

BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Surviving And Thriving In The Small Business Administration's 8(a) Program: Maximizing Opportunities For NHOs, ANCs, And Tribes

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Since its establishment, the Small Business Administration's (SBA's) 8(a) Business Development (BD) Program has provided socially and economically disadvantaged small business owners with federal contracting and training opportunities. The Program is designed to assist "eligible small disadvantaged business concerns [to] compete in the American economy through business development."¹ The Program also provides small disadvantaged business concerns with a participation term of nine years from the date the SBA approves their admission to the 8(a) Program.²

A core component of the 8(a) Program centers on specific statutory and regulatory provisions aimed at facilitating the ability of Native Hawaiian Organizations (NHOs), Alaska Native Corporations (ANCs), and businesses owned by Native American tribes (Tribal-owned) to enter and succeed in the federal government contracting marketplace. These contractor-specific programs are intended to support the economic development of the respective, highly nuanced communities of these businesses. For example, NHOs must be recognized entities established for the benefit of Native Hawaiians, owning at least 51% of the 8(a) firm, and controlled by Native Hawaiians. ANCs are native-owned corporations created under the Alaska Native Claims Settlement Act, while Tribal-owned programs involve businesses owned by federally recognized tribes or their members. While all three groups participate in the 8(a) Program to generate revenue and provide education, health, and welfare services for their communities, their operations can vary widely. That said, each of these firms can benefit tremendously from the Program by, for example, taking advantage of set-aside opportunities, leveraging

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sole-source contracting arrangements, and harnessing other contracting advantages to support their respective communities.

While the 8(a) Program has always been focused on strengthening the ability of small businesses to compete effectively and contribute to the American economy, it has not remained static. The Program has evolved over the years and has even come under fire in some circles. However, the SBA remains steadfast in attempting to ensure that socially and economically disadvantaged small businesses have equitable access to federal contracting opportunities in the marketplace. The Program aims to achieve this goal by providing small disadvantaged business concerns with business assistance to strengthen and increase their chances of capturing federal procurement opportunities.

History And Purpose Of The SBA's 8(a) Program

Statutory/Regulatory Framework

The 8(a) Program takes its name from § 8(a) of the Small Business Act of 1958.³ When enacted, § 8(a) empowered the SBA to enter into contracts with any department or agency in the government and arrange for the performance of such contracts, vis-à-vis the issuance of subcontracts to small business concerns.⁴ Unlike its current form, when first enacted, § 8(a) did not limit subcontracting opportunities only to socially and economically disadvantaged small business concerns.

Rather, the original language in § 8(a) allowed the SBA to contract with any “small-business concerns or others.”⁵ This changed in 1978. In that year, the Small

Business Investment Act of 1958 was amended, giving the SBA express statutory authority to subcontract to minority-owned businesses under its 8(a) Program.⁶ Section 201 of the Act provided the SBA statutory authorization to foster the development of businesses “own[ed] by individuals who are both socially and economically disadvantaged.”⁷ Further, the Act defined “socially and economically disadvantaged small business concern” to mean any small business concern:

(A) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(B) whose management and daily business operations are controlled by one or more of such individuals.⁸

A socially disadvantaged individual was defined as an individual “who ha[s] been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”⁹ An economically disadvantaged individual is an individual who is a socially disadvantaged individual and “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”¹⁰

Codified at 15 U.S.C.A. § 637, the 8(a) Program empowers the SBA with authority to enter into contracts with federal departments and agencies that are performed by small business concerns owned by socially and economically disadvantaged individuals via subcontracts.¹¹ The statute and Program have also been

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amended several times to broaden eligibility and include other “disadvantaged” groups. This included expanding eligibility under the 8(a) Program to extend benefits to Indian Tribes and Alaskan Natives in 1986.¹² In 1988, Native Hawaiians were recognized as a disadvantaged group eligible under the Program.¹³ These changes enabled certain concerns owned by NHOs, ANC’s, and Indian Tribes to participate in the 8(a) Program by virtue of their respective statuses.

