

## **UNIQUE RIGHTS OF ALASKA NATIVE CORPORATION OWNED 8(a) BUSINESSES IN THE FEDERAL GOVERNMENT PROCUREMENT PROCESS**

Indian reservations and Alaska Native Villages suffer from some of the worst poverty in this country, with unemployment levels in excess of 60%. For example, a recent federal study found that the area of the country with the lowest life expectancy in the country was not an urban ghetto but an Indian reservation. Because of the lack of resources, there is little individual entrepreneurship on reservations. Instead, the Indian tribal governments and Alaska Native Corporations (the Alaska equivalent of tribes) have the primary responsibility for promoting economic development. ***On the premise that it is both appropriate and necessary to use the Federal government's massive procurement activity to help jump-start reservation economies, Congress has given tribes and Alaska Native Corporations (ANCs) unique rights in the Federal procurement process***<sup>1</sup>. These rights provide the Federal agencies and federal contractors with strong incentives to contract with tribal and ANC firms. (All of these special provisions are contingent upon the tribal and ANC-owned firms providing quality services and supplies to the Federal agencies and performing 51% of the labor hours with their own direct labor.)

### **OVERVIEW**

There are three different procurement areas in which tribal and ANC-owned firms have special rights.

- **Special Rights Under the SBA 8(a) Program.**

***Tribal and ANC 8(a) firms are eligible to receive sole source 8(a) contracts regardless of dollar size, with no upper limit, while all other 8(a) firms may not receive sole source contracts in excess of \$3 million for services and \$5 million for manufacturing***<sup>2</sup>. Congress provided this opportunity because it recognized that tribes and ANCs have the large responsibility of trying to pull their entire tribal membership up from poverty and need larger contracts to be able to do so. For the same reason, they permitted tribes and ANCs to have as many 8(a) firms as they wish, so long as each is in a different primary NAICS (formerly SIC) Code. In sum, to enable tribes and ANCs to build their

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<sup>1</sup> Section 450b(e) of title 25 U.S.C. "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) (43 U.S.C. 1601 et seq.), 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>2</sup> 13 C.F.R. 124.506(b): (b) SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement. There is no requirement that procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally owned or ANC- owned concern, but a procurement may not be removed from competition to award it to a tribally owned or ANC-owned concern on a sole source basis

communities, Congress has permitted a tribal or ANC owned 8(a) firm to have many of the attributes of a large company to enable them to perform large and complex contracts, while still having preferential procurement rights under the 8(a) program.

- **Special Rights Under the A-76 Program**

The A-76 program ("A-76" refers to the number of the implementing Office of Management and Budget (OMB) Circular) imposes a long and cumbersome procedure for any government facility that wishes to contract out (i.e., outsource) an activity that employs ten or more civilian government employees. (The average A-76 study takes 23 months.) One of the few options open to a DOD command, service or agency that wants to contract out a function but avoid the cumbersome A-76 process is to award the contract to a tribal or ANC 8(a) firm. ***Language in the Defense Appropriations Act<sup>3</sup> provides that a command does not have to go through the A-76 process but may do a direct conversion of that function to a private contractor, regardless of the number of civilian employees, if the command contracts with a firm that is 51% or more Native American owned, so long as the conversion is cost effective.*** While this opportunity is available to any 51% or more Native American owned firm, in practice it is only available to tribal and ANC 8(a)s on the larger conversions, because the Appropriations language does not create a new procurement vehicle. As a result, the only way the command may contract with a Native American firm is to do it through the 8(a) sole source authority. As indicated above, the only entities that may receive an 8(a) contract in excess of \$3 million for services are tribal and ANC-owned 8(a) firms and the bulk of the A-76 contracts are far in excess of \$3 million.

- **The 5% Subcontracting Bonus**

***Pursuant to statutory language and implementing regulations, a DOD contractor that subcontracts with a firm that is 51% or more Native American owned is entitled to receive a bonus equal to 5% of the amount of the subcontract award.*** While this provision is theoretically available to all

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<sup>3</sup> Public Law 107-117 (Defense Appropriations Act FY2002), SEC. 8014. 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 the enactment of this Act, is performed by more than 10 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 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: (1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (3) 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.

agencies, Congress has provided appropriations to implement it only to DOD, which, after some initial resistance, has initiated it fully (out of the DOD Office of Small and Disadvantaged Business Utilization). The FY 98, 99, and 2001 Defense Appropriations Acts provided \$8 million to this program each year and another \$8 million has been provided in FY 2002<sup>4</sup>. It is expected that a similar amount will be provided in subsequent years.

## **ANALYSIS OF THE THREE BENEFITS**

Following is a more detailed description of the three sets of unique rights of tribal and ANC-owned firms summarized above, with citations to the applicable statutory and regulatory provisions.

### **1. The SBA 8(a) Program**

- 8(a) firms owned by tribes and ANCs may receive sole source contracts regardless of dollar amount. They are not subject to the \$3 million limitation on sole source contracts for services and the \$5 limitation for manufacturing (the “competitive threshold”) applicable to other 8(a) firms. The applicable regulation is 13 C.F.R. 124.506(b), which states that the SBA may award an 8(a) subcontract on a non-competitive basis to an 8(a) concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.
- Sole-source procurements to tribes and ANC owned 8(a) firms may not be protested, because there is no injured party. The applicable regulation is 13 C.F.R. 124.517(a), which state: “The eligibility of a Participant for a sole source or competitive 8(a) contract may not be challenged by another Participant or any other party, either before SBA or any administrative forum as part of a bid or other contract protest.”
- The Justice Department has determined that tribal and ANC-owned 8(a) firms are not subject to the U. S. Supreme Court’s ruling in the **Adarand** case. As set out in the Justice Department’s proposed policy, issued in the May 23, 1996 **Federal Register**, any limitations that may end up being imposed on the SDB and 8(a) programs as a result of **Adarand** will not be applicable to tribal and ANC-owned 8(a) firms. This is because the tribes and ANC are included in the 8(a) and the SDB programs as a result of their unique government to-government relationship with the United States, not because

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<sup>4</sup> Public Law 107-117 (Defense Appropriations Act FY2002), SEC. 8022. In addition to the funds provided elsewhere in this Act, \$8,000,000 is appropriated only for incentive payments authorized by section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544): *Provided*, That a subcontractor at any tier shall be considered a contractor for the purposes of being allowed additional compensation under section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544).

of race or national origin factors. This in turn goes back to the U. S. Supreme Court's 1975 ruling in *Morton v. Mancari*, in which the Court ruled that Indian preference is not a racial classification but a political one based on the government-to-government relationship discussed above.

## 2. The A-76 Program

- Section 8014 of the FY 2002 Defense Appropriations Act, P.L. 107-117, requires the A-76 procedure to be followed before contracting out any DOD activity performed by more than ten DOD civilian employees. It then goes on to provide that this requirement shall not apply to a commercial or industrial type function that is contracted to the blind or handicapped, or "(3) is planned to be converted to performance by a qualified firm under 51% Native American ownership...." This provision has appeared in previous Defense Appropriations Acts, and likely will be included in future legislation.
- Within the last few years, Congress has clarified and reinforced its intent, such that DOD is now prepared to move forward in implementing this authority. To quickly review these events, in November 1997, the Air Force, notwithstanding the language in section 8014, issued a policy message stating that there was no authority to do direct conversions with Native American owned firms. At a meeting attended by the Air Force, Senate Defense Appropriations Committee staff, and representatives of the ANCs, the Committee reaffirmed that its intent in enacting section 8014 was to authorize direct conversions with Native American firms. Staff also clarified that the language did not create any new procurement authority, such that the only way this authority can be used is through contracts with Native American 8(a) firms. Following that meeting the Air Force published memo no. 201726Z May 98, which rescinded the November 1997 policy message and replaced it with the following:

"2. Air Force Policy for converting in-house activities to the National Industries of the Severely Handicapped (NISH), National Industries for the Blind (NIB), or firms with more than 51% Native American ownership follows. A. Regardless of the number of civilian employees or military positions, a direct conversion may be performed if negotiations indicate the conversion will be cost effective."

- Because there is no authority that would permit a command to issue a competitive bid with competition limited to Native American owned firms, the only way a command may use this authority is by awarding an 8(a) sole source contract to a Native American firm. As indicated above, only 8(a) firms owned by tribes and ANCs are eligible for sole source awards in excess of \$3 million.

### **3. The 5% Subcontracting Bonus**

- Section 504 of the Indian Finance Act (25 U.S.C. 1544) provides that a contractor subcontracting with a firm that is 51% or more owned by a Native American individual, tribe or ANC may receive an additional amount of compensation, above the amount of the prime contract, equal to 5% of the amount of the subcontract with the Native American-owned entity. While this authority is applicable government-wide, agencies have been unwilling to implement this provision without specific appropriations to pay for the bonus, since they are unwilling to take the 5% out of the contract or other budget items. The FY 2002, the Defense Appropriations Act contains \$8 million for DOD to implement this program within DOD. As a result, DOD is the only agency now implementing the 5% bonus program.
- The DOD procedure for tapping the bonus is relatively simple. After a DOD contractor awards a subcontract to a 51% or more Native American-owned firm, it submits an invoice to its contracting officer, along with a copy of the subcontract and proof that the subcontractor is 51% or more Native American-owned. The invoice is routed through the DOD Office of Small and Disadvantaged Business Utilization and then to the Comptroller, who authorizes payment. Various contractors who have received their bonus payments under this program, including Lockheed.

### **SUMMARY OF KEY POINTS**

Tribal and ANC-owned firms have been granted special contracting opportunities under the FAR for government contracts in general and for DOD contracts in particular. These include unique 8(a) rights, expedited A-76 authority, and bonuses for DOD contractors that subcontract with Native American-owned firms. However, to fully put these rights to work in order to aggressively attack the extreme poverty that exists on Indian reservations and in Alaska Native Villages, the tribal and ANC-owned firms often need mentoring from large established government contracting firms that can help guide them through the intricacies of DOD contracting and provide technical support while the firms are building their in-house capability. Working with tribal and ANC firms to put these unique rights to work provides the DOD contractor with an opportunity to help reduce some of the worst poverty in this country, to meet its SDB goals, to make money, and help further legislative initiatives.