

# NAVIGATING UNCHARTED WATERS: ALASKA NATIVE CORPORATIONS IN A NEW ERA OF 8(A) CONTRACTING

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## ABSTRACT

*The highly anticipated finalized rule changes to the Small Business Administration 8(a) Business Development Program will have a prominent impact on 8(a) certified Alaska Native Corporations (ANCs). This Article evaluates the weaknesses in the previous regulations and analyzes how the revisions will effect ANC participation. The Article argues that the revisions address a number of ambiguities in the original regulations without limiting ANC participation in the 8(a) Business Development Program, but other factors may prove critical to future ANC contract procurement.*

## INTRODUCTION

In 2011, the Small Business Administration (SBA) finalized rule changes to how it implements section 8(a) of the Small Business Act.<sup>1</sup> These changes (2011 Revisions) took effect on March 14, 2011.<sup>2</sup> The 2011 Revisions respond to concerns about lack of clarity in the original regulations and criticisms of Alaska Native Corporation (ANC) participation in the business development program.<sup>3</sup> The 2011 Revisions' stated goals include clarifying program guidelines to avoid confusion and addressing concerns of program benefit abuse.<sup>4</sup> The

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1. Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 Fed. Reg. 8222, 8222 (Feb. 11, 2011) [hereinafter 8(a) Business Development].

2. *Id.*

3. *Id.*

4. *Id.*

following sections explore this topic with a focus on the changes as they relate to ANC participation in the SBA. Part I provides a brief history of ANCs and describes their integration into the 8(a) Business Development Program. Part II summarizes the criticisms of ANC participation in the program and outlines the ultimate objectives of the 2011 Revisions. Finally, Part III examines how the finalized 2011 Revisions and their rule changes will impact ANC participation in the 8(a) Business Development Program.

## I. ALASKA NATIVE CORPORATIONS AND SECTION 8(A)

### A. A New Approach to Aboriginal Land Claims

ANCs were created through the Alaska Native Claims Settlement Act of 1971 (ANCSA) as an experiment. Rather than resort to the failing reservation system of the lower forty-eight states, ANCSA legislation established a corporate framework to govern the relationship between Alaska Natives and the United States government.<sup>5</sup> ANCSA extinguished aboriginal land claims in Alaska to allow the State of Alaska and the federal government to obtain rights to the abundant oil and minerals found in the state. In exchange, Alaska Natives received \$962 million<sup>6</sup> and title to approximately forty-four million acres of land.<sup>7</sup>

Most importantly, ANCSA gave Alaska Natives a business structure with which to administer these new land rights and create future profits for shareholders.<sup>8</sup> ANCSA created twelve regional corporations within Alaska, each characterized by ancestral history and geography, and a thirteenth Regional Corporation for Alaska Natives living outside the state.<sup>9</sup> ANCSA also established additional village corporations within the regional corporations' geographic areas.<sup>10</sup>

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5. H.R. REP. NO. 92-746, at 8 (1971) (Conf. Rep.), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2253; *see also* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2012)).

6. *See* 43 U.S.C. § 1605(a)(1), (3) (2012).

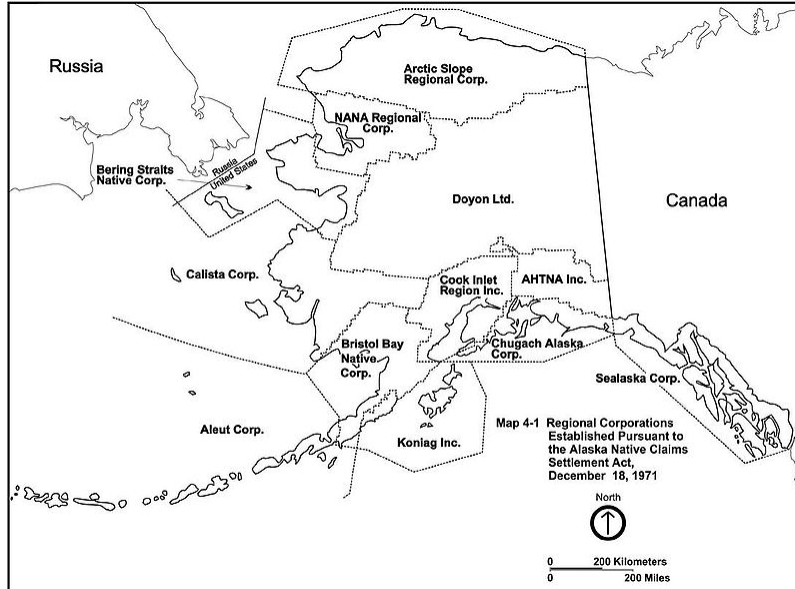
7. *See id.* § 1613 (conveying land); *see also* James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ROCKY MTN. MIN. L. INST. 1, 12-24 (2007).

8. 43 U.S.C. §§ 1601-1629h (2012).

9. *Id.* § 1606.

10. *Id.* § 1607.

Upon incorporation, the ANCs identified and distributed shares to a total of 79,044 Alaska Natives.<sup>11</sup> ANC shares are inalienable; they cannot be issued or sold save for very limited circumstances among family members.<sup>12</sup> Additionally, ANCSA exempts ANCs from the regulations of the U.S. Securities and Exchange Commission.<sup>13</sup> These provisions ensure that ANC ownership remains with the population the ANC was created to serve, but they also limit the ANCs in their ability to raise capital quickly and compete in the general market.



*Geographical Designations of Alaska Native Regional Corporations.*<sup>14</sup>

## B. Strengthening Communities to Honor Native Values

Forty years after ANCSA, ANCs are major participants in Alaska's economy. In 2008, when a widespread economic recession caused losses for businesses across the United States, ANCs experienced 17.5% overall

11. NATIVE 8(A) WORKS, FACT SHEET: CALCULATING BENEFITS TO SHAREHOLDERS 1, available at [http://www.Native8aworks.com/the\\_facts/docs/EIG038%20Benefits%20Sholder%20Handout.pdf](http://www.Native8aworks.com/the_facts/docs/EIG038%20Benefits%20Sholder%20Handout.pdf).

12. 43 U.S.C. § 1606(h)(1)(B)-(C).

13. *Id.* § 1625(a).

14. FRANK NORRIS, U.S. DEP'T. OF THE INTERIOR, NAT'L PARK SERV., ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY Map 4-1 (2002), available at [http://www.cr.nps.gov/history/online\\_books/norris1](http://www.cr.nps.gov/history/online_books/norris1).

growth in revenues.<sup>15</sup> By 2011, twenty-two of the top forty-nine businesses in Alaska were ANCs.<sup>16</sup> Through steady development and profits, ANCs have become economic powerhouses within Alaska. Combined, ANCs provide 64% of Alaskan jobs and generate 74% of the state's revenue.<sup>17</sup>

Business success gives ANCs the ability to serve as centers of their communities. Alaska Natives have close ties to the land and often live in extreme environments, in villages not connected to the road system, and far from creature comforts. Rural life can be difficult, limiting, and expensive, but many Alaska Natives consider it central to their heritage.<sup>18</sup> Today a total of 112,686 regional and village corporation shareholders benefit from ANC profits.<sup>19</sup> In 2008, ANCs distributed a total of \$171 million, or 66% of total net profits, to shareholders in the form of dividends.<sup>20</sup>

In addition to paying annual dividends, ANCs provide unique benefits to shareholders such as subsidies for food, heat, insurance, and education.<sup>21</sup> Shareholders are also eligible for preferential hiring within the corporations, scholarships, subsistence training, and youth camps.<sup>22</sup> In 2010, ANCs reported employing a total of 3,577 Alaska Natives, approximately 10% of the corporations' total workforces. Moreover, they contributed \$11 million to scholarships in 2008.<sup>23</sup> These are just a few illustrations of ANCs' positive impact on Alaska's economy and Alaska Native communities.

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15. ANCSA REG'L ASS'N, TRANSFORMATIONS: ALASKA NATIVE CORPORATIONS 2010 ECONOMIC DATA 8 (2010), available at [http://www.ciri.com/content/history/documents/ANCSA\\_EconomicReport\\_2010.pdf](http://www.ciri.com/content/history/documents/ANCSA_EconomicReport_2010.pdf).

16. *Id.* at 9.

17. Debbie Cutler, *2011 Alaska's Top 49ers: Superheroes of Success*, ALASKA BUS. MONTHLY, Oct. 2011, at 60, available at [http://issuu.com/alaska\\_business\\_monthly/docs/october-2010](http://issuu.com/alaska_business_monthly/docs/october-2010).

18. See generally Robert O'Harrow Jr., *In Alaska, a Promise Unmet*, WASH. POST, Sept. 30, 2010, at A1.

19. NATIVE 8(A) WORKS, *supra* note 11, at 1.

20. ANCSA REG'L ASS'N, *supra* note 15, at 8.

21. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-399, INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 81-83 (2006).

22. *Id.* at 83-84; see also Linxwiler, *supra* note 7, at 12-46.

23. NATIVE 8(A) WORKS, *supra* note 11, at 2.

### C. A Hand Up, Not a Hand Out

Alaska Native communities did not immediately realize the economic benefits of ANCs. In fact, the transition from subsistence and rural lifestyles to running Western corporate entities nearly destroyed several regional corporations within their first twenty years of incorporation.<sup>24</sup> Since the mid-1980s, a substantial number of corporations have enjoyed success due in part to their participation in the SBA 8(a) Business Development Program (8(a) BD Program).<sup>25</sup>

The 8(a) BD Program is designed to assist socially and economically disadvantaged small business owners in becoming competitively viable.<sup>26</sup> The program allows qualifying firms to procure government contracts on a sole-source, or non-competitive, basis.<sup>27</sup> Once admitted, firms may participate for up to nine years before graduating from the program.<sup>28</sup>

The SBA arranges with each agency for 8(a) certified businesses to complete the set-aside contracts.<sup>29</sup> The SBA uses a variety of methods to award contracts to a particular firm. The most common method is an inter-program competition, but the contracting federal agency or the SBA may also make a special selection for a particular contract.<sup>30</sup> No matter how the SBA chooses a firm, the federal agency is prohibited from paying more than the fair market price for the work to be performed.<sup>31</sup> The 8(a) BD Program provides a way for small businesses that lack the resources to procure bid-awarded government contracts to gain valuable business opportunities. For ANCs, 8(a) participation offers a special opportunity to increase revenues and, consequently, provide benefits to Alaska Native shareholders.<sup>32</sup>

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24. See Travis G. Buchanan, *One Company, Two Worlds: The Case for Alaska Native Corporations*, 27 ALASKA L. REV. 297, 303-04 & n.42 (2010); see also INST. OF SOC. & ECON. RESEARCH, BENEFITS OF ALASKA NATIVE CORPORATIONS AND THE SBA 8(A) BD PROGRAM TO ALASKA NATIVES AND ALASKA 8 (2009), available at [iser.uaa.alaska.edu/Publications/8\(a\)/Full\\_Report.pdf](http://iser.uaa.alaska.edu/Publications/8(a)/Full_Report.pdf); Linxwiler, *supra* note 7, at 12-45.

25. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 6.

26. 8(a) Business Development, 76 Fed. Reg. 8222, 8223 (Feb. 11, 2011).

27. 43 U.S.C. § 1626(e) (2012); see also 48 C.F.R. § 2.101 (2012) ("*Sole source acquisition* means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source." (emphasis added)).

28. 13 C.F.R. § 124.2 (2012).

29. 15 U.S.C. § 637(a)(1)(A)-(B) (2012).

30. Buchanan, *supra* note 24, at 303-04 & n.42.

31. 15 U.S.C. § 637(a)(1)(A).

32. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 80-84.

The core of the 8(a) BD Program is small business development. When program regulations were amended in 1986, ANCs were young corporations with widely varying levels of success. Individual ANCs and their subsidiaries were not necessarily prepared to single-handedly take on complex government contracts. Partnership agreements offered a solution.

SBA guidelines permit 8(a) firms to partner with non-8(a) firms in mentor-protégé relationships to seek guidance and support. When necessary or desirable, an 8(a) firm can even enter into a joint venture agreement with one or more non-8(a) firms to work together for a limited duration on a specific contract.<sup>33</sup> By forming partnerships within the 8(a) BD Program, ANC subsidiaries can offer a broad range of services and complete complex government contracts.<sup>34</sup> This facilitates business growth and skill development for future expansion without reliance on government intervention.<sup>35</sup>

#### D. Special Rights for Native-Owned Businesses

Congress used ANCSA as the foundation to amend the 8(a) BD Program to specifically include ANCs.<sup>36</sup> The amendments accounted for the unique government-to-government relationship between the federal government and Alaska Natives by exempting ANCs from certain program limitations.<sup>37</sup> Typically, individual owners of the approximately 9,000 participating small businesses must qualify for 8(a) certification by proving their socially or economically disadvantaged status.<sup>38</sup> But ANCSA automatically grants ANCs this status.<sup>39</sup> Also, SBA guidelines typically limit 8(a) BD Program participants to one 8(a)

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33. *Id.* at 30.

34. *Id.* at 6-7.

35. Press Release, NANA Dev. Corp., SBA Issues Final Rules on 8(a) Ushers in New Generation for Successful Program (Mar. 11, 2011), available at [http://nana-dev.com/news\\_and\\_press/news\\_archive/sba\\_issues\\_final\\_rules\\_on\\_8\\_a\\_ushers\\_in\\_new\\_gen](http://nana-dev.com/news_and_press/news_archive/sba_issues_final_rules_on_8_a_ushers_in_new_gen).

36. See 15 U.S.C. § 637(a)(4)(A)(i)(II); see also 13 C.F.R. § 124.103(b) (2012) (creating a rebuttable presumption that Alaska Natives are socially disadvantaged).

37. ACQUISITION AND GRANTS OFFICE, NAT'L OCEANIC ATMOSPHERIC ADMIN., UNIQUE RIGHTS OF ALASKA NATIVE CORPORATION OWNED 8(A) BUSINESSES IN THE FEDERAL GOVERNMENT PROCUREMENT PROCESS 3 (1996), available at [http://www.ago.noaa.gov/ago/acquisition/docs/alaska\\_native\\_contracting.pdf](http://www.ago.noaa.gov/ago/acquisition/docs/alaska_native_contracting.pdf).

38. 15 U.S.C. § 637 (a)(1)(B), (a)(4).

39. 43 U.S.C. § 1626(e)(2) (2012).

certified firm in a lifetime.<sup>40</sup> ANCs have no such limit, essentially allowing parent ANCs to establish multiple subsidiaries for 8(a) certification, provided that each subsidiary operates within a different primary industry.<sup>41</sup> Additionally, most 8(a) firms are limited by “competitive thresholds” of \$4 million for service contracts and \$6.5 million for manufacturing contracts. These thresholds do not apply to tribally-owned firms, allowing ANCs to receive sole-source government contracts regardless of the dollar amount.<sup>42</sup>

### E. A Foundation for Success

In 2006, the Government Accountability Office (GAO) found that twelve of the thirteen regional corporations, thirty-three village corporations, and four urban corporations had subsidiaries participating in the 8(a) BD Program.<sup>43</sup> This meant big business for participating ANCs, Alaska Natives, and the Alaskan economy. From 2000 to 2004, ANCs procured a total of \$2.9 billion in government contract obligations.<sup>44</sup> During those years, 77% of 8(a) contracts procured by ANCs were awarded on a sole-source basis.<sup>45</sup>

Today, government contracts, both within and outside of the 8(a) BD Program, account for the majority of ANC revenues.<sup>46</sup> In 2010, Sealaska Corporation (Sealaska) attributed just over half of its revenues to government services.<sup>47</sup> Meanwhile, Bering Straits Regional Corporation attributed 94% of its 2010 revenues to government services.<sup>48</sup> Also in 2010, Ahtna Regional Corporation earned 70% of its \$243 million in revenues from government services while Aleut Management Services attributed 80% of its revenues to government services.<sup>49</sup> Both of these regional corporations report that the 8(a) BD

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40. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 3.

41. *Id.*

42. 13 C.F.R. § 124.506(b) (2012); 48 C.F.R. § 19.805-1(a)-(b).

43. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 78-79.

44. *Id.* at 6.

45. *Id.*

46. Julie Stricker, *2010 ANCSA Regional Corporation Overview*, ALASKA BUS. MONTHLY, Sept. 1, 2011, at 72, available at [http://issuu.com/alaska\\_business\\_monthly/docs/september\\_2011?mode=window&viewMode=doublePage](http://issuu.com/alaska_business_monthly/docs/september_2011?mode=window&viewMode=doublePage).

47. *Id.* at 81.

48. *Id.* at 74.

49. *Id.* at 73.

Program has been key to growth and success but that the time has come to diversify and endeavor toward competitive contracts.<sup>50</sup>

Only a handful of ANCs are not heavily reliant on government contracts for significant portions of their annual revenues. In most cases, ANCs that flourish without government contracts have diverse business holdings and rights to lands that are rich in natural resources. Bristol Bay Native Corporation and Cook Inlet Regional, Inc. (CIRI) both maintain substantial business interests outside of the 8(a) BD Program and have landholdings rich in natural resources.<sup>51</sup> North Slope-based Arctic Slope Regional Corporation (ASRC) holds title to five million acres of highly mineralized land and paid staggering dividends of \$51.83 per share in 2010.<sup>52</sup> Calista Regional Corporation subsidiaries Yulista and Tunista Arctic Rim are both 8(a) BD Program graduates that recently began acquiring non-ANC Alaska businesses.<sup>53</sup>

Similarly, Doyon, Ltd. has varied its business interests among four “pillars.”<sup>54</sup> Doyon typically attributed the bulk of its profits to oilfield services, but the government contracting pillar took the lead in 2010, accounting for roughly two-thirds of Doyon’s revenues.<sup>55</sup> Additionally, Doyon, the largest private landowner in Alaska, reports that it is exploring its landholdings for gold, zinc, lead, and copper. This diversified and steady growth indicates that Doyon does not require 8(a) government contracts to survive.<sup>56</sup>

The contrast between ANCs that attribute substantial portions of revenues to government services and those that thrive without these valuable contracts indicates that some ANCs need the 8(a) BD Program more than others. The key variable in this difference is usually whether a given ANC has rights to lands with abundant and accessible natural resources. Clearly the 8(a) BD Program provides the benefits it promises to those ANCs that choose to participate. But for those more dependent on government contracts for income, certain revisions could lead to financial instability in the coming years.

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50. *Id.* at 73–74.

51. *Id.* at 75, 78.

52. *Id.* at 72–73.

53. *Id.* at 76–77.

54. *Id.* at 78.

55. *Id.*

56. *Id.* (identifying Doyon’s four “pillars” as oilfield services, government contracting, natural resource development, and transitional).



## II. CALLS FOR CHANGE FROM “OUTSIDE”

The majority of scrutiny over ANC participation in the 8(a) BD Program came from sources outside Alaska. These critics cited a broad spectrum of issues pertaining to continued procurement of sole-source contracts by ANCs. Primary concerns included whether program benefits reach shareholders,<sup>57</sup> ANCs obtaining a large percentage of 8(a) contracts,<sup>58</sup> regional corporations exceeding small business size limitations, and ANC practices of hiring non-Native managers and subcontracting work to non-8(a) firms.<sup>59</sup> The sum of these concerns was the view that ANCs are not minority-operated businesses, thereby depriving shareholders of the expected benefits from increased access to government contracts.<sup>60</sup>

Senator Claire McCaskill (D-Missouri) and House Representative Bennie Thompson (D-Mississippi), both harsh critics of ANCs, fueled this criticism.<sup>61</sup> Rather than call for revision or compromise, Senator McCaskill and Representative Thompson each introduced bills in early 2011 to remove all preferential status for ANCs under the 8(a) BD Program.<sup>62</sup> Moreover, they proposed eliminating the automatic designation of economically and socially disadvantaged status for ANCs, an action that would effectively be a legislative violation of ANCSA.<sup>63</sup> But their criticisms were based on incomplete reports, a lack

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57. Robert O’Harrow, *Behind Lucrative Deals, A Disconnect*, WASH. POST, Oct. 1, 2010, at A1.

58. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 21, at 12.

59. *Id.*; U.S. SENATE COMM. ON HOMELAND SEC. & GOV’T AFFAIRS SUBCOMM. ON CONTRACTING OVERSIGHT, NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS (PART II) 12, 16 (2009) [hereinafter U.S. SENATE COMM. ON HOMELAND SEC.], available at <http://mccaskill.senate.gov/pdf/071509/ANC.pdf>.

60. Elise Castelli, *Alaska Contracts Alarm Critics*, FED. TIMES, Jul. 20, 2009, <http://www.federaltimes.com/article/20090720/ACQUISITION03/907200301/1024/DEPARTMENTS05>; O’Harrow, *supra* note 18.

61. *Hearing on Contracting Preferences for Alaska Native Corporations: Hearing Before the Subcomm. on Contracting Oversight of the S. Comm. on Homeland Security*, 111 Cong. 1-2 (2009) (statement of Sen. McCaskill, Member, S. Comm. on Homeland Security).

62. Press Release, U.S. House of Representatives, Comm. on Homeland Sec. Press Ctr., Thompson Calls for Elimination of the Alaskan Native Corporation Carve-Out (Feb. 10, 2011), available at <http://chsdemocrats.house.gov/press/index.asp?ID=613>.

63. 8(a) Business Development, 76 Fed. Reg. 8233-8234, (Feb. 11, 2011); see also S. 3959, 111th Cong. (2010); H.R. 598, 111th Cong. (2010). The proposition to extinguish ANCs’ automatic designation as socially and economically disadvantaged violates the ANCSA provision that reads: “For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned

of compiled data, and overarching calls for increased oversight in government contracting programs.<sup>64</sup> With only a partial view of the situation, critics failed to account for essential variables in their analyses of ANC participation in the 8(a) BD Program.

The purpose and function of 8(a) participation is far more complex for ANCs than for their non-Native counterparts. In addition to building viable businesses, ANCs are charged with providing economic, social, and cultural benefits to their shareholders.<sup>65</sup> ANCs are diverse in terms of size, culture, and the communities they represent, and they use their profits differently to meet their respective needs.<sup>66</sup> As such, a simple comparison between ANC and non-ANC 8(a) activities does not tell the whole story.

Alaska Senators Lisa Murkowski and Mark Begich defended ANCs against these charges, but they recognized that reforms may be in order.<sup>67</sup> Moreover, in response to the proposed bills, leaders from ASRC, Doyon, and CIRI—three of the largest ANCs, together representing over 35,000 shareholders—issued a joint statement calling for radical changes to 8(a) BD Program regulations.<sup>68</sup> Some of the changes for which these

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and controlled by Natives and a minority and economically disadvantaged business enterprise. . . .” 43 U.S.C. § 1626(e)(1) (2012).

64. In 2010 the *Alaska Law Review* published a note that examined and identified the weaknesses in these criticisms and argued for a holistic view of ANC participation in the 8(a) BD Program. See Buchanan, *supra* note 24, at 315 n.98.

65. See generally ANCSA REG’L ASS’N, *supra* note 15.

66. Telephone Interview with Dennis Worden, Legislative Dir., Native Am. Contractors Assoc. (Nov. 10, 2011).

67. Sean Cockerham, *Alaska Delegation Wary of Native Contracting Investigation: Hearing Could Be “Showboat” Politics, Begich Says*, ANCHORAGE DAILY NEWS, Oct. 6, 2011, <http://www.adn.com/2011/10/05/2106314/alaska-delegation-wary-of-probe.html> (“Instead of a showboat political hearing, what’s needed is proper oversight from the federal government to prevent activities like [the EyakTek GTSI incident] in the future and Sen. Begich is working toward that goal.”); Rhoda McBride, *Senate Candidates Address Alaska Native Issues at Forum*, KTUU (Oct. 7, 2010), [http://articles.ktuu.com/2010-10-07/alaska-Natives\\_24130067](http://articles.ktuu.com/2010-10-07/alaska-Natives_24130067) (“‘We must stand behind these programs that allow for opportunity for our Alaska Natives,’ Murkowski said. Murkowski did say that her support was not unconditional, and that Native corporations need to be held accountable when managing government contracts.”).

68. These ANCs cite building sustainable businesses and reducing repeated violations for proposing these revisions: “Our proposed reforms are intended to build on the successes of the 8(a) program by promoting more competition, strengthening enforcement against those who repeatedly violate the rules of the program and requiring Native 8(a) companies to track and report benefits derived from their 8(a) contracts.” Press Release, Arctic Slope Reg’l Corp., Strengthening the 8(a) BD program (Sept. 13, 2010), available at <http://www.asrc.com/CorpNews/Pages/News-3.aspx>.

ANCs advocated included tracking and reporting shareholder benefits, requiring specific justification for sole-source awards exceeding \$100 million, and increasing enforcement of existing SBA regulations.<sup>69</sup>

With ANC participants cooperating, the SBA began to review its 8(a) guidelines. For twenty-five years, the SBA and 8(a) participants had observed how ANCs function within the program. Through continued program participation, interested parties – ANC supporters and critics – identified certain provisions in the original guidelines that create challenges for 8(a) certified firms. Though this debate subjected ANCs to harsh, and often unfair, criticism, the dialogue proved to be timely in promoting a review of 8(a) guidelines.<sup>70</sup>

### III. ANSWERS TO CALLS FOR REFORM

Prior to publishing its final revisions, the SBA reviewed comments submitted by interested parties and conducted a series of tribal consultations, including some with ANC leaders.<sup>71</sup> The updated program regulations are comprehensive and applicable to all 8(a) certified firms.<sup>72</sup> But some revisions are more significant to Native-owned firms, particularly ANCs, than others. The most pertinent revisions for ANC participation include new regulations for SBA oversight, clearer subsidiary and industry code guidelines, stricter rules for the mentor-protégé program, and clarified requirements for 8(a) joint ventures.<sup>73</sup>

#### A. Transparency to the SBA, Deference to ANCs

Those suspicious of ANC participation in the 8(a) BD Program suggested that Alaska Native communities do not receive sufficient program benefits from sole-source government contracts procured by their respective ANCs. Pre-revision ANCSA required that ANCs provide shareholders with annual reports of corporate activities,<sup>74</sup> but insufficient compiled data makes this accusation difficult to summarize

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69. *Id.*

70. Government agencies periodically review program regulations. This was the first series of comprehensive revisions in over ten years. 8(a) Business Development, 76 Fed. Reg. 8222, 8222 (Feb. 11, 2011).

71. *Id.*

72. Telephone Interview with Dennis Worden, *supra* note 66.

73. *Revised 8(a) Business Development Program Regulations Fact Sheet*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/revise-8a-business-development-program-regulations-fact-sheet> (last visited Feb. 18, 2012).

74. 43 U.S.C. § 1625(c) (2012).

disprove.<sup>75</sup> After the 2011 Revisions, the SBA now requires ANCs, Indian tribes, and Native Hawaiian Organizations participating in the 8(a) BD Program to communicate certain activities directly to the SBA. The purpose of this new regulation is to ensure that the corporation is not making business choices that are detrimental to the community.<sup>76</sup> Additional revisions provide the SBA with recourse when participants act in violation of these regulations.

1. *Reporting Community Benefits*

The distinct lack of government data about ANC 8(a) participation causes outsiders to assume the worst of ANCs: that the communities they are tasked with serving gain little from 8(a) BD Program participation. The deficiency in data is directly linked to insufficient SBA resources, which consequently results in minimal oversight. In 2008, the Anchorage SBA office, which is charged with monitoring 8(a) contracts in Alaska and ANC subsidiary activities, had only three staff members to oversee more than 200 ANC firms.<sup>77</sup> Looking forward, the San Francisco and Philadelphia regional offices will play a much larger role in fulfilling the tasks previously assigned to the Anchorage office in an attempt to increase the flow of information to the agency.<sup>78</sup>

In a more precise attempt to acquire data, a new regulation stipulates that ANCs, Indian tribes, and Native Hawaiian Organizations must annually report the financial benefits of the 8(a) BD Program flowing back to their communities. ANC regional corporations will submit one report on behalf of all their subsidiaries.<sup>79</sup> ANCs' responses to this revision have been positive. In fact, the new reporting requirement is similar to a revision suggested by ASRC, CIRI and Doyon.<sup>80</sup> The requirement will give ANCs the chance to display their success and disprove the recent allegations of abuse, fraud, and waste by highlighting the wide array of benefits provided to shareholders.<sup>81</sup>

Though annual reporting is nothing new to ANCs, compliance will require more than simply passing this information along to the SBA. Native communities across the United States expressed concern that the federal government will impose its generic view of acceptable

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75. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 39.

76. Press Release, NANA Dev. Corp., *supra* note 35.

77. Castelli, *supra* note 60.

78. 8(a) Business Development, 76 Fed. Reg. 8222, 8238 (Feb. 11, 2011).

79. *Id.* at 8248 (codified at 13 C.F.R. § 124.604 (2012)).

80. Press Release, Arctic Slope Reg'l Corp., *supra* note 68.

81. Press Release, NANA Dev. Corp., *supra* note 35; Telephone Interview with Dennis Worden, *supra* note 66.

community benefits without having the ability to distinguish between the needs of each community.<sup>82</sup> Alaska Native communities vary widely in cultural and community needs, just as their respective Native corporations vary in size and complexity. Consequently, the best methods to meet the unique needs of each community vary widely. One ANC might best serve its shareholders entirely through direct dividend payments while another might choose to use some profits to provide a variety of community services. Though the SBA takes a broader approach to recognizing benefits to Native communities, it remains to be seen how indirect benefits, such as reinvesting profits in the corporation, will be viewed by the federal government overall.<sup>83</sup>

The difficulties with this proposed reporting scheme and the 2011 Revisions' incomplete language creating these defects is reminiscent of the same problems the new regulation attempts to remedy. In response, the SBA delayed implementation of the reporting requirement for six months to find a practical solution with input from Native 8(a) participants.<sup>84</sup> In June 2011, the Native American Contractors Association presented the SBA with a model reporting form designed to account for the diverse Native firms and their communities. The SBA has not published its final decision on the reporting method, but it continues to communicate with Native-owned participants in the interim.<sup>85</sup>

## 2. *Clarifying Excessive Withdrawals*

In business vernacular, "withdrawals" typically include officer salaries, bonuses, advances, loans, individual investments, and speculative ventures.<sup>86</sup> Although the 8(a) BD Program always prohibited excessive withdrawals, the SBA previously had little to no means of enforcing this limitation.<sup>87</sup> The 2011 Revisions provide recourse for excessive withdrawal violations. The SBA may terminate or "early graduate" firms from the 8(a) BD Program for making withdrawals that are detrimental to the achievement of program targets, objectives, and goals.<sup>88</sup> To modernize the regulation to contemporary financial standards, the SBA also increased the thresholds of what withdrawals

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82. Telephone Interview with Dennis Worden, *supra* note 66.

83. *Id.*

84. 8(a) Business Development, 76 Fed. Reg. at 8236.

85. Telephone Interview with Dennis Worden, *supra* note 66.

86. 13 C.F.R. § 124.112(d) (2012).

87. 8(a) Business Development, 76 Fed. Reg. at 8326.

88. *Id.* at 8239 (codified at 13 C.F.R. § 124.303(a)(13)).

would be considered “excessive” by \$100,000.<sup>89</sup> For ANCs, which typically have annual sales in excess of \$2 million, a withdrawal for the benefit of an individual within the firm may be deemed “excessive” if it exceeds \$400,000.<sup>90</sup>

ANCSA requires that ANC boards of directors consist of shareholders, meaning Alaska Natives, but no such requirements exist for filling officer positions.<sup>91</sup> Based on the previous definition of “withdrawals,” it would seem that ANCs are now limited to paying executives and consultants \$400,000 per year for their contributions to government contracts procured through the 8(a) BD Program.

But, the 2011 Revisions also changed the definition of the term “withdrawal” to no longer include officer salaries.<sup>92</sup> According to the SBA, this allows 8(a) firms to recruit and retain key employees by offering competitive salaries.<sup>93</sup> For ANCs this means that officer salaries are not limited by the new excessive withdrawal thresholds, regardless of whether a shareholder holds the position.<sup>94</sup> The SBA yields to ANC judgment even further by excluding tribally owned firms from the excessive withdrawal prohibition.<sup>95</sup> Instead, only excessive withdrawals made for the personal benefit of a non-Native manager are open to SBA scrutiny.<sup>96</sup> The SBA asserts its interest in ensuring that financial benefits reach Alaska Native shareholders, but it defers to ANC leadership to determine the best investments in future officers and business ventures.<sup>97</sup>

## B. Reaching and Re-identifying Industry Goals

Under the original 8(a) BD Program guidelines, if an 8(a) firm met its “targets, objectives, and goals,” the SBA had the discretion to force the firm into “early graduation” prior to the expiration of its nine-year tenure.<sup>98</sup> But, because goals can change due to unanticipated market shifts, a better measurement of success may be growth. In either case,

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89. *Id.* at 8237 (codified at 13 C.F.R. § 124.303(a)(13)).

90. *Id.*

91. *See* 43 U.S.C. § 1606(f) (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 3.

92. 8(a) Business Development, 76 Fed. Reg. at 8236.

93. *Id.*

94. Some critics objected to 8(a) certified ANCs hiring non-Natives for high salary executive and consultant positions. *See supra* note 59.

95. 8(a) Business Development, 76 Fed. Reg. at 8236.

96. *Id.*

97. *Id.* at 8236–37.

98. 13 C.F.R. § 124.302 (2012).

the 8(a) firm would have achieved its program goals so that continued participation would no longer be necessary.

The 8(a) BD Program identifies small businesses depending on the North American Industry Classification System (NAICS) code within which the small business operates.<sup>99</sup> When a business applies for 8(a) certification, it must qualify as “small” according to its primary NAICS code.<sup>100</sup> ANCs must meet the same size standards as all other participant firms to qualify for 8(a) certification, but subsidiaries are assessed apart from the ANC parent corporation.<sup>101</sup> If an 8(a) certified firm outgrows the limits for its NAICS code, it is technically ineligible for the 8(a) BD Program. Under the original guidelines, however, this restriction was not enforceable in practice. Instead, the SBA reserved the “early graduation” option for firms that met their “targets, objectives and goals.”<sup>102</sup> Moreover, growing beyond “small business” status was not recognized as a universal objective under the previous 8(a) guidelines. The 2011 Revisions require 8(a) certified firms to remain “small” according to their primary NAICS codes throughout their nine years in the 8(a) BD Program.<sup>103</sup> If a firm exceeds its size limit for three successive years, the SBA has the discretion to “early graduate” the firm just as if it had reached its program “targets, objectives and goals.”<sup>104</sup>

Previously, the 8(a) regulations barred participant firms from changing to a different primary NAICS code, even if the majority of their revenues came from work performed under secondary industry codes.<sup>105</sup> The 2011 Revisions now allow a firm to switch primary NAICS codes if the majority of its revenues have evolved from the former code to a new code over a two-year period.<sup>106</sup> This option is also available

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99. See *North American Industry Classification System*, U.S. CENSUS BUREAU, <http://www.census.gov/eos/www/naics> (last revised Jan. 11, 2012) (“The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purposes of collecting, analyzing, and publishing statistical data related to the U.S. business economy.”).

100. 13 C.F.R. § 124.102(a)(2).

101. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 26–27.

102. 8(a) Business Development, 76 Fed. Reg. at 8227.

103. *Id.* at 8228 (codified at 13 C.F.R. § 124.102(a)(2)).

104. *Id.* at 8228–29 (codified at 13 C.F.R. § 124.302(c)).

105. See 13 C.F.R. § 124.3 (2010) (“Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The SIC code designations are described in the Standard Industrial Classification Manual Published by the U.S. Office of Management and Budget.”).

106. 8(a) Business Development, 76 Fed. Reg. at 8227 (codified at 13 C.F.R. § 124.3 (2012)).

retrospectively. An 8(a) participant facing early graduation can remain in the program if it demonstrates an attempt to change its industry focus to a secondary NAICS code. The secondary NAICS code must have a larger size limitation to justify the increase, and any plans to shift NAICS codes must be contained in the firm's most recently approved business plan.<sup>107</sup> Allowing firms to switch primary NAICS codes in the midst of program participation will likely prove vital to thorough program oversight and allow firms to complete their nine years of program eligibility.

Another significant change involving NAICS industry codes pertains to the timing for ANCs to create new subsidiaries for 8(a) contract procurement. In general terms, ANCs can create unlimited subsidiaries to participate in the 8(a) BD Program. For ANC parent companies, the original regulations only required that the company not have more than one subsidiary operating within a given NAICS code on a primary basis. For subsidiaries, the original regulations only required that the subsidiary conduct business within its primary NAICS code for two years before applying for 8(a) certification.<sup>108</sup> No regulations prohibited ANC parent companies from replacing subsidiaries facing program graduation through other means. In an effort to continue procuring contracts within a desirable industry, ANC parent companies had the option to certify new subsidiaries under the same NAICS code on a secondary basis.<sup>109</sup> The new subsidiary would overlap with its predecessor in every way, sometimes even rehiring the same employees and continuing to procure contracts from the same government agencies.<sup>110</sup>

If an ANC formed a partnership with a non-8(a) corporation, that partnership was free to establish multiple subsidiaries and partnerships through which to participate in the 8(a) BD Program. For example, if such an ANC and its partner were to establish a joint venture called JV I, two years later it could then establish another joint venture, JV II, operating under the same NAICS code on a secondary basis. The partnership would procure sole-source government contracts through JV I for nine years. Upon the graduation of JV I, the partnership would then use JV II to continue to procure contracts within that coveted NAICS code.

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107. 13 C.F.R. § 124.112(e).

108. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 3.

109. 13 C.F.R. 124.109(c)(3)(ii) (2010).

110. *See* 8(a) Business Development, 76 Fed. Reg. at 8234.



In 2006, the GAO identified an ANC with seven subsidiaries, six of which marketed capabilities within the NAICS code for “facilities support services” at various levels of priority.<sup>111</sup> Instances such as this raised concerns regarding the possibility and likelihood that ANCs would rotate subsidiaries within various NAICS codes indefinitely.<sup>112</sup> Now, under the 2011 Revisions, when a subsidiary graduates from the program, two years must pass before the parent corporation can establish a new subsidiary in the same NAICS code and take on 8(a) BD Program government contracts.<sup>113</sup> Further, ANCs and other tribally-owned subsidiaries cannot procure follow-on contracts to 8(a) contracts previously performed by a subsidiary of the same parent corporation.<sup>114</sup>

This particular regulatory revision will have a clear impact on ANCs, all of which have a history of creating subsidiaries for 8(a) BD Program participation.<sup>115</sup> Consequently, ANCs will have to adjust their business plans to obtain certain types of government contracts and consider expanding future subsidiaries into new industries.

This regulation levels the playing field for all 8(a) firms with interests in the same industry and encourages ANC subsidiaries to enter new areas of business. As noted above, Calista subsidiaries Yulista and Tunista Arctic Rim both graduated from the 8(a) BD Program after nine-year tenures. As of 2011, both subsidiaries remain in business, forming partnerships and taking on competitive contracts without 8(a) BD Program benefits.<sup>116</sup> Sealaska subsidiary SES Solutions offers another success story. After graduating from the 8(a) BD Program, SES Solutions now competes for contracts and independently forms joint ventures.<sup>117</sup> Clearly program graduation does not spell the demise of these subsidiaries, but rather promotes the true spirit of the 8(a) BD program: helping socially and economically disadvantaged small businesses to

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111. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 85.

112. 8(a) Business Development, 76 Fed. Reg. at 8234.

113. *Id.* at 8227.

114. *Id.* at 8234 (codified at 13 C.F.R. § 124.109(c)(3)(ii) (2012)).

115. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 34.

116. Stricker, *supra* note 46, at 77.

117. See, e.g., *Sealaska Subsidiary Wins D.O.E. Contract*, SEALASKA, [http://www.sealaska.com/object/io\\_1218675306322.html](http://www.sealaska.com/object/io_1218675306322.html) (last visited Feb. 18, 2012) (“SES is the managing partner in a small business joint venture with Tetra Tech EC, Inc., a New Jersey based international environmental remediation company, called SES-TECH Global Solutions. The JV team will share in the \$700 million contract ceiling over the next seven years with two other contract winners.”).

develop in order to fully participate in the economy without government support.<sup>118</sup>

### C. Mentor-Protégé Relationships

The SBA established the mentor-protégé program to encourage non-8(a) firms to provide technical, financial, and other assistance to 8(a) BD Program participants in the course of contract performance. These partnerships give 8(a) firms access to capital, create new subsidiaries, form joint ventures, or otherwise allow 8(a) firms to obtain a better position when seeking contracts.<sup>119</sup> In exchange, the mentor firm may perform work on 8(a) government contracts via an “exclusion from affiliation” of the small business size limitations.<sup>120</sup> In 2006, approximately twenty-four ANC subsidiaries participated in the mentor-protégé program.<sup>121</sup> Prior to the 2011 Revisions, federal agencies were often unclear as to which business relationships qualified as partnerships.<sup>122</sup>

The program charges mentor firms with a duty to provide their protégés with actual, substantive business development assistance.<sup>123</sup> But this regulation was not strictly enforced.<sup>124</sup> Previously, mentor-protégé agreements needed only to describe the assistance provided by the mentor.<sup>125</sup> The new rules stipulate that the mentor must specifically address how it will assist its protégé in meeting the goals described in its business plan.<sup>126</sup> In another effort by the SBA to avoid the exploitation of 8(a) BD Program participants, mentor firms that fail to provide protégé firms with sufficient assistance will face stop-work orders or debarment from program participation.<sup>127</sup> This revision provides protégés and the SBA peace of mind that mentor firms will fulfill their duties rather than use protégés as a front for access to sole-source contracts.

To further promote the mentor-protégé option, after the 2011 Revisions the SBA now permits interested businesses to form multiple mentor-protégé relationships. Mentor firms may have up to three

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118. 8(a) Business Development, 76 Fed. Reg. at 8234.

119. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 29–30.

120. 8(a) Business Development, 76 Fed. Reg. at 8223.

121. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 30.

122. *See* 13 C.F.R. § 124.520 (2012).

123. 8(a) Business Development, 76 Fed. Reg. at 8223.

124. *Id.* at 8246–47.

125. 13 C.F.R. § 124.520(e)(1) (2010).

126. 8(a) Business Development, 76 Fed. Reg. at 8244 (codified at 13 C.F.R. § 124.520(e)(1)(i) (2012)).

127. *Id.* at 8247 (codified at 13 C.F.R. § 124.520(h)).

protégés if the protégé firms are not in direct competition with one another.<sup>128</sup> Additionally, protégés with operations in multiple lines of business can obtain a second mentor.<sup>129</sup> The second mentorship cannot conflict with the first, and the mentorship must refer to an unrelated, secondary NAICS code within which the first mentor cannot provide expertise.<sup>130</sup> The SBA also clarified that 8(a) firms scheduled to graduate within six months are not eligible for protégé status,<sup>131</sup> nor are firms currently serving as mentors.<sup>132</sup> Also, once a firm reaches the end of its mentor-protégé agreement or exits the 8(a) BD Program, it is no longer eligible to benefit from that relationship.<sup>133</sup>

The SBA increased its oversight of the mentor-protégé program to ensure that 8(a) participants receive the appropriate benefits from these relationships. Mentors of ANC firms can no longer merely buttress the subsidiary's fulfillment of contracts. Instead, mentors will have to account for the actual developmental support provided to their protégés throughout the partnership.<sup>134</sup> In addition, the revision allowing a second mentor for ANCs operating within multiple NAICS codes serves a dual purpose. The provision gives ANCs greater growth opportunities and forces each ANC to splice its business practices officially, thus allowing for increased oversight. The number of 8(a) firms forming mentor-protégé partnerships is not likely to decrease in the future as a result of these revisions. Instead, more partnerships will form, albeit under closer supervision and complying with more administrative requirements.

#### D. Joint Venture Partnerships

For the purposes of the 8(a) BD Program, a joint venture is the incorporation of a mentor-protégé relationship. The SBA will only permit a joint venture agreement if the 8(a) participant lacks the necessary capacity to perform the contract outside a partnership.<sup>135</sup> The SBA must find that the agreement is fair and equitable and will "be of substantial benefit to the 8(a) [participant]." If the SBA finds that an 8(a)

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128. *Id.* at 8244 (codified at 13 C.F.R. § 124.520(b)(2)).

129. *Id.* at 8245 (codified at 13 C.F.R. § 124.520(c)(3)).

130. *Id.*

131. *Id.* at 8246 (codified at 13 C.F.R. § 124.520(c)(5)).

132. 13 C.F.R. § 124.520(c)(4).

133. 8(a) Business Development, 76 Fed. Reg. at 8245 (codified at 13 C.F.R. § 124.520(d)(1)(iii)).

134. 13 C.F.R. § 124.520(h).

135. *Id.* §124.513(a)(2).

participant brings very little to the joint venture aside from 8(a) status, the SBA will not approve that joint venture for contract procurement.<sup>136</sup>

Participation in 8(a) joint ventures is widespread among ANCs. In 2006, the GAO interviewed twenty-six ANCs participating in the 8(a) subsidiary program. Among those interviewed, twenty-two owned subsidiaries with a total of fifty-seven joint venture agreements.<sup>137</sup> For example, Bering Straits subsidiary Bering Straits Solutions joined forces with a California-based federal systems integration company to form Iteq/Bering Straits Solutions.<sup>138</sup> Also, Sealaska partnered with a global leader in plastics design to form the joint venture Nypro Kánaak in order to obtain 8(a) contracts for plastics manufacturing.<sup>139</sup> These business relationships give ANCs the opportunity to attempt greater business challenges and provide economic opportunities to which they would not normally have access. Furthermore, joint ventures promote business competition, develop shareholder skills, and provide good value for taxpayers within the 8(a) BD Program.<sup>140</sup>

Depending on its business strategy and goals, the recent revisions could significantly alter the future of a given joint venture. The revisions most likely to impact ANC joint venture partners include clarified contract management and work performance requirements, new regulations limiting subcontracting to non-8(a) partners, and expanded contract procurement limits.

### 1. *Managerial Experience*

Project management is a key aspect of 8(a) BD Program joint ventures. The managing firm gains significant practical experience and maintains control over the outcome of the project. But the old 8(a) BD Program guidelines were previously silent as to whether an 8(a) partner should manage its joint venture. The 2011 Revisions now dictate that the 8(a) firm must play a managerial role in the joint venture.<sup>141</sup> For an “unpopulated” joint venture, this means that an employee of the 8(a) partner, in this case the ANC subsidiary, must serve as project

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136. *Id.*

137. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 30.

138. SBA Profile for ITEQ/Bering Straits Solutions, SMALL BUS. ASS'N DYNAMIC SMALL BUS. SEARCH, [http://dsbs.sba.gov/dsbs/search/dsp\\_profile.cfm?User\\_Id=P0609519](http://dsbs.sba.gov/dsbs/search/dsp_profile.cfm?User_Id=P0609519) (last updated Nov. 23, 2011).

139. *Government Contracting*, NYPRO KANAAK, <http://www.nyprokanaak.com/page/governmentcontracting> (last visited Feb. 18, 2012).

140. Press Release, NANA Dev. Corp., *supra* note 35.

141. 13 C.F.R. § 124.513(c)(2).

manager.<sup>142</sup> When a joint venture is “populated,” the joint venture must demonstrate to the SBA that an 8(a) partner controls performance of the contract.<sup>143</sup>

Directing 8(a) BD Program participants to take control of their business development is one of the more decisive revisions made by the SBA. Due to the previous lack of regulations pertaining to management requirements, very little published information exists indicating how often ANC subsidiaries take the lead in joint venture contracts. Indeed, in certain circumstances it seems illogical that a joint venture would choose to name the ANC subsidiary partner as “project manager.” For example, ESS Support Services regularly partners with Native corporations of various sizes. One of its largest 8(a) partners is Chiulista Services, a subsidiary of ANC powerhouse Calista. But ESS Support Services also regularly partners with small village corporations like Tikigaq, Kake, Gana-A’Yoo, and Kijic.<sup>144</sup> As ESS is a division of the global corporation Compass Group,<sup>145</sup> it is unlikely that the various small ANC partner firms would take the lead on each joint venture with ESS Solutions unless prompted by government regulations.

Moreover, some partnerships fail to fit into a particular mold. The joint venture Bering Straits Orion Management lists two managing partners, one from Bering Straits and one from the much larger firm Orion Management. In this case, the non-ANC partner firm is veteran-owned and therefore also qualified to receive sole-source contracts through SBA programs.<sup>146</sup> Until the 2011 Revisions, the SBA has not required specification of such tasks. But now the joint venture must demonstrate that the 8(a) partner acts as the project manager or risk program disqualification. Because this is an entirely new requirement, this revision will substantially impact how joint ventures are structured and represent themselves to the public.<sup>147</sup>

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142. *Id.*

143. *Id.*

144. *Our Business Partners, ESS SUPPORT SERVICES*, <http://www.essalaska.com/partners.htm> (last visited Feb. 18, 2012).

145. *Id.*

146. The Veteran Benefit Act § 308, 15 U.S.C. § 657(f) (2012).

147. The *Washington Post* published an exposé on joint ventures between mentor firm GTSI and Eyak Corp. and a separate joint venture with one of Eyak Corp.’s direct competitors. The SBA suspected that GTSI was exploiting its protégé 8(a) partners’ small business status when staff members identified themselves to customers as GTSI rather than the joint venture. Letter from Tom Kennedy, Vice President, GTSI, to Multimax/Array GTSI JV Staff (Jul. 22, 2008), cited in O’Harrow, *supra* note 57.

## 2. Documenting Joint Venture Contract Performance

Work performance minimums for 8(a) joint venture partners are not new to the 8(a) BD Program.<sup>148</sup> But, the prior regulations were minimally enforced and were often only slightly understood by program participants. Previously, the regulations mandated that the 8(a) joint venture partner perform a “significant portion” of the work required to complete an awarded contract.<sup>149</sup> However, the term “significant portion” was not defined. Additionally, no provisions outlined different functional reporting requirements depending on whether a joint venture was “populated” with its own employees, or “unpopulated,” using the partners’ respective employees to perform various parts of the contract.

Following major changes, the 2011 Revisions require the 8(a) participant in “unpopulated” joint ventures to perform at least 40% of all work done by the joint venture partners, excluding merely administrative tasks. The non-8(a) partner and its affiliates cannot serve as subcontractors to the project. Instead, any work performed by the non-8(a) partner or its affiliates must not account for more than 60% of all work performed by the joint venture partners. Meanwhile, the 8(a) partner can perform work directly or as a subcontractor to the project.<sup>150</sup> According to the SBA, each partnership must determine whether to form an “unpopulated” or “populated” joint venture.<sup>151</sup> But “populated” joint ventures are subject to stricter regulations under the finalized 2011 Revisions. The 8(a) partner seeking approval for a “populated” joint venture must now demonstrate how it will benefit or develop its business through the relationship.<sup>152</sup> Also, because employees of “populated” joint ventures work directly for the joint venture, it is impossible to determine which firm is performing the bulk of the work. For this reason, specific work requirements for 8(a) partners to “populated” joint ventures are ineffectual. Instead, the partnership must demonstrate that the 8(a) partner (1) controls the joint venture, (2) is responsible for its records, (3) owns at least 50% of the joint venture, and (4) receives profits commensurate with its ownership.<sup>153</sup>

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148. See 13 C.F.R. § 124.510 (2010) (“To assist the business development of Participants in the 8(a) BD program, an 8(a) contractor must perform certain percentages of work with its own employees.”).

149. 13 C.F.R. § 124.513(d) (2010).

150. 8(a) Business Development, 76 Fed. Reg. at 8224–25 (codified at 13 C.F.R. § 124.513(d) (2012)).

151. *Id.* at 8224.

152. *Id.* at 8243 (codified at 13 C.F.R. § 124.513(d)(1)).

153. *Id.* at 8224 (codified at 13 C.F.R. § 124.513(d)).

### 3. *Subcontracting Work and Maintaining Profit Margins*

The ANC practice of subcontracting large portions of work to non-8(a) firms bore extensive criticism from governmental and non-governmental critics. A 2009 Senate Subcommittee report suggested that no-limit, sole source contracts are sometimes awarded to ANCs for the sole purpose of passing the work through to a non-8(a) firm.<sup>154</sup> But subcontracting is par for the course in completing large government contracts.<sup>155</sup> The real problem was much more specific. Under the old rules, work performance requirements were satisfied through the joint venture.<sup>156</sup> This allowed non-8(a) joint venture partners to also serve as subcontractors, sometimes performing a large majority of work on the contract. The more work the joint venture subcontracted, the smaller the profits realized by the joint venture. A possible result is the non-8(a) partner receiving large sums in subcontractors' fees, thereby benefitting more from the joint venture than the ANC partner.<sup>157</sup>

The 2011 Revisions stipulate that non-8(a) joint venture partners and their affiliates can no longer subcontract to 8(a) joint ventures.<sup>158</sup> Instead, any work performed by the non-8(a) partner or its affiliate must be completed as a portion of the partner's 60% maximum contribution to contract performance. This ensures that the joint venture partners maintain the 40% to 60% work performance ratio required by SBA guidelines.<sup>159</sup> To protect the 8(a) partner's profit shares, the new regulations also stipulate that the 8(a) partner must receive profits commensurate with its work performance or, if incorporated, commensurate with its ownership interest (51% or more).<sup>160</sup> Prior regulations only required that the 8(a) receive 51% of profits.<sup>161</sup> As discussed above, without clear work performance and ownership requirements, unnecessarily high performance costs can easily whittle away profits for the 8(a) partner.

Regardless of the structure of a partnership, all 8(a) partners to a joint venture must submit work performance reports to the SBA. This reporting requirement is entirely new to 8(a) joint ventures. The report must be submitted annually and at the conclusion of the contract to

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154. U.S. SENATE COMM. ON HOMELAND SEC., *supra* note 59.

155. Telephone Interview with Dennis Worden, *supra* note 66.

156. 13 C.F.R. § 124.513(d) (2010).

157. 8(a) Business Development, 76 Fed. Reg. at 8240.

158. *Id.* (codified at 13 C.F.R. 124.513(d)(2)(ii)).

159. *Id.* (codified at 13 C.F.R. § 124.513(d)(2)(ii)(A)).

160. *Id.* at 8243 (codified at 13 C.F.R. § 124.513(c)(4)).

161. 13 C.F.R. § 124.513(c)(3) (2010).

explain how the work performance requirement was met.<sup>162</sup> By creating functional barriers to passing through work to larger firms and requiring regular reporting, the SBA guidelines will make business more difficult and costly. But the SBA is simultaneously promoting the true spirit of the program: business development for disadvantaged populations.

Stricter regulations could have a variety of effects on firms seeking partnerships. One possibility is an increase in partnering among 8(a) firms to avoid impropriety in meeting the 40% threshold. Many ANCs have already begun partnering among themselves and other socially and economically disadvantaged corporations. A classic example is Bering Kaya Support Services Joint Venture, a partnership between a Bering Straits subsidiary and Kaya Associates, another 8(a) disadvantaged small business that often subcontracts for ANCs and other 8(a) firms.<sup>163</sup> Encouraging cooperation among 8(a) qualifying small businesses may lead to disadvantaged firms growing together and possibly merging with one another.

Clarifying the work performance requirements ensures that 8(a) partners will have access to perform substantive work on procured contracts. More importantly for ANCs, the revision places the 8(a) partner in a position of control. These new specific guidelines fill in the gray areas that previously led to substantially reduced profit margins for 8(a) joint venture partners. For ANCs, the revisions ensure the ability to form joint ventures, attempt complex and sophisticated contracts, and subcontract as needed while operating within a system that facilitates positive relationships.<sup>164</sup>

#### 4. *The "Three in Two" Rule*

Prior to the 2011 Revisions, the "three in two" rule limited joint ventures to submitting three offers to perform government contracts in a two-year period.<sup>165</sup> The original drafting of this rule failed to identify a clear purpose, leading participants to apply their own interpretations of the regulatory language. In fact, the original rule could be interpreted to

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162. 8(a) Business Development, 76 Fed. Reg. at 8243 (codified at 13 C.F.R. § 124.513(i)(1)-(2)).

163. *Bering Kaya Support Services JV Receives Ft. Greely Contract*, AGLUKTUK, Jan./Feb. 2011, at 1, 3, available at <http://beringstraits.com/northriver/wb/media/agluktuk/2011/2011%20January%20February%20Annual%20Meeting.pdf>; see also *Company Portfolio*, KAYA ASSOCIATES, INC., <http://www.kayacorp.com/portfolio/default.aspx> (last visited Mar. 21, 2012).

164. Telephone Interview with Dennis Worden, *supra* note 66.

165. 13 C.F.R. § 121.103(h) (2010).



compel joint ventures to create a new subsidiary and a new joint venture each time it makes three bids, even if all three bids were made in a short period of time, to remain active in the program. Now, after the 2011 Revisions, the regulation reads that joint ventures cannot be *awarded* more than three contracts in two years.<sup>166</sup> Changing a single word in the provision has vast implications for joint ventures. Rather than limiting the number of offers a joint venture makes, it limits the number of actual contracts procured. Not only does the new language clarify the legislative intent, it also expands opportunities for joint ventures.

Also, partners within a joint venture can be awarded up to three additional contracts in that two-year period by forming additional joint ventures. For example, Bering Straits' aerospace subsidiary (BSA) currently partners with a major corporation called LB&B to form the BSA-LB&B joint venture. The revisions allow this joint venture to procure three 8(a) government contracts over a two-year period. Then, if they choose, BSA and LB&B can form another joint venture to double the number of contracts awarded over the next two years.

But this option is not limitless. The SBA reserves discretion to make a "finding of affiliation" if it determines that joint venture partners have become contractually dependent on one another due to a longstanding relationship.<sup>167</sup> As a result, if BSA and LB&B continue to create joint ventures together, the SBA reserves the right to deny the joint ventures access to government contracts for the remainder of that two-year period. The revised procurement limit will serve to counterbalance other strict regulations by allowing joint ventures to be considered for more contracts.

The expounded joint venture regulations described above will profoundly impact how ANC joint venture partners perform 8(a) contracts in the future. Even the slightest of these revisions, sometimes changing only a single word in the regulation, guard 8(a) participants from making business decisions based on incorrect interpretations of regulatory intent. The commonality of 8(a) certified ANCs entering joint ventures makes these revisions all the more important. Armed with complete instructions, ANCs can join forces with other corporations with clear expectations of the work to be performed and profit margins to be earned.

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166. 13 C.F.R. § 121.103(h) (2012).

167. *Id.* § 121.103(f); *see also* 8(a) Business Development, 76 Fed. Reg. at 8223.

## CONCLUSION

In the forty years since ANCSA and twenty-five years since the SBA opened the 8(a) BD Program to ANC participation, ANCs have created thriving businesses to the benefit of Native communities. These achievements are nothing less than admirable. But vague regulations and lack of enforcement sometimes undermined the goals of Section 8(a). The SBA attempted to remedy these deficiencies. The results consider the form and function of these regulations and make strides toward taking a holistic view of Native-owned participant firms, including ANCs.

The full impact of the 2011 Revisions is still unknown, but some changes are certain to cause ANCs to significantly modify their business plans.<sup>168</sup> The new regulations better articulate program goals and will push ANCs to develop viable subsidiaries without the support of the 8(a) BD program. Allowing 8(a) participants to shift NAICS codes balances the increased oversight of size regulations and prevents Native-owned businesses from continuously rotating subsidiaries within an industry. ANCs can expect positive gains from this change. For example, in 2010 an ANC called Koniag, Inc. attributed 71% of revenues to services for the federal government but also saw revenues increase by 29% due to subsidiary diversification. This considerable growth in a single fiscal year is mostly attributable to entering new markets.<sup>169</sup>

The creation of joint venture partnerships will become increasingly competitive in coming years. Stricter rules place ANC joint venture partners in control of contract performance and provide recourse for mentor firm violations. As a result, ANCs will likely be more selective in choosing their non-8(a) partners, an approach that will translate to non-8(a) firms seeking to partner with 8(a) firms. Rather than relying on an ANC merely to obtain access to 8(a) contracts, potential partners will consider the ANC's ability to take on a given contract, manage the project, and complete its mandated portion of the work. Over time, mentors with an improper view of program benefits may be effectively phased out.

Moreover, joint ventures between 8(a) firm subsidiaries are a viable option, offering both partners full access to 8(a) contracts without the concern of regulations aimed at non-8(a) partner firms. This arrangement is not unheard of. In 2000, ASRC and Chenega Technology

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168. Telephone Interview with Dennis Worden, *supra* note 66.

169. Stricker, *supra* note 46, at 78-79.

Services formed NJVC to offer IT services to the Department of Defense.<sup>170</sup> Calista's Yulista Management and Sealaska's SES, now both 8(a) BD Program graduates, together formed the joint venture JVYS.<sup>171</sup> In 2010, Sealaska went so far as to acquire a former Hispanic-owned 8(a) partner called Security Alliance of Florida.<sup>172</sup> It is foreseeable that this trend will expand under the revised regulations, promoting competition among ANCs to form the most practical partnerships with other qualifying firms.

All government contractors, both 8(a) and otherwise, will feel the pinch of decreased government spending following these and other regulatory revisions. Chugach Alaska Corporation (Chugach), with 64% of revenues in government contracts, cited changes in government contract procurement policies as a reason for contract losses and decreased revenues from \$1.1 billion in 2009 to \$937 million in 2010.<sup>173</sup> But budgetary changes and SBA regulatory revisions are applicable to all government contractors. For this reason, ANCs might experience lower revenues in the coming years, but they will not be any more vulnerable to lost profits than other government contractors.

ANCs may be on equal footing with other 8(a) firms under the finalized rule changes, but politics may play a large role as well. Government contracting by Native-owned firms experienced a special brand of negative attention during the revision process. The Native-owned government contracting community worries that heightened oversight and negative political attention may deter government contracting officers from awarding contracts to Native-owned businesses in the future. It remains to be seen to what extent these and other regulatory revisions will change political attitudes and how those changes will effect ANC contract procurement in the future.<sup>174</sup>

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170. *About Us*, NJVC, <http://www.njvc.com/about-us> (last visited Feb. 19, 2012).

171. JOINT VENTURE YULISTA & SES, <http://www.jvys.org> (last visited Feb. 19, 2012).

172. Stricker, *supra* note 46, at 81.

173. *Id.* at 77.

174. This Article focuses on ANC participation in the 8(a) BD program, but the FY10 Section 8(11) National Defense Regulation changes are suspected to have an equal or greater impact on Native-owned firms. In short, 8(a) firms are no longer exempt from the justification and approval process for defense contracts valued over \$20 million. ANCs comprise most of the few 8(a) firms with the ability to perform contracts of this size. Some ANCs fear that the negative political attention leading to the 8(a) and 8(11) changes will cause contracting officers to avoid awarding contracts to Native-owned firms in the future. Telephone Interview with Dennis Worden, *supra* note 66.

Regulatory changes, budget cuts, and increased scrutiny of government spending will cause the next two to five years to be difficult while government contractors learn to operate within this new paradigm.<sup>175</sup> But the introduction of healthy competition and the push to develop beyond 8(a) will spur ANC subsidiaries to grow faster and eventually compete without government intervention. As ANCs rise to the challenge, so will profits. Eventually, ANC subsidiaries will outgrow the 8(a) BD Program with the confidence and capital to compete in the greater market.

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175. *Id.*