Regulations governing the 8(a) Program are promulgated at 13 C.F.R. Part 124, *8(a) Business Development/Small Disadvantaged Business Status Determinations*. The regulations provide guidance and requirements on eligibility,¹⁴ applying to the 8(a) Program,¹⁵ contractual assistance under the 8(a) Program,¹⁶ and exiting the 8(a) Program.¹⁷ Furthermore, another feature of the 8(a) Program is that for Participants owned by NHOs, ANC’s, and Indian Tribes, sole-source contracting is available. Although the regulations generally require that procurements with an anticipated award price, inclusive of options, exceeding \$7 million must be competitive,¹⁸ the following exemptions apply to Participants owned by Indian Tribes, ANC’s, and NHOs:

(1) A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract 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.

(2) A Participant concern owned and controlled by an NHO may be awarded a sole source Department of Defense (DoD) 8(a) contract 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.

(3) There is no requirement that a procurement must

be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts. However, a current procurement requirement may not be removed from 8(a) competition and awarded to a tribally-owned, ANC-owned, or NHO-owned concern on a sole source basis (*i.e.*, a procuring agency may not evidence its intent to fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant). A follow-on requirement to one previously awarded as a competitive 8(a) procurement may be offered, accepted and awarded on a sole source basis to a tribally-owned or ANC-owned concern or a concern owned by an NHO for DoD contracts.

(4) A joint venture between one or more eligible Tribally-owned, ANC-owned or NHO-owned Participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that it meets the requirements of [13 C.F.R.] § 124.513.

(5) An agency may not award an 8(a) sole source contract for an amount exceeding \$25,000,000 or \$100,000,000 for an agency of the Department of Defense unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.¹⁹

Annual Government Spending On The 8(a) Program

Under the 8(a) Program, the federal government earmarks 5% of all federal spending to be distributed to small disadvantaged businesses²⁰ (SDBs) each year.²¹ Despite this floor, actual federal dollars spent under the 8(a) Program have been generally greater, averaging 8.72% between fiscal years 2006 through 2021 and illustrated in the following table:

SBA Small Business Procurement Scorecard Overview:²²

Fiscal Year	Percentage Goal	Percentage Achieved	Government Spend
2006	5%	6.76%	\$22.99 B
2007	5%	6.58%	\$24.90 B
2008	5%	6.76%	\$29.33 B
2009	5%	7.57%	N/A
2010	5%	7.95%	\$34.39 B
2011	5%	7.67%	\$32.4 B
2012	5%	8.00%	\$32.3 B

Fiscal Year	Percentage Goal	Percentage Achieved	Government Spend
2013	5%	8.61%	\$30.6 B
2014	5%	9.46%	\$34.7 B
2015	5%	10.06%	\$35.4 B
2016	5%	9.53%	\$39.1 B
2017	5%	9.10%	\$40.2 B
2018	5%	9.65%	\$46.5 B
2019	5%	10.29%	\$51.6 B
2020	5%	10.54%	\$59.0 B
2021	5%	11.01%	\$62.4 B

The government has recently increased the percentage of federal dollars earmarked for SDBs. On January 20, 2021, President Biden signed Executive Order (EO) 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which directed the government to “pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”²³ EO 13985 requires the Office of Management and Budget (OMB) to coordinate with agencies to identify methods “for allocating Federal resources in a manner that increases investment in underserved communities, as well as individuals from those communities.”²⁴

On February 16, 2023, the President issued EO 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which builds upon previous “equity-related Executive Orders by extending and strengthen-

ing equity-advancing requirements for agencies, and . . . positions agencies to deliver better outcomes for the American people.”²⁵ Pertinent to the 8(a) Program, Section 7 of EO 14091, *Advancing Equitable Procurement*, provides:

(a) The Government-wide goal for Federal procurement dollars awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals (SDBs) shall be 15 percent in Fiscal Year 2025. In furtherance of this goal, OMB shall set a Government-wide SDB goal for Fiscal Year 2024. The Small Business Administration shall, on an annual basis, work with each agency to establish an agency-specific goal that, in aggregate, supports the Government-wide goal. Further, agencies shall undertake efforts to increase contracting opportunities for all other small business concerns as described in the Small Business Act (15 U.S.C. ch. 14A).²⁶

As a result of these equity-advancing EOs, and to achieve the President’s goal, there has been a significant increase in the percentage of federal contracting dollars awarded to SDBs:

Fiscal Year	Percentage Goal	Percentage Achieved ²⁷	Government Spend ²⁸
2022	11% ²⁹	11.38%	\$69.9 B
2023	12%	12.1%	\$76.2 B

For fiscal year 2024, the OMB has earmarked 13% of federal procurement dollars to SDBs.³⁰ To meet this goal and further increase small business participation, the OMB has issued guidance to agencies, including on January 25, 2024, *Increasing Small Business Participation on Multiple-Award Contracts*.³¹ In the January 25, 2024 memorandum, the OMB identified several actions to strengthen small business participation on multiple-award contracts, including identifying several 8(a) government-wide acquisition contracts designated best-in-class.³²

Statistics On The Number Of Current 8(a) Contractors

The number of 8(a) contractors, commensurate with federal dollars awarded to SDBs, has also increased during the Program’s life. According to the SBA’s Dynamic Small Business Search (DSBS), there are currently 6,009 entities that are either 8(a) certified or an 8(a) joint venture.³³ From this total, 693 are ANC-owned, 139 are NHO-owned, and 447 are Tribally-owned.³⁴ The ratio of current 8(a) entities on DSBS that are ANC-, NHO-, or Tribal-owned is, thus, 11.66%, 2.44%, and 7.41%, respectively.

Native Hawaiian Organizations

Statutory/Regulatory Framework

As previously noted, NHOs are the most recent group recognized as socially and economically disadvantaged and thus eligible for inclusion in the 8(a) Program.³⁵ To qualify as an NHO-owned SDB, a small business concern must be owned (at least 51% unconditional ownership of the concern or the concern's stock) and controlled by an economically disadvantaged NHO.³⁶ An NHO is defined as “any community service organization serving Native Hawaiians in the State of Hawaii which—(A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs, or any successor agency, (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.”³⁷ In the SBA regulations governing the 8(a) Program promulgated at 13 C.F.R. Part 124, *8(a) Business Development/Small Disadvantaged Business Status Determinations*, special rules particular to NHOs are set forth under 13 C.F.R. § 124.110.

How To Qualify As An NHO

An organization must meet the definition of an NHO to qualify under the 8(a) Program. Under the SBA regulations, an NHO means “any community service organization serving Native Hawaiians³⁸ in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.”³⁹

To participate in the 8(a) Program, a small business concern (typically referred to as either an applicant when applying to the Program, or a Participant⁴⁰ once admitted to the 8(a) Program) must meet certain requirements. The following provisions apply to NHO-owned concerns to the extent that they are consistent with rules special to NHOs:⁴¹

- (1) The entity must be “a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citi-

zens of and residing in the United States, and which demonstrates potential for success.”⁴²

- (2) The entity must qualify as a small business concern as defined under 13 C.F.R. Part 121, *Small Business Size Regulations*, based on the applicable size standard for the concern's primary industry classification.⁴³ A concern “must generally remain small for its primary industry classification” during its participation in the 8(a) Program, not exceeding “the size standard corresponding to its primary [North American Industry Classification System (NAICS)] code, as adjusted, for three successive program years, unless the [concern] demonstrates that through its growth and development, its primary industry is changing pursuant to 13 C.F.R. § 121.107, to a related secondary NAICS code that is contained in its most recently approved business plan.”⁴⁴
- (3) The small business concern must be owned by socially disadvantaged individuals. For Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a federally or state-recognized Indian Tribe), there is a rebuttable presumption that such individuals are socially disadvantaged.⁴⁵
- (4) The entity must be owned by economically disadvantaged individuals who are also socially disadvantaged, meaning that the individuals' “ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”⁴⁶
- (5) Unconditional ownership⁴⁷ in small business concerns by disadvantaged individuals requires that the small business concern must be “at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States.”⁴⁸
- (6) The qualified disadvantaged individual must be in control of the small business concern. This

requires the “management⁴⁹ and daily business operations to be conducted by one or more disadvantaged individuals.”⁵⁰ As a general rule, the disadvantaged individual(s) who manage the small business concern “must devote full-time to the business during the normal working hours of firms in the same or similar line of business.”⁵¹

- (7) The small business concern must demonstrate a potential for success, showing that “it has operated and received contracts . . . in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application” that with support from the 8(a) Program, the small business concern will be able to perform 8(a) contracts and have reasonable prospects for success in competing in the private sector.⁵²
- (8) Good Character/one-time eligibility. This requirement applies to both small business concerns and all its principals.⁵³ Furthermore, the regulations state that once a concerned or disadvantaged individual participates in the 8(a) Program, “neither the concern nor that individual will be eligible again.”⁵⁴
- (9) To continue remaining eligible to participate in the 8(a) Program, Participants must provide records and documentation, as well as “other information as SBA deems necessary,” as part of its annual review of each Participant.⁵⁵

Special Considerations That Differentiate NHOs From Other Entities

NHOs must meet all eligibility criteria outlined in 13 C.F.R. §§ 124.101 through 124.108 and § 124.112, to the extent they are not consistent with rules particular to NHOs at 13 C.F.R. § 124.110.⁵⁶ For example, when determining whether a concern is small, the SBA will determine its size “independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, . . . unless the [SBA] determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are

likely to obtain, a substantial unfair competitive advantage within an industry category.”⁵⁷ This exception to the SBA’s general rules regarding affiliation is critical because an NHO may own more than one 8(a) Participant.⁵⁸ As a general matter, concerns and entities are affiliated when one has control (actual or the power to) over the other, or a third party has control (actual or the power to) over both.⁵⁹ If the SBA considers concerns and entities affiliated, it “counts the receipts, employees, or other measure of size of the concern whose size is at issue” with all of its affiliates to determine its size.⁶⁰ This usually results in a concern exceeding the size standards and not qualifying as small.

Although NHOs are presumptively socially disadvantaged,⁶¹ they must demonstrate that they are economically disadvantaged by establishing that their business activities will principally benefit⁶² Native Hawaiians.⁶³ Furthermore, since the regulations permit an NHO to own more than one 8(a) Participant, once an NHO has established it is economically disadvantaged, it does not need to reestablish that it is economically disadvantaged for other businesses it owns that apply to the 8(a) Program unless specifically requested by the SBA.⁶⁴ Similarly, unless specifically requested by SBA, a “second” NHO need not establish its economic disadvantage status in connection with the 8(a) application of a business concern it owns if the “second” NHO will serve and benefit the same Native Hawaiian community as an NHO (the “first NHO”) that has already established its economic disadvantage status.⁶⁵

Control is also unique for NHOs. Specifically, to establish that an NHO controls a small business concern, the concern “must demonstrate that the NHO controls the concern’s board of directors, managing members, managers or managing partners.”⁶⁶ Although an NHO’s management of a concern is similar to general requirements under the Program,⁶⁷ the individual managing an NHO-owned concern, in addition to not being required to establish they are personally socially and economically disadvantaged,⁶⁸ is also not deemed “to have used his or her individual eligibility within the meaning of [13 C.F.R.] § 124.108(b).”⁶⁹ Relatedly, the full-time devotion requirement also does not apply, provided the

individual may not manage “more than two [NHO-owned] Program Participants at the same time.”⁷⁰ This is because the eligibility of NHO-owned concerns depends on how their activities will benefit Native Hawaiians.⁷¹ Therefore, “[a]n NHO-owned firm’s eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO’s members, directors, or managers. The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO’s members.”⁷²

Although NHOs can own multiple 8(a) Participants, an NHO may not own “51% or more or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant.”⁷³ However, an NHO may “own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.”⁷⁴ Furthermore, “[i]f the primary NAICS code of a Participant owned by an NHO is changed pursuant to [13 C.F.R.] § 124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.”⁷⁵

Alaska Native Corporations

Statutory/Regulatory Framework

Along with Indian Tribes, Alaskan Natives were one of the first groups statutorily designated socially disadvantaged and eligible for 8(a) participation.⁷⁶ In addition, in 1992, ANCs were also statutorily deemed economically disadvantaged,⁷⁷ a designation unique when compared to NHOs and Indian Tribes. Recognition that ANCs are eligible for participation in the Program is codified at 15 U.S.C.A. § 637.⁷⁸ The statute and regulations also provide several critical definitions regarding ANCs. First, an Alaskan Native is defined to mean “a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including

Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.”⁷⁹ Furthermore, an ANC may be either a Regional Corporation,⁸⁰ Village Corporation,⁸¹ Urban Corporation,⁸² or Group Corporation,⁸³ “organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).”⁸⁴

How To Qualify As An ANC

Like NHOs, ANC-owned concerns must comply with the SBA’s general 8(a) eligibility requirements, *i.e.*, 13 C.F.R. §§ 124.101 through 124.108 and § 124.112, to the extent they are not inconsistent with rules special to ANCs. This means that the ANC-owned concern:

- (1) must be unconditionally owned and controlled by socially and economically disadvantaged individual(s) (or, for ANCs, a disadvantaged group);⁸⁵
- (2) must demonstrate it is socially disadvantaged, which ANCs are presumed to be;⁸⁶
- (3) must demonstrate a potential for success;⁸⁷
- (4) must show good character;⁸⁸ and
- (5) must demonstrate that it continues to remain eligible under the 8(a) Program.⁸⁹

Special Considerations That Differentiate ANCs From Other Entities

As in the case of NHOs, there is a rebuttable presumption that Alaskan Natives the ANC benefits are socially disadvantaged.⁹⁰ However, by statute, Alaskan Natives are also deemed economically disadvantaged.⁹¹ Therefore, ANCs, unlike NHOs and Indian Tribes, do not need to demonstrate that they are economically disadvantaged.⁹²

With respect to ownership, an ANC-unique feature

is that “Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock.”⁹³ Second, unlike NHOs, which are nonprofit organizations, an ANC can be either a for-profit or nonprofit entity.⁹⁴ However, small business concerns owned and controlled by the ANC must be for-profit to be eligible for participation under the 8(a) Program.⁹⁵

As under the regulations regarding ownership and control for NHOs, an ANC must own and control the concern, which is “deemed [to exist] . . . where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.”⁹⁶ In addition, because ANCs are similarly established to benefit a disadvantaged group, the “individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage”⁹⁷ Finally, the SBA regulations similarly provide ANCs the ability to “reorganize[] its ownership of a[n 8(a)] Participation . . . by inserting or removing a wholly-owned subsidiary entity between the ANC and the Participant” without requesting a change of ownership from SBA before the change.⁹⁸

In addition, because ANCs were collectively designated as a disadvantaged group along with Indian Tribes, there are certain unique features of Indian Tribes, discussed in the following section, that similarly apply to ANCs.⁹⁹ However, not all subsections in 13 C.F.R. § 124.109 regarding Indian Tribes apply to ANCs.¹⁰⁰ Therefore, such distinctions are noted below in the section of this BRIEFING PAPER addressing special considerations that differentiate Tribes from other entities.

Tribally Owned Entities

Statutory/Regulatory Framework

Indian Tribes, like ANCs, were one of the first groups designated socially disadvantaged by statute.¹⁰¹ Codified at 15 U.S.C.A. § 637, an Indian Tribe is defined as “any Indian tribe, band, nation, or other organized group or community of Indians” federally or

state-recognized.¹⁰² The pertinent 8(a) regulations apply a similar definition, defining an Indian Tribe as “any Indian tribe, band, nation, or other organized group or community of Indians, . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.”¹⁰³ To qualify as a small business concern owned by an Indian Tribe, or Tribal-owned concern, the concern must be “at least 51 percent owned by an Indian tribe.”¹⁰⁴ Like ANCs and NHOs, there is a rebuttable presumption that Indian Tribes are socially disadvantaged.¹⁰⁵

Indian Tribes eligible to participate in the Program may be federally or state recognized.¹⁰⁶ Pursuant to the Federally Recognized Indian Tribe List Act of 1994,¹⁰⁷ the Bureau of Indian Affairs compiles and publishes a list of federally recognized Indian Tribes, excluding Alaskan Native entities. As of January 8, 2024, there are 574 federally recognized Indian Tribes.¹⁰⁸ In a 2012 report, the U.S. Government Accountability Office (GAO) identified that there are approximately 61 tribes recognized by 12 different states that are also not recognized by the Federal Government.¹⁰⁹ Since the report, 15 states recognize Indian Tribes in a formal capacity.¹¹⁰

How To Qualify As A Tribe

Unlike ANCs, Indian Tribes are not deemed economically disadvantaged and, thus, must establish their own economically disadvantaged status for their Tribal-owned concern to qualify for eligibility and participation in the 8(a) Program.¹¹¹ However, like NHOs, once an Indian Tribe (or ANC) has established its economically disadvantaged status for one Tribal-owned firm, other Tribal-owned firms do not need to reestablish their status unless specifically requested by the SBA.¹¹² That said, an Indian Tribe/ANC unique feature is the advance opportunity for an Indian Tribe or ANC “to meet with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to understand better what SBA requires for it to establish economic disadvantage.”¹¹³

Special Considerations That Differentiate Tribes From Other Entities

Similar to their socially disadvantaged designated counterparts, Indian Tribes have special considerations that differentiate them from non-designated group 8(a) Program Participants. First, the Indian Tribe must demonstrate that the Tribe itself is economically disadvantaged.¹¹⁴ Evidence that an Indian Tribe is economically disadvantaged includes information about the Tribe, tribal unemployment rate, per capita income of tribal members, what percentage of the population lives below the property level, and the Tribe's access to capital.¹¹⁵ Although these requirements are similar to the requirements for NHOs,¹¹⁶ an Indian Tribe must also disclose tribal assets in a current financial statement and “[a] list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each.”¹¹⁷

A Tribal-owned concern is distinct from an Indian Tribe. Specifically, a Tribal-owned concern must be established as a “separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities” and include in the concern's articles of incorporation or agreement an “express sovereign immunity waiver language . . . which designates United States Federal Courts to be . . . the courts of competent jurisdiction for all matters relating to SBA's programs.”¹¹⁸ The Tribal-owned concern must also be organized as a for-profit entity, and the Indian Tribe “must possess economic development powers in the tribe's governing documents.”¹¹⁹ Unlike Indian Tribes, ANC-owned concerns do not need to include “an express waiver of sovereign immunity or a ‘sue and be sued’ clause” in the concern's articles of incorporation.¹²⁰

In addition to qualifying as small as defined in 13 C.F.R. Part 121,¹²¹ a Tribal-owned (and ANC-owned) Participant will have its size 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.”¹²² This requirement is similar to that for NHOs, including factors the SBA considers in determining whether a Tribal-owned or ANC-owned concern has or is likely to obtain “a substantial unfair competitive advantage within an industry category.”¹²³

Both ANC-owned and Tribal-owned concerns must be unconditionally owned, at least 51%, by an Indian Tribe/ANC.¹²⁴ Like NHOs, an ANC/Indian Tribe “may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant” and “may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same [Indian] Tribe [or ANC].”¹²⁵ Similarly, if the primary NAICS code of an ANC- or Tribal-owned Participant changes, the ANC or Indian Tribe “can submit an application and qualify another firm owned by the [ANC or Indian Tribe] for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.”¹²⁶ Because an Indian Tribe and ANC can own multiple 8(a) Participants,¹²⁷ the restrictions on ownership in multiple 8(a) Participants do not apply except “to non disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.”¹²⁸ Finally, when an ANC or Indian tribe reorganizes the ownership of an ANC- or Tribal-owned Participant by “inserting or removing a wholly-owned business entity between the Tribe and a Participant,” a request to change ownership is not required provided the Tribal-owned Participant notifies SBA “of the change within 30 days of the transfer.”¹²⁹

The management and daily business operations of a Tribal-owned or ANC-owned concern must also be controlled by the Indian Tribe or ANC.¹³⁰ Although the regulations permit that management may be provided by a non-Tribal or Alaskan Native member, the concern must demonstrate that the Indian Tribe or ANC can hire and fire those individuals and that it retains control over management decisions, including strategic planning, employment, compensation, and budget, and that “a written management development plan exists which

shows how Tribal [and Alaskan Native] members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.”¹³¹ In addition, like NHOs, an individual can manage up to two Tribal- or ANC-owned concerns, rendering the full-time devotion requirement at 13 C.F.R. § 124.106 inapplicable.¹³² Finally, because Indian Tribes/ANCs are socially disadvantaged by statute, the individual “involved in the management or daily business operations of a tribally-owned [or ANC-owned] concern [is not deemed] to have used his or her individual eligibility within the meaning of [13 C.F.R.] § 124.108(b).”¹³³

As with all SDBs, ANC- and Tribal-owned concerns must demonstrate a reasonable prospect for success.¹³⁴ However, unlike NHOs, Tribal- and ANC-owned concerns must comply with additional requirements. Specifically, although a Tribal- or ANC-owned applicant to the 8(a) Program “shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern[,]” it may be denied if “(1) [t]he Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or (2) [t]he purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.”¹³⁵

Avoiding Common Pitfalls

Size And Status Protests

Bidders on competitive procurements set aside for 8(a) entities, to which an Indian Tribe, ANC, or NHO is a party, may protest the size status of another offeror concerning the procurement.¹³⁶ A size protest may be filed when an interested party has reason to believe another party to a procurement is not accurately representing its size per 13 C.F.R. Part 121. Contracting officers, offerors, the SBA, and other interested parties can file a size protest.¹³⁷ When not initiated by the contracting officer, a size protest must be filed with the contracting officer, who then forwards the protest to the SBA

Government Contracting Area Office serving the area where the protested concern is headquartered.¹³⁸ The SBA regulations provide different procedures, including the applicable time limits, depending on whether the procurement utilized procedures for sealed bidding¹³⁹ or negotiated procurements,¹⁴⁰ or if the procurement is for a “long-term contract” (a contract over five years).¹⁴¹ The time limits for filing a size protest do not apply to protests by contracting officers or the SBA, either of which may file size protests before or after an award.¹⁴²

Following receipt of a size protest, the SBA Area Office is supposed to issue a formal size determination within 15 business days, if possible.¹⁴³ However, a protester may also initiate a protest to the procuring agency, the GAO, or the U.S. Court of Federal Claims.¹⁴⁴ In such a case, the SBA will not make a ruling on the size protest and will wait for the conclusion of the other protest.¹⁴⁵ Parties adversely affected by a formal size determination may appeal to the determination to the SBA Office of Hearing and Appeals (OHA), which has jurisdiction over size appeals.¹⁴⁶ Size appeals must be filed with the OHA within 15 calendar days, and if untimely, the appeal will be dismissed.¹⁴⁷ Oral hearings are not generally held unless “based upon a finding by the [OHA] Judge of extraordinary circumstances.”¹⁴⁸ No discovery is permitted.¹⁴⁹

In addition to size protests, the SDB status of an NHO-, ANC-, or Tribal-owned concern is subject to challenges. Under the 8(a) Program, challenges to a small business concern’s SDB status are initiated by the SBA “whenever SBA receives credible information calling into question the SDB status of the firm.”¹⁵⁰ When a concern is a proposed subcontractor or subcontractor awardee, the contracting officer or the SBA may protest the concern’s status.¹⁵¹ To be timely when protesting the SDB status of a subcontractor, the protest “must be submitted to the SBA prior to completion of performance by the intended subcontractor.”¹⁵² If the SBA determines a concern does not qualify as an SDB, the prime contractor may not subcontract or count the subcontracts to that subcontractor for goal purposes, “starting from the time that the protest was decided.”¹⁵³

Although the OHA has jurisdiction to hear appeals

regarding 8(a) Program determinations, appeals are limited to the following issues:

(1) Denial of program admission based solely on a negative finding as to social disadvantage, economic disadvantage, ownership or control; program termination; program graduation; or denial of a waiver of the requirement to perform to completion an 8(a) contract; and

(2) Program suspension[.]¹⁵⁴

Unlike size protests, SDB status protests have no direct appeal to the OHA. However, recourse may still be available for NHOs, ANCs, and Indian Tribes if, due to the SDB status protest, the SBA initiates grounds for termination from the 8(a) Program,¹⁵⁵ which is a basis for appealing to the OHA.¹⁵⁶

Although size and eligibility protests are contemplated under the regulations, there are several limitations in the 8(a) Program applicable to NHOs, Indian Tribes, and ANCs. First, although the SBA may investigate the eligibility of an 8(a) Participant, the regulations do not provide a right for one Participant to challenge “[t]he eligibility of a Participant for a sole source or competitive 8(a) requirement . . . or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.”¹⁵⁷ However, information questioning the eligibility of a Participant to continue participation under the 8(a) Program “or for purposes of a specific 8(a) contract may [be] submit[ted] . . . to SBA under [13 C.F.R.] § 124.112(c)[, eligibility review].”¹⁵⁸ Second, the size status of an entity nominated for a sole source 8(a) procurement cannot be protested.¹⁵⁹ Finally, challenges to the designated NAICS code for a sole source procurement “may not be challenged by another Participant or any other party,” while in competitive 8(a) procurements, an interested party “adversely affected by a NAICS code designation may appeal the designation to SBA’s OHA.”¹⁶⁰

Additionally, protesters face uphill battles in any argument that alleges an NHO- or Tribal-owned concern is affiliated with other entities. As previously discussed in this BRIEFING PAPER, small businesