a 2006 GAO report on contracting with ANCs shows a gradual but consistent increase in the number of ANCs (of all types) with 8(a) subsidiaries and the total number of such subsidiaries in the 8(a) Program, from very low numbers in 1988 to a total of 49 ANCs and 154 subsidiaries in December 2005.<sup>43</sup> According to GAO, as of 2005, 12 of the 13 regional ANCs had 8(a) subsidiaries, as did 33 village ANCs and 4 urban ANCs (out of a total of 182 village, urban, and group ANCs).<sup>44</sup>

## **Legal Authorities Governing Contracting with ANCs**

Various authorities presently govern contracting between federal agencies and ANCs or ANC-owned firms. These include (1) the general contracting authorities, (2) the general small business authorities, (3) Section 8(a) of the Small Business Act, (4) authorities pertaining to Native Americans, and (5) various appropriations riders. These authorities address the award of contracts, as well as related issues.

### **General Contracting Authorities**

The Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, as amended, give defense and civilian agencies, respectively, broad authority to contract for goods and services.<sup>45</sup> So long as they comply with statutory and regulatory requirements governing solicitation of bids or offers, competition in contracting, and similar matters, agencies may generally make awards to any entity that happens to be the lowest qualified responsible bidder or offeror.<sup>46</sup> This includes ANCs and their subsidiaries.

Moreover, agencies may make sole-source awards to ANCs or ANC-owned firms under the general contracting authorities in the same circumstances in which they can make sole-source awards to other entities. Such circumstances exist when

1. only one source can supply the goods or services,
2. there are unusual and compelling circumstances,
3. the agency seeks to maintain the industrial base,
4. international agreements require the agency to award the contract to a particular entity,

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<sup>42</sup> Vivian Hamilton, Building on Experience, *Alaska Bus. Monthly*, September 1997, at 28 and following.

<sup>43</sup> Contract Management, *supra* note 23, at 26, Fig. 6.

<sup>44</sup> *Id.* at 9.

<sup>45</sup> Armed Services Procurement Act, P.L. 80-413, 62 Stat. 21 (February 19, 1948) (codified at 10 U.S.C. §2302 et seq.); Federal Property and Administrative Services Act, P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified at 40 U.S.C. §471 et seq. and 41 U.S.C. §3301 et seq.).

<sup>46</sup> There are some exceptions to this general rule, such as the prohibition upon contracting with government employees or entities owned or substantially owned and controlled by government employees. See 48 C.F.R. §§3.601-3.602. The exceptions are few and narrow, however.

5. a statute authorizes non-competitive awards or the agency is acquiring brand-name commercial items for resale,
6. considerations of national security keep the agency from advertising its requirements, or
7. a particular award is necessary in the public interest.<sup>47</sup>

Contracting officers must generally justify such sole-source awards in writing<sup>48</sup> and obtain approval of these justifications from their superiors.<sup>49</sup> They must also generally issue a notice of their intent to make a sole-source award prior to awarding the contract.<sup>50</sup>

The general contracting authorities may, in fact, be necessary to make awards to ANCs themselves, as opposed to their subsidiaries or ANC-owned firms, given that some ANCs may not qualify as “small” under the size standards applicable to contracts awarded under the authority of the Small Business Act.<sup>51</sup> The general contracting authorities also do not require that entities be for-profit to receive an award, unlike the small business authorities.<sup>52</sup> Not all ANCs are for-profit,<sup>53</sup> and small non-profit ANCs could receive awards under the general contracting authorities when they could not receive awards under the small business authorities.

## General Small Business Authorities

Contracts could also be awarded to small ANCs or ANC-owned firms under the general small business authorities. Section 15 of the Small Business Act of 1958, in conjunction with Sections 2711 and 2723 of the Competition in Contracting Act of 1984, provides agencies with special authorities for contracting with small businesses.<sup>54</sup> Under these authorities, agencies may “set

<sup>47</sup> 10 U.S.C. §2304(c)(1)-(7) (defense agencies) & 41 U.S.C. §3304(a)(1)-(7) (civilian agencies).

<sup>48</sup> 10 U.S.C. §2304(f) (defense agencies) & 41 U.S.C. §3304(e) (civilian agencies). The justification must include (1) a description of agency needs; (2) the statutory exception upon which the agency relied and a demonstration of the reasons for using the exception that is based upon the proposed contractor’s qualifications or the nature of the procurement; (3) a determination that the anticipated cost will be fair and reasonable; (4) a description of any market survey conducted, or a statement of the reasons for not conducting a market survey; (5) a listing of any sources that expressed, in writing, interest in the procurement; and (6) a statement of any actions that the agency may take to remove or overcome barriers to competition before subsequent procurements.

<sup>49</sup> 10 U.S.C. §2304(f)(1)(B) (defense agencies) & 41 U.S.C. §3304(e)(1)(B) (civilian agencies). The identity of the approving official is determined by the anticipated value of the contract.

<sup>50</sup> 41 U.S.C. §1708.

<sup>51</sup> 15 U.S.C. §632(a)(1)-(2)(A) (statutory definition of “small” for purposes of the Small Business Act); 13 C.F.R. §§121.101-121.108 (defining size in terms of the number of employees or gross income); Participation in the 8(a) Program, *supra* note 1, at 12 (characterizing ANCs as “large”).

<sup>52</sup> See 13 C.F.R. §121.105(a)(1) (“Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”).

<sup>53</sup> See, e.g., Contract Management, *supra* note 23, at 1 (noting that Alaskan village, urban, and group corporations may be either for-profit or nonprofit). Regional corporations, in contrast, must be for-profit. *Id.*

<sup>54</sup> Small Business Act of 1958, P.L. 85-536, §15, 72 Stat. 395 (July 18, 1958) (codified at 15 U.S.C. §644(a)) (“To effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the [Small Business] Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation’s full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total sales of Government property be (continued...)”).

aside” contracts for small businesses—by conducting competitions in which only they can compete—when certain conditions are met.<sup>55</sup> These set-asides can be total or partial, encompassing the entire acquisition or a severable segment of it.<sup>56</sup> Agencies may also make sole-source awards to small businesses when one of the seven circumstances authorizing noncompetitive awards under the general contracting authorities exist, although such awards are made under the general contracting authorities and not the general small business authorities.<sup>57</sup> They are thus subject to the notice, justification, and approval requirements discussed previously.<sup>58</sup>

One of the alleged “special provisions” governing contracting with ANCs, discussed below, arguably assists ANC-owned firms in qualifying as “small” for purposes of contracting under the general small business authorities. While all affiliations between businesses, or relationships allowing one party control or the power of control over another,<sup>59</sup> count when the SBA makes size determinations,<sup>60</sup> certain affiliations with the parent ANC or its subsidiaries are generally excluded when the SBA determines the size of an ANC-owned firm.<sup>61</sup> Although the SBA is authorized to consider these affiliations when not doing so results, or is likely to result, in an ANC-owned firm obtaining a “substantial unfair competitive advantage within an industry category,”<sup>62</sup> the SBA and agencies exercising delegated authority on its behalf<sup>63</sup> reportedly seldom exercise this authority.<sup>64</sup>

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(...continued)

made to small business concerns.”); Competition in Contracting Act, P.L. 98-369, §2711, 98 Stat. 1175-76 (August 18, 1984) (“In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.”) (procurements of civilian agencies); CICA, §2723, 98 Stat. 1187-88 (same) (procurements of defense agencies).

<sup>55</sup> Federal law requires that contracts whose anticipated value is between \$3,000 and \$150,000 be set aside for small businesses *unless* the contracting officer is unable to obtain offers from two or more small businesses that are competitive with market prices and in terms of the quality and delivery of goods or services. 15 U.S.C. §644(j)(1); 48 C.F.R. §19.502-2(a). Contracts whose anticipated value exceeds \$150,000 are similarly required to be set aside for small businesses *if* the contracting officer reasonably expects that offers will be obtained from at least two responsible small businesses offering the products of different small businesses, and the award will be made at a fair market price. 48 C.F.R. §19.502-2(b).

<sup>56</sup> When a total set-aside is not appropriate, an acquisition can generally be partially set aside for small businesses if (1) the requirement is severable into two or more economic production runs or reasonable lots, (2) one or more small businesses are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price, and (3) the acquisition is not subject to simplified acquisition procedures. 48 C.F.R. §19.502-3(a)(1)-(4). Partial set-asides cannot be made when procuring construction work, however. 48 C.F.R. §19.502-3(a).

<sup>57</sup> See *supra* note 47 and accompanying text.

<sup>58</sup> See *supra* notes 48 to 50 and accompanying text.

<sup>59</sup> 13 C.F.R. §121.103(a)(1). Control or the power of control need only exist; it need not be exercised.

<sup>60</sup> 13 C.F.R. §121.103(a)(6) (“In determining the concern’s size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.”).

<sup>61</sup> 15 U.S.C. §636(j)(10)(J)(ii)(II); 13 C.F.R. §121.103(b)(2)(i) (“Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs) authorized by 42 U.S.C. 9805, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered affiliates of such entities.”).

<sup>62</sup> 13 C.F.R. §124.109(c)(2)(iii). (“In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program (continued...)”).

In contrast, ANC-owned firms are not exempt from the requirement that they be “businesses” for purposes of the Small Business Act, which means that they must be for-profit to be awarded contracts under the general small business authorities.<sup>65</sup> They also must self-certify that they are “small,” as measured by the size standards for the goods or services to be procured, when submitting bids or offers for contracts to be awarded under the general small business authorities.<sup>66</sup> However, while there are potentially severe penalties for misrepresentation of size<sup>67</sup> and other entities may generally protest firms’ size,<sup>68</sup> self-certifications are not necessarily closely scrutinized. SBA regulations provide that

A contracting officer may accept a concern’s self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.<sup>69</sup>

## **Section 8(a) of the Small Business Act**

Agencies can also contract with ANC-owned firms, although not necessarily ANCs themselves,<sup>70</sup> under the authority of Section 8(a) of the Small Business Act of 1958, as amended. Section 8(a) generally authorizes set-asides and sole-source awards to “socially and economically disadvantaged small business concerns,” which include firms at least 51% owned and unconditionally controlled by ANCs, Indian tribes, Native Hawaiian Organizations (NHOs) or Community Development Corporations (CDCs).<sup>71</sup> Contracts whose value is at or below the so-

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entry or contract award, the firm’s size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.”). ANCs are included within the definition of “Indian tribe” used here. *See* Omnibus Consolidated Budget Reconciliation Act of 1985, P.L. 99-272, §18015, 100 Stat. 370 (1986) (codified at 15 U.S.C. §637(a)(13)).

<sup>63</sup> 13 C.F.R. §124.501(a).

<sup>64</sup> *See, e.g.*, Contract Management, *supra* note 23, at 37 (reporting that some contracting officers claimed not to know how to determine what constitutes a “substantial unfair competitive advantage” when making size determinations for ANC-owned firms).

<sup>65</sup> 13 C.F.R. §124.109(a)(3).

<sup>66</sup> *See* Small Business Administration, Guide to SBA’s Definitions of Small Business, “Use of Size Standards for Government Procurement,” at 13-14, *available at* [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/guide\\_to\\_size\\_standards.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/guide_to_size_standards.pdf).

<sup>67</sup> *See* 13 C.F.R. §121.108 (including criminal penalties under 15 U.S.C. §645(d)).

<sup>68</sup> 13 C.F.R. §121.1001(a)(2) (authorizing protests of competitive awards by offerors whom the contracting officer has not eliminated for reasons related to size; the contracting officer; and the SBA Government Contracting Area Director with responsibility for the area in which the headquarters of the protested offeror is located). Sole-source awards are treated differently. *See* 13 C.F.R. §1001(b)(2)(ii).

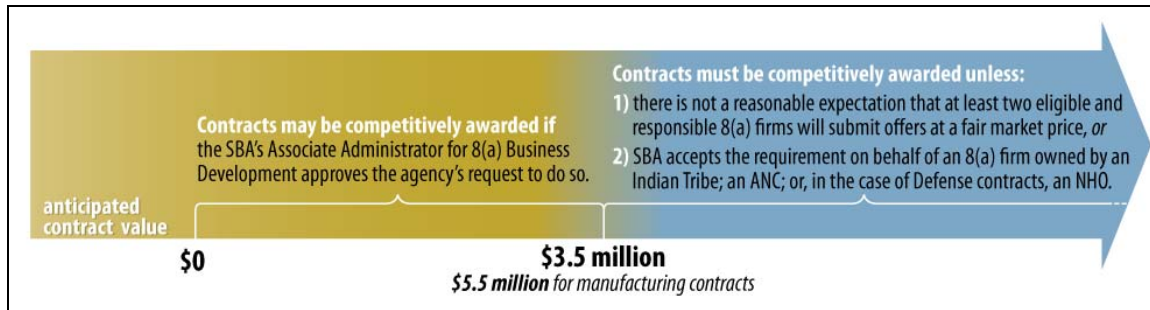
<sup>69</sup> 13 C.F.R. §121.405(b).

<sup>70</sup> The statutes and regulations consistently refer to agencies’ contracting with ANC-owned firms, and individual ANCs could have difficulty qualifying as small under the size standards. Additionally, non-profit ANCs would not qualify as businesses for purposes of the Small Business Act. *See* 13 C.F.R. §124.109(a) (speaking of participation in the 8(a) Program by “ANC-owned concerns”); 13 C.F.R. §§121.101-121.108 (size standards used in determining whether a firm is small); 13 C.F.R. §121.105(a)(1) (defining “businesses” as for-profit entities).

<sup>71</sup> 15 U.S.C. §637(a)(1)(A)-(B). While “socially and economically disadvantaged small business concerns” were originally defined as those owned by one or more socially and economically disadvantaged individuals, Congress later included firms that are at least 51% owned and unconditionally controlled by ANCs, Indian tribes, NHOs, or CDCs. (continued...)

called “competitive threshold” (\$4 million, \$6.5 million for manufacturing contracts) may generally be awarded on a sole-source basis, without the competition among 8(a) firms that would result if the contract were set aside.<sup>72</sup> Contracts whose value exceeds the competitive threshold, in contrast, generally must be set-aside for competitions in which all 8(a) firms may compete *unless* there is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price.<sup>73</sup> See **Figure 1**.

**Figure 1. Competition Requirements for the 8(a) Program**



**Source:** Congressional Research Service.

However, agencies also have special authority to make sole-source awards to ANC- or other group-owned firms under Section 8(a) in circumstances when they could not make awards to individually owned 8(a) firms (e.g., when the contract exceeds the “competitive threshold,” and there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price).<sup>74</sup> Because this authority does not derive from the Competition in Contracting Act (CICA), such awards were not subject to the same requirements regarding justifications, approvals, and notices as other sole-source awards prior to enactment of the National Defense Authorization Act (NDAA) for FY2010.<sup>75</sup> The NDAA for FY2010 changed this

(...continued)

See P.L. 95-507, §202, 92 Stat. 1757 (October 24, 1978) (codified at 15 U.S.C. §637(a)(4)(A)-(B)) (creating statutory authority for the 8(a) Program for minority-owned businesses); Community Development Act of 1981, P.L. 97-35, Ch. 8, Subch. A, 95 Stat. 489 (August 13, 1981) (codified at 42 U.S.C. §§9801 et seq.) (making CDC-owned firms eligible for the 8(a) Program); Omnibus Consolidated Budget Reconciliation Act of 1985, P.L. 99-272, §18015, 100 Stat. 370 (April 7, 1986) (making tribally and ANC-owned firms eligible for the 8(a) Program); Business Opportunity Development Reform Act of 1988, P.L. 100-656, §207, 102 Stat. 3861 (November 15, 1988) (codified at 15 U.S.C. §637(a)(4)) (making NHO firms eligible for the 8(a) Program).

<sup>72</sup> 15 U.S.C. §637(a)(16)(A). A noncompetitive award may be made under this authority so long as (1) the firm is determined to be a responsible contractor for performance of the contract, (2) award of the contract would be consistent with the firm’s business plan, and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan. 15 U.S.C. §637(a)(16)(A)(i)-(iii). For contracts whose value is below the competitive threshold to be awarded competitively, the SBA’s Associate Administrator for 8(a) Business Development must approve the agency’s request to do so. 15 U.S.C. §637(a)(1)(D)(ii); 48 C.F.R. §19.805-1(d).

<sup>73</sup> 15 U.S.C. §637(a)(1)(D)(i)(II); 48 C.F.R. §19.805-1(a)(1)-(2). The text of the Small Business Act, as codified at Section 637(a) of Title 15, currently gives the “competitive threshold” as \$3 million (\$5 million for manufacturing contracts). However, this amount has twice been adjusted for inflation pursuant to Section 807 of the Ronald W. Reagan National Defense Authorization Act for FY2005. See P.L. 108-375, §807, 118 Stat. 2010-11 (October 28, 2004) (requiring that certain “acquisition” thresholds be periodically adjusted for inflation).

<sup>74</sup> 15 U.S.C. §637(a)(1)(D)(i)(I)-(II); 48 C.F.R. §19.805-1(b)(1)-(2) (sole-source awards to tribally or ANC-owned firms); 48 C.F.R. §219.805-1(b)(2)(A)-(B) (sole-source awards to NHO-owned firms).

<sup>75</sup> P.L. 111-84, §811(a)(1)-(3), 123 Stat. 2405-06 (October 28, 2009) (prohibiting agencies from awarding sole-source (continued...))

by requiring justifications, approvals, and notices for sole-source contracts in excess of \$20 million (base plus all options)<sup>76</sup> awarded under the authority of Section 8(a) similar to those required for sole-source contracts awarded under the general contracting authorities.<sup>77</sup> However, justifications, approvals, and notices are still not required for sole-source contracts valued at between \$4 million (\$6.5 million for manufacturing contracts) and \$20 million awarded under the authority of Section 8(a).

While agency discretion in determining whether to procure particular goods or services under the authority of Section 8 (a) is fairly broad,<sup>78</sup> detailed statutory and regulatory requirements govern firms' eligibility for and participation in the 8(a) Program. The places where the statutory or regulatory requirements pertaining to contracting with ANC-owned firms differ from the general 8(a) requirements have attracted the most scrutiny from those concerned about the alleged "special procurement advantages" of ANC-owned firms.<sup>79</sup> These places are briefly summarized in **Table 1**,<sup>80</sup> while a separate report explains the general 8(a) requirements in more detail.<sup>81</sup>

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contracts in excess of \$20 million in "covered procurements" unless "(1) the contracting officer for the contract justifies the use of a sole-source contract in writing; (2) the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and (3) the justification and related information are made public). "Covered procurements" include those described in 10 U.S.C. §2304(f)(2)(D)(ii) and 41 U.S.C. §3304(e)(4)(D), provisions which exempt sole-source contracts awarded under the authority of Section 8(a) of the Small Business Act from the justifications and approvals required for other sole-source contracts.

<sup>76</sup> Section 811 did not itself specify whether these justifications, approvals, and notices are required only when the base value of the contract exceeds \$20 million, or when the base value of the contract *plus all options* exceeds \$20 million. However, regulations promulgated by the Federal Acquisition Regulatory Council on March 16, 2011, clarified that justifications, approvals, and notices are required when the base value of the contract *plus all options* exceeds \$20 million. See Dep't of Defense, Gen. Servs. Admin., Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; Justification and Approval of Sole-Source 8(a) Contracts: Interim Rule, 76 Fed. Reg. 14559 (March 16, 2011). This regulation also clarified that agency heads may generally delegate the authority to approve contracting officers' justifications to other agency personnel and are not required to approve all justifications themselves. *Id.*

<sup>77</sup> P.L. 111-84, at §811(b)(1)-(5). The NDAA for FY2010 requires that justifications for sole-source awards include: (1) a description of the agency's needs; (2) the specific statutory provision authorizing the agency to use other than competitive procedures; (3) a determination that use of a sole-source contract is in the best interest of the agency; (4) a determination that the anticipated cost of the contract will be fair and reasonable; and (5) any other matters that the head of the contracting agency might require. The contents of such justifications thus differ slightly from those required for other sole-source awards under CICA. Under CICA, justifications must include: (1) a description of the agency's needs; (2) the specific statutory provision authorizing the agency to use other than competitive procedures; (3) a determination that the anticipated cost will be fair and reasonable; (4) a description of the market survey conducted or a statement of the reasons for not conducting a market survey; (5) a listing of any sources that expressed an interest in the procurement in writing; and (6) a statement of any actions the agency may take to remove or overcome barriers to competition before future procurements of similar goods or services. See *supra* note 48.

<sup>78</sup> See, e.g., AHNTECH, Inc., B-401092, Comp. Gen. Dec. (April 22, 2009) ("The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.").

<sup>79</sup> See, e.g., *Northern Lights and Procurement Plights*, *supra* note 4, at 178 (statement of Ann Sullivan, President, Madison Services Group, Inc., on behalf of Women Impacting Public Policy) (suggesting that all 8(a) firms should be subject to the same requirements). Firms owned by Indian tribes, NHOs, and CDCs enjoy many, but not all, of the alleged "special procurement advantages" enjoyed by ANC-owned firms. See 13 C.F.R. §124.109(b)-(c) (tribally owned firms); 13 C.F.R. §124.110 (NHO-owned firms); 13 C.F.R. §124.111 (CDC-owned firms). A notable exception is that tribally and NHO-owned firms are not deemed to be economically disadvantaged in the same way that ANC-owned firms are. Compare 13 C.F.R. §124.109(a)(2) (ANC-owned firms) with 13 C.F.R. §124.109(b)(2) (tribally owned firms) and 13 C.F.R. §124.110(c) (NHO-owned firms).

<sup>80</sup> There are also variations in the regulations regarding "good character" and "potential for success." With 8(a) firms generally, SBA checks that the firm and its owner(s) have not engaged in criminal conduct, have not violated SBA (continued...)



**Table I. “Special Rules” for Contracting with ANC-owned Firms Under Section 8(a) of the Small Business Act**

Issue	General 8(a) Rule	“Special Rule” for ANC-Owned Firms	Authority for the “Special Rule”
Exclusion of certain affiliations in size determinations	All affiliations, as defined under SBA regulations, count when the SBA makes size determinations.	Affiliations with the parent ANC or its subsidiaries are excluded when the SBA makes size determinations unless the SBA determines that the ANC-owned firm has obtained, or is likely to obtain, a “substantial unfair competitive advantage within an industry category” if these affiliations are excluded.	15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.109(c)(2)(iii)
Management by non-disadvantaged individuals (as a component of control)	Management and daily business operations must be conducted by one or more disadvantaged individuals.	People who are not Alaska Natives may manage ANC-owned firms if the SBA determines that such management is required to assist the firm’s development, the firm will retain control of all management decisions, and a written management plan shows how Alaska Natives will develop managerial skills sufficient to manage the concern or similar concerns in the future.	13 C.F.R. §124.109(c)(4)(i)(B)
Social disadvantage	Individuals are either rebuttably presumed to be socially disadvantaged or must prove individual social disadvantage by a preponderance of the evidence.	ANC-owned firms are deemed “minority business enterprises” and are irrebuttably presumed to be socially and economically disadvantaged small business concerns provided they are at least 51% owned by an ANC and their management and daily business operations are controlled by one or more Alaska Natives.	43 U.S.C. §1626(e); P.L. 99-272, 101 Stat. 370-71 (Apr. 7, 1986) (codified at 15 U.S.C. §637(a)(4)(A)-(B))

(...continued)

regulations, and are not debarred or suspended from government contracting. *See* 13 C.F.R. §124.108(a). With ANC-owned firms, the SBA applies these requirements only to officers, directors, and shareholders owning more than a 20% interest in the firm, not to all ANC shareholders. *See* 13 C.F.R. §124.109(c)(7)(B)(ii). Similarly, with potential for success, SBA generally considers the following five criteria when granting waivers: (1) the management experience of the disadvantaged individual(s) upon whom eligibility is based; (2) the firm’s technical experience; (3) the firm’s capital; (4) the firm’s performance record on prior federal or other contracts in its primary field; and (5) whether the firm has or can timely obtain the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a). *See* 13 C.F.R. §124.107. Waivers for ANC-owned firms, in contrast, can be granted based on: (1) the technical and managerial experience and competency of the individuals who will manage and control the firm’s daily operations, (2) the firm’s record of successful performance on contracts from governmental or nongovernmental sources, and (3) adequate capital to sustain the firm’s operations and carry out its business plan. *See* 13 C.F.R. §124.109(c)(6)(ii). However, commentators generally do not attribute the reportedly increasing number of contracts with ANC-owned firms to these factors, and they are thus excluded from **Table I**.

<sup>81</sup> *See* CRS Report R40744, *The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, *supra* note 8.

Issue	General 8(a) Rule	“Special Rule” for ANC-Owned Firms	Authority for the “Special Rule”
Economic disadvantage	Individuals must show economic disadvantage upon entry to the program and annually thereafter.	ANCs are deemed economically disadvantaged provided that Alaska Natives and descendants of Alaska Natives own a majority of the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock.	P.L. 100-241, §15, 101 Stat. 1812-13 (Feb. 3, 1988); P.L. 102-415, §10, 106 Stat. 2115 (Oct. 14, 1992) (codified at 43 U.S.C. §1626(e)); 13 C.F.R. 124.109(a)
Sole-source awards above the competitive threshold	Agencies may make sole-source awards in excess of \$4 million (\$6.5 million for manufacturing contracts) only if the contracting officer does not reasonably expect that at least two responsible firms will submit offers and the award can be made at a fair market price.	Agencies may make sole-source awards to ANC-owned firms at any time, even when the contracting officer reasonably expects that at least two responsible 8(a) firms will submit offers and the award can be made at a fair market price.	P.L. 100-656, §602(a), 102 Stat. 3887-88 (Nov. 15, 1988) (codified at 15 U.S.C. §637(a)(1)(D)(i)-(ii)); 13 C.F.R. §124.506(a)
Inability to receive additional source-source awards after obtaining a certain amount of 8(a) awards	8(a) firms generally may not receive additional sole-source awards once they have received a combined total of competitive and sole-source awards in excess of (1) \$100 million, in the case of firms whose size is based on their number of employees, or (2) the lesser of (A) \$100 million or (B) five times the size standard for the industry, in the case of firms whose size is based on their revenues.	ANCs can continue to receive additional sole-source awards even once they have reached \$100 million or other applicable threshold.	13 C.F.R. §124.519(a)-(d)
Owners’ one-time eligibility for the 8(a) Program	Individuals may confer eligibility for the 8(a) Program upon only one firm; individuals, along with their firms, may participate in the 8(a) Program for a maximum of nine years.	ANCs may confer eligibility upon multiple firms; while ANC-owned firms must leave the 8(a) Program after a maximum of nine years, the ANC can continue to participate in the program as a firm owner perpetually.	P.L. 101-37, §4, 103 Stat. 70-71 (June 15, 1989) (codified at 15 U.S.C. §636(j)(11)(B)-(C))
Ability to own majority interests in multiple 8(a) firms	Individuals who have been determined to be disadvantaged for purposes of one 8(a) firm, their immediate family members, and 8(a) firms themselves generally may not own more than 20% of any other 8(a) firm.	ANCs are barred from owning more than 51% of another 8(a) firm obtaining the majority of its revenues from the same primary industry in which another ANC-owned firm operates or has operated within the past two years. They may own majority interests in multiple firms obtaining the majority of their revenues in different primary industries, or obtaining less than 50% of their revenues in the same secondary industry.	P.L. 101-37, §4, 103 Stat. 70-71 (June 15, 1989) (codified at 15 U.S.C. §636(j)(11)(B)-(C)); 13 C.F.R. §124.109(c)(3)

Source: Congressional Research Service.

ANC-owned firms are, however, subject to other requirements governing eligibility for and participation in the 8(a) Program, including requirements that they (1) be small under the SBA's size standards,<sup>82</sup> (2) be businesses under the SBA's definition,<sup>83</sup> (3) be unconditionally owned and substantially controlled by their owner (i.e., the ANC),<sup>84</sup> (4) possess good character,<sup>85</sup> (5) demonstrate potential for success,<sup>86</sup> and (6) obtain increasing percentages of their income from non-8(a) sources in their final five years of participation in the 8(a) Program.<sup>87</sup> ANC-owned firms must also apply to participate in the 8(a) Program like other firms. This application form is somewhat different from that used by individually owned firms, but requires similarly extensive supporting documentation concerning company personnel, corporate organization, financial status, and company operations.<sup>88</sup> ANC-owned firms must also submit an "8(a) Annual Update" like other 8(a) firms.<sup>89</sup> This update requires additional documentation much like that submitted with applications to the 8(a) Program. Careful review of this documentation could potentially disclose some of the alleged problems with ANC-owned 8(a) firms, such as joint ventures to which the ANC-owned firm contributes nothing beyond its eligibility for 8(a) contracts. However, a November 2008 GAO report questioned whether SBA's resources are adequate for thorough reviews of 8(a) firms,<sup>90</sup> and a January 2012 GAO report opined that SBA "cannot implement" its new rules (discussed below) intended to strengthen 8(a) firms' role in any joint ventures using currently available information.<sup>91</sup>

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<sup>82</sup> 13 C.F.R. §124.109(c)(3)(i) ("For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest."). ANC-owned firms are subject to the same requirements as tribally owned firms here.

<sup>83</sup> 13 C.F.R. §124.109(a) & (b) (requiring ANC-owned firms to comply with the general eligibility requirements when they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §121.105(a)(1) ("Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.").

<sup>84</sup> 13 C.F.R. §124.109(a) & (b).

<sup>85</sup> 13 C.F.R. §124.109(b)(7)(ii).

<sup>86</sup> 13 C.F.R. §124.109(c)(6).

<sup>87</sup> 13 C.F.R. §124.509(b)(2). The final five years of a firm's participation in the 8(a) Program are known as the "transitional stage," and firms in the transitional stage must generally achieve annual targets for the amount of income they receive from non-8(a) sources. 15 U.S.C. §636(j)(10)(I)(i)-(iii); 13 C.F.R. §124.509(b)(1). These targets increase over time, with firms required to attain 15% of their revenue from non-8(a) sources in the fifth year, 25% in the sixth year, 35% in the seventh year, 45% in the eighth year, and 55% in the ninth year. 13 C.F.R. §124.509(b)(2). Firms that do not obtain the required percentage of revenue from non-8(a) sources are generally ineligible for sole-source 8(a) contracts "unless and until" they remedy the situation. 13 C.F.R. §124.509(d)(1).

<sup>88</sup> Compare Small Business Administration, 8(a) Business Development (BD) Program Application: Alaska Native Corporation-Owned Concern, available at <http://www.sba.gov/content/8a-business-development-bd-program-application-alaskan-native-corporation-owned-concern> with Small Business Administration, 8(a) Business Development Program Application, available at [http://www.sba.gov/sites/default/files/SBA%20Form%201010\\_0.pdf](http://www.sba.gov/sites/default/files/SBA%20Form%201010_0.pdf).

<sup>89</sup> Small Business Administration, 8(a) Annual Update, available at [http://www.sba.gov/sites/default/files/forms\\_1450.pdf](http://www.sba.gov/sites/default/files/forms_1450.pdf).

<sup>90</sup> Government Accountability Office, Small Business Administration: Agency Should Assess Resources Devoted to Contracting and Improve Several Processes in the 8(a) Program, GAO-09-16, at 1 (November 2008), available at <http://www.gao.gov/new.items/d0916.pdf> (noting a lack of routine surveillance reviews).

<sup>91</sup> Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention, *supra* note 3, at 39. This report also suggested that SBA has failed to address certain previously identified issues, such as determining when an ANC-owned firm would have an "unfair advantage" over other 8(a) firms due to its affiliation with an ANC or other subsidiaries of an ANC. *Id.* at 41.

## **Authorities in Native American Laws**

Several authorities governing contracting with ANCs and their subsidiaries are located in statutes and U.S. Code sections pertaining to Native Americans, rather than those pertaining to contracting or small business. These provisions create incentives for agencies to contract with ANCs or their subsidiaries by, for example, allowing contracts with “large” ANCs to count toward federal prime contractors’ goals for subcontracting with small businesses.

### **5% “Subcontracting Bonus”**

Federal prime contractors are eligible for so-called “bonuses” equal to “5 percent of the amount paid, or to be paid, to a subcontractor” when they subcontract with ANCs or ANC-owned firms, among others.<sup>92</sup> Congress authorized such bonuses in 1988, in part, because of concerns that federal prime contractors had less incentive to use Indian-owned subcontractors than other minority-owned subcontractors because of the geographical “remoteness of [Indian] reservation[s].”<sup>93</sup> Congress also appropriated funds for the Department of Defense (DOD), in particular, to pay subcontracting bonuses. The amount appropriated remained constant at \$8 million per year between FY1989 and FY2006, and was increased to \$15 million per year during the 110<sup>th</sup> Congress.<sup>94</sup> Other agencies have not received similar appropriations to pay subcontracting bonuses, but have the same statutory authority to pay them that DOD has.

To be eligible for a bonus, the prime contractor must

use its best efforts to give Indian organizations and Indian-owned economic enterprises ... the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with efficient performance of its contract.<sup>95</sup>

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<sup>92</sup> 25 U.S.C. §1544 (“Notwithstanding any other provision of law, a contractor of a Federal agency under any Act of Congress may be allowed an additional amount of compensation equal to 5 percent of the amount paid, or to be paid, to a subcontractor or supplier, in carrying out the contract if such subcontractor or supplier is an Indian organization or Indian-owned economic enterprise as defined in this chapter.”).

<sup>93</sup> P.L. 100-442, §7, 102 Stat. 1765 (September 22, 1988) (codified at 25 U.S.C. §1544); H.Rept. 100-838, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 2344, 2347 (“Currently, contracting agencies are authorized to encourage contractors to use minority subcontractors, however, there is no incentive for the contractors to use Indian contractors located on Indian reservations due to the remoteness of such reservation.”). The statute and its implementing regulations (in Subpart 26.1 of the Federal Acquisition Regulation) only mention Indians, Indian organizations, Indian-owned economic enterprises, and Indian tribes, which include ANCs. However, Congress included Native Hawaiians among those entities that prime contractors may receive bonuses for subcontracting with in 2002. *See* P.L. 107-248, §8021, 116 Stat. 1541 (October 23, 2002) (including “small business[es] owned and controlled by an individual defined under 25 U.S.C. 4221(9)” among those whom contractors receive bonuses for contracting with); 25 U.S.C. §4221(9) (defining “Native Hawaiians”); 48 C.F.R. Subpart 226.1 and §252.226-7001.

<sup>94</sup> *See* P.L. 101-165, §9103, 103 Stat. 1151-52 (November 21, 1989); P.L. 101-511, §8077, 104 Stat. 1892-93 (November 5, 1990); P.L. 102-172, §8112A, 105 Stat. 1202 (November 26, 1991); P.L. 102-396, §9091A, 106 Stat. 1922 (October 6, 1992); P.L. 103-139, §8059A, 107 Stat. 1453 (November 11, 1993); P.L. 103-335, §8025A, 108 Stat. 2623 (September 30, 1994); P.L. 104-61, §8024, 109 Stat. 657 (December 1, 1995); P.L. 104-208, §8024, 110 Stat. 3009-93 (September 30, 1996); P.L. 105-56, §8024, 111 Stat. 1225 (October 8, 1997); P.L. 106-79, §8024, 113 Stat. 1236 (October 25, 1999); P.L. 106-259, §8022, 114 Stat. 679 (August 9, 2000); P.L. 107-117, §8022, 115 Stat. 2252 (January 10, 2002); P.L. 107-248, §8021; P.L. 108-87, §8021; P.L. 108-287, §8021; P.L. 109-148, §8020; P.L. 109-289, §8018; P.L. 110-116, §8021; P.L. 110-329, §8021; P.L. 111-118, §8021, 123 Stat. 3432. The amount appropriated remained at \$15 million per year during the first session of the 112<sup>th</sup> Congress. *See* P.L. 112-10, §8020, 125 Stat. 61 (April 15, 2011); P.L. 112-74, §8019, 125 Stat. 808-89 (December 31, 2011).

<sup>95</sup> 48 C.F.R. §52.226-1(b).

Contracting officers and contractors may generally rely on subcontractors' representations regarding their eligibility as Indian organizations or Indian-owned economic enterprises unless an interested party challenges their eligibility, or the contracting officer has independent reason to question it.<sup>96</sup> Any challenges are referred to the Bureau of Indian Affairs for eligibility determinations.<sup>97</sup>

### **Credit Toward Prime Contractors' Subcontracting Goals**

Subcontracts awarded by federal prime contractors to ANCs or their subsidiaries count toward contractors' goals for subcontracting with small businesses and "small disadvantaged businesses" *even if* the ANC or ANC subsidiary is large *or* not certified as "disadvantaged":

Subcontracts awarded to an ANC or an Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business (SDB) concerns regardless of the size or Small Business Administration certification status of the ANC or Indian tribe.<sup>98</sup>

Section 8(d) of the Small Business Act, as amended, requires federal agencies to negotiate subcontracting plans with the apparently successful bidder or offeror on eligible prime contracts prior to awarding the contract.<sup>99</sup> These subcontracting plans establish goals for the value of subcontracts that prime contractors should award to small businesses and small disadvantaged businesses, among others.<sup>100</sup> A contractor's failure to comply with its subcontracting plan constitutes a material breach of the contract, potentially allowing the agency to terminate the contractor for default.<sup>101</sup> The contractor could also potentially be required to pay liquidated damages.<sup>102</sup>

Other firms must qualify as "small" under the SBA regulations for subcontracts with them to count toward contractors' goals for subcontracting with small businesses or small disadvantaged businesses (SDBs).<sup>103</sup> Moreover, until October 3, 2008, other firms had to be certified SDBs for subcontracts with them to count toward contractors' goals.<sup>104</sup> All 8(a) firms were deemed to be

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<sup>96</sup> 48 C.F.R. §52.226-1(b)(1).

<sup>97</sup> *Id.*

<sup>98</sup> 48 C.F.R. §19.703(c)(1)(i). The statutory authority for this regulation is presently unclear. Section 702 of the Emergency Supplemental Act of 2002 initially amended 43 U.S.C. §1626(e)(4)(B) to allow subcontracts with large or uncertified ANCs or ANC subsidiaries to count toward subcontracting goals under Section 8(d) of the Small Business Act. *See* P.L. 107-117, §702, 115 Stat. 2312 (January 10, 2002). However, a later statute amended 43 U.S.C. §1626(e)(4)(B) again, so that it now addresses government contracting and subcontracting goals under Section 15 of the Small Business Act, not subcontracting goals under 8(d). *See* Supplemental Appropriations Act for Further Recovery from and Responses to Terrorist Attacks on the United States, P.L. 107-206, §3003, 116 Stat. 924 (August 2, 2002). The regulations have apparently been promulgated as if the Emergency Supplemental Act still governed. *See* Dep't of Defense, General Servs. Admin., & National Aeronautics & Space Admin., FAR Case 2004-017, Small Business Credit for Alaska Native Corporations and Indian Tribes, 72 Fed. Reg. 46345 (August 17, 2007).

<sup>99</sup> 15 U.S.C. §637(d)(4) & (5). Eligible contracts are generally those exceeding \$650,000 (\$1.5 million for contracts to construct public facilities) and offering subcontracting possibilities. *Id.*

<sup>100</sup> 15 U.S.C. §637(d)(6).

<sup>101</sup> 15 U.S.C. §637(d)(8).

<sup>102</sup> 48 C.F.R. §19.705-7.

<sup>103</sup> 15 U.S.C. §637(d)(1) (describing subcontracting with "small businesses").

<sup>104</sup> *See* Small Business Administration, Small Disadvantaged Business Program, 73 Fed. Reg. 57490 (October 3, 2008) (announcing that SBA would no longer certify SDBs); 13 C.F.R. §124.1001(c) (2009) ("A firm may represent that it (continued...)

SDBs, but other firms at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals or groups could also obtain certification.<sup>105</sup>

### Small Disadvantaged Businesses for Purposes of Transportation Contracts

The same statute that allows subcontracts with large or uncertified ANCs or ANC affiliates to count for purposes of contractors' subcontracting goals for small businesses also enables large ANCs or ANC affiliates to qualify as "small disadvantaged businesses" for certain contracts funded by the Department of Transportation (DOT), provided that they obtain the necessary certifications.<sup>106</sup> The Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) originally required that

not less than 10 percent of the amounts made available for the program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.<sup>107</sup>

However, later regulations, promulgated in response to court cases challenging the constitutionality of "quotas" for minority firms,<sup>108</sup> construe "10 percent" as an "aspirational goal at the national level," which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent."<sup>109</sup>

Allowing large ANCs and their affiliates to qualify as small disadvantaged businesses for purposes of DOT contracting goals is potentially significant for two reasons. First, "small business" arguably has a narrower meaning under TEA-21 than it does under the Small Business Act, which could render some non-ANC-owned firms that might otherwise qualify as "small" ineligible for the DOT program.<sup>110</sup> Second, "small disadvantaged businesses" under TEA-21 include women-owned firms,<sup>111</sup> which could place the collective interests of women-owned small businesses more directly at odds with those of ANC-owned firms than is the case when individual

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(...continued)

qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.").

<sup>105</sup> 13 C.F.R. §124.1002 (2008).

<sup>106</sup> P.L. 107-117, §702; P.L. 107-206, §3003 (codified at 43 U.S.C. §1626(e)(4)(C) ("Any entity that satisfies subsection (e)(1) or (e)(2) of this section that has been certified under section 637 of title 15 is a Disadvantaged Business Enterprise for the purposes of P.L. 105-178.").

<sup>107</sup> P.L. 105-178, §1101(b), 112 Stat. 113 (June 9, 1998). TEA-21 lapsed on May 31, 2005, but was extended through FY2009 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). See SAFETEA-LU, P.L. 109-59, §1101(b), 119 Stat. 1144 (August 10, 2005). More recently, Congress has enacted the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), which includes similar language. See P.L. 112-141, §1101, 126 Stat. 415 (July 6, 2012).

<sup>108</sup> See CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by Jody Feder.

<sup>109</sup> 49 C.F.R. §26.41(b)-(c).

<sup>110</sup> P.L. 105-178, §1101(b)(2)(A) ("The term 'small business concern' has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$16,600,000, as adjusted by the Secretary for inflation.").

<sup>111</sup> P.L. 105-178, §1101(b)(2)(B).

women-owned firms participate in the 8(a) Program or are designated as small disadvantaged businesses for SBA programs. Women are not among the groups presumed to be socially disadvantaged for purposes of SBA programs, and small businesses owned and controlled by women are eligible for such programs only when individual women owners prove by a preponderance of the evidence that they are socially disadvantaged.

## **Appropriations Riders Allowing Direct Conversion of DOD Functions**

The Department of Defense (DOD) can contract out functions performed by government employees to ANCs or ANC-owned firms without going through the competitive sourcing process normally required under Office of Management and Budget (OMB) Circular A-76.<sup>112</sup> OMB Circular A-76, along with its four attachments,<sup>113</sup> generally sets forth guidelines and procedures for determining whether an activity should be performed in-house by the agency with government personnel or contracted-out to the private sector. Beginning in the early 1980s, a series of appropriations riders<sup>114</sup> and permanent laws<sup>115</sup> affected DOD's use of the A-76 process. While most of these enactments in some way limited DOD's ability to contract out functions using the A-76 process, one rider attached to every DOD appropriations act since 1989 has permitted DOD to avoid the A-76 process and its restrictions on outsourcing by contracting functions out to firms owned by ANCs, Indian tribes, or NHOs.<sup>116</sup>

The original version of this rider generally restricted outsourcing using the A-76 process, but exempted so-called "direct conversions" to "qualified firm[s] under 51 percent Native American

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<sup>112</sup> Since the 1950s, the federal government has had a stated policy of not competing with the private sector. This policy was first officially stated by the Bureau of the Budget (BOB) in a directive issued in 1955. See BOB Bulletin 55-4 (January 15, 1955). Since 1966, this policy has been expressed in OMB Circular A-76. This circular was substantially revised in 1967, 1979, 1983, 1991, 1999, and, most recently and most extensively, in May 2003. The 1999 amendment was issued to bring the circular into conformance with and assist implementation of the Federal Activities Inventory Reform (FAIR) Act of 1998 (P.L. 105-270), which generally requires each executive agency to annually inventory its activities that are not inherently governmental and submit this inventory to OMB. In the early 1990s, much of OMB Circular A-76 was incorporated into the Federal Acquisition Regulation. See 48 C.F.R. §7.3.

<sup>113</sup> Attachment A contains the inventory process for categorizing all activities as commercial or inherently governmental. Attachment B sets out the process to be used for public-private competitions. Attachment C gives the rules for calculating the cost of these competitions. Attachment D supplies the definitions for the circular.

<sup>114</sup> See, e.g., P.L. 111-8, §737, 123 Stat. 559 (March 11, 2009) (suspending new A-76 competitions).

<sup>115</sup> See, e.g., 10 U.S.C. §§2460-2476 ("Contracting for Performance of Civilian or Industrial Type Functions"). For more examples of this type of legislation, see CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel, at Appendix A.

<sup>116</sup> See P.L. 101-165, §9036, 103 Stat. 1137 (November 21, 1989); P.L. 101-511, §8026, 104 Stat. 1880 (November 5, 1990); P.L. 102-172, §8026, 105 Stat. 1177 (November 26, 1991); P.L. 102-396, §9026, 106 Stat. 1906 (October 6, 1992); P.L. 103-139, §8022, 107 Stat. 1442 (November 11, 1993); P.L. 103-335, §8020, 108 Stat. 2621 (September 30, 1994); P.L. 104-61, §8020, 109 Stat. 656 (December 1, 1995); P.L. 104-208, §8015, 110 Stat. 3009-91 (September 30, 1996); P.L. 105-56, §8014, 111 Stat. 1223 (October 8, 1997); P.L. 106-79, §8014, 113 Stat. 1234 (October 25, 1999); P.L. 106-259, §8014, 114 Stat. 677 (August 9, 2000); P.L. 107-117, §8014, 115 Stat. 2250 (January 10, 2002); P.L. 107-248, §8014, 116 Stat. 1539 (October 23, 2002); P.L. 108-87, §8014, 117 Stat. 1074 (September 30, 2003); P.L. 108-287, §8014, 118 Stat. 972 (August 5, 2004); P.L. 109-148, §8014, 119 Stat. 2700 (December 30, 2005); P.L. 109-289, §8013, 120 Stat. 1275-76 (September 26, 2006); P.L. 110-116, §8015, 121 Stat. 1316-17 (November 13, 2007); P.L. 110-329, §8016, 122 Stat. 3623-24 (September 30, 2008); P.L. 111-118, §8016, 123 Stat. 3430-31 (December 19, 2009); P.L. 112-10, §8016(b)(1)(C), 125 Stat. 59 (April 15, 2011); P.L. 112-74, §8039, 125 Stat. 814-15 (December 31, 2011).

ownership,” among others.<sup>117</sup> Such firms included those owned by ANCs, Indian tribes, or individual Native Americans. The 106<sup>th</sup> Congress later made two modifications to this provision. First, it exempted direct conversions to “qualified firms” from requirements concerning federal employee comments and congressional notification codified in 10 U.S.C. §2461(b)-(c), as well as from the A-76 process codified in 10 U.S.C. §2461(a).<sup>118</sup> Second, while it maintained the exemption for direct conversion to firms owned by ANCs and Indian tribes, it removed the exemption for direct conversions to firms owned by Native American individuals and replaced it with one for direct conversions to NHO-owned firms.<sup>119</sup> The exemptions for direct conversions remained unchanged since the 106<sup>th</sup> Congress.<sup>120</sup>

However, while these appropriations riders allowed DOD to avoid the A-76 process when contracting out functions to ANCs or ANC-owned firms, they did not authorize DOD to make noncompetitive awards to such entities. For this reason, DOD has used the authority to make sole-source awards above the competitive threshold to ANC-owned firms codified in Section 8(a) of the Small Business Act in conjunction with its authority under the appropriations riders.

## Legislative Activity in the 112<sup>th</sup> Congress

Members of the 112<sup>th</sup> Congress have introduced legislation (H.R. 598, S. 236) that would remove all the “special rules” for contracting with ANC-owned 8(a) firms described in **Table 1** and subject ANC-owned firms to eligibility and other requirements like those to which individually owned 8(a) firms are subject.<sup>121</sup> The proposed legislation would accomplish this, in part, by amending the Alaska Native Claims Settlement Act (ANCSA) so that ANCs are no longer deemed to be socially or economically disadvantaged for purposes of Sections 7(j) and 8(a) of the Small Business Act.<sup>122</sup> It would also amend the definition of “Indian tribe” contained in Section

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<sup>117</sup> P.L. 101-165, §9036 (“None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of enactment of this Act, is performed by more than ten Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: Provided, That this section shall not apply to a commercial or industrial type function of the Department of Defense that ... is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.”). Identical provisions were included in later statutes. *See* P.L. 101-511, §8026; P.L. 102-172, §8026; P.L. 102-396, §9026; P.L. 103-139, §8022; P.L. 103-335, §8020; P.L. 104-61, §8020; P.L. 104-208, §8015; P.L. 105-56, §8014; P.L. 106-79, §8014.

<sup>118</sup> P.L. 106-79, §8014 (“[T]his section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that ... is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.”).

<sup>119</sup> P.L. 106-259, §8014 (“[T]his section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that ... is planned to be converted to performance by a qualified firm under 51 percent ownership by an Indian tribe, as defined in section 450b(e) of title 25, United States Code, or a Native Hawaiian organization, as defined in section 637(a)(15) of title 15, United States Code.”).

<sup>120</sup> *See* P.L. 112-74, §8039, 125 Stat. 814-15 (December 31, 2011).

<sup>121</sup> As introduced, H.R. 598 and S. 236 are identical in their provisions and numbering.

<sup>122</sup> H.R. 598, §3; S. 236, §3. Currently, under ANCSA, ANCs are deemed “minority business enterprises” and, therefore, are irrebutably presumed to be socially disadvantaged for purposes of the 8(a) Program if they are at least 51% owned by an ANC, and their management and daily business operations are controlled by one or more Alaska Natives. 43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B). ANCs are similarly deemed to be “economically disadvantaged” if Alaska Natives or descendants of Alaska Natives own a majority of the ANC’s total equity and voting powers through their holdings of settlement common stock. *Id.* H.R. 598 and S. 236 would remove these presumptions and force ANCs to qualify as “socially disadvantaged” and “economically disadvantaged” under criteria (continued...)



8(a)(13) of the Small Business Act so that ANCs no longer constitute “Indian tribes” for purposes of the 8(a) Program.<sup>123</sup> By doing so, H.R. 598 and S. 236 would preclude ANCs from receiving sole source awards in excess of \$4 million (\$6.5 million for manufacturing contracts) under the authority of the Business Opportunity Development Reform Act (BODRA) of 1988.<sup>124</sup> Section 602(a) of BODRA currently provides that the “competitive thresholds” contained in Section 8(a) of the Small Business Act do not apply to entities defined as “Indian tribes” in Section 8(a).<sup>125</sup> Excluding ANCs from Section 8(a)’s definition of “Indian tribe” would, thus, subject them to the competitive thresholds, as well as require that all affiliations of ANC-owned firms count when the firms’ size is determined and that an ANC may participate in the 8(a) Program only one time.<sup>126</sup>

The proposed legislation would also amend Section 8(a) to (1) prevent ANC-owned firms from receiving additional sole-source awards when the total amount of competitive and sole-source awards they have received in any year exceeds the total amount of competitive and sole-source awards that individually owned firms may receive (currently, \$100 million); (2) prohibit the SBA from exempting ANC-owned firms from any time limitations on participation in the 8(a) Program to which individually owned 8(a) firms are subject; and (3) require ANCs to report annually to the SBA on their total revenue, the amount of this revenue attributable to the 8(a) Program, and the “total amount of benefits paid to shareholders.”<sup>127</sup> H.R. 598 and S. 236 would also require the SBA to amend the regulations for the 8(a) Program so as to preclude SBA from waiving the requirement that the management and daily business operations of ANC-owned firms be controlled by one or more socially and economically disadvantaged individuals; prohibit ANCs from conferring eligibility to participate in the 8(a) Program on more than one firm at a time; and preclude ANC-owned 8(a) firms from acquiring ownership interests in other 8(a) firms that exceed the ownership interests that individually owned 8(a) firms may acquire.<sup>128</sup>

## Regulatory Developments

On February 11, 2011, SBA amended its rules to change certain eligibility and other requirements pertaining to the 8(a) Program.<sup>129</sup> Several of these changes apply specifically to ANC-owned firms. Under the new rules, ANC-owned 8(a) firms (1) may not receive a sole-source 8(a) contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by a firm owned by the same ANC;<sup>130</sup> (2) must report annually to the SBA on the

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(...continued)

to be promulgated by the SBA. H.R. 598, §8(a)-(b); S. 236, §8(a)-(b).

<sup>123</sup> H.R. 598, §1; S. 236, §1. ANCs would, however, remain “Indian tribes” under other provisions of federal law, including the Indian Financing Act. *See supra* notes 92 to 97 and accompanying text.

<sup>124</sup> ANC-owned firms could, however, potentially still receive sole-source awards under other authority, including the Competition in Contracting Act. *See supra* note 47 and accompanying text.

<sup>125</sup> P.L. 100-656, §602(a), 102 Stat. 3887-77 (November 15, 1988).

<sup>126</sup> H.R. 598, §3 & 5; S. 236, §3 & 5.

<sup>127</sup> H.R. 598, §4(b), 6 & 7; S. 236, §4(b), 6 & 7. It should be noted that “benefits” is not defined in H.R. 598 or S. 236, and the term could potentially be construed to include more than just dividends paid to shareholders. ANCs often assert that they provide other benefits to Alaska Natives than dividend payments. *See supra* note 7.

<sup>128</sup> H.R. 598, §8; S. 236, §8.

<sup>129</sup> Small Bus. Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations: Final Rule, 76 Fed. Reg. 8222 (February 11, 2011).

<sup>130</sup> *Id.* at 8234 (codified at 13 C.F.R. §124.109(c)(3)(2)). The proposed rule would have gone further and prohibited a (continued...)

benefits provided to Alaska Natives from the ANC's participation in the 8(a) Program,<sup>131</sup> and (3) may be found to have potential for success if the ANC pledges to use its resources to support the firm and to not allow the firm to cease operations.<sup>132</sup> The rule also generally prohibits non-8(a) firms that form joint ventures with 8(a) firms to perform sole-source contracts in excess of \$4 million (\$6.5 million for manufacturing contracts) from serving as subcontractors (at any tier) on the contract.<sup>133</sup> In addition, the rule indicates that it is the SBA's policy to have ANC-owned firms' applications for the 8(a) Program processed at the San Francisco Division of Program Certification and Eligibility whenever possible.<sup>134</sup> These applications had previously been processed in the Anchorage District Office.

These changes generally took effect on March 14, 2011, although the SBA has delayed implementation of the requirement that ANCs report on the benefits provided to Alaska Natives through their participation in the 8(a) Program.<sup>135</sup>

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newly certified 8(a) firm from receiving an 8(a) contract in a secondary NAICS code that is or was the primary NAICS code of another firm owned by the same ANC for two years after its admission to the program. *See* Small Bus. Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations: Proposed Rule, 74 Fed. Reg. 55694, 55702 (October 28, 2009).

<sup>131</sup> 76 Fed. Reg. at 8264 (codified at 13 C.F.R. §124.604). The SBA did, however, clarify that this is purely a reporting requirement, not an eligibility requirement. *Id.* at 8236.

<sup>132</sup> *Id.* at 8235 (codified at 13 C.F.R. §124.109(c)(6)(i)-(iii)).

<sup>133</sup> *Id.* at 8241 (codified at 13 C.F.R. §124.506(b)(4)). The non-8(a) firm may serve as a subcontractor only if the SBA's Associate Administrator for Business Development determines that other potential subcontractors are not available.

<sup>134</sup> *Id.* at 8238. The rule also notes that, when the San Francisco office has a backlog, applications may be processed by the Philadelphia Division of Program Certification and Eligibility. *Id.*

<sup>135</sup> The regulations promulgated in February provided that this reporting requirement would be effective "as of September 9, 2011, unless SBA further delays implementation through a Notice in the Federal Register." *Id.* at 8222. However, SBA appears to have delayed reporting, in part, so that it could consult with the Tribes. *See, e.g.,* Small Bus. Admin., Notice of Tribal Consultations, 76 Fed. Reg. 27859 (May 13, 2011); Small Bus. Admin., Notice of Tribal Consultations, 76 Fed. Reg. 12273 (March 7, 2011). Most recently, SBA gave notice that it has submitted the reporting requirements to the Office of Management and Budget for review. *See* Small Bus. Admin., Notice of Reporting Requirements for OMB Review, 77 Fed. Reg. 12902 (March 2, 2012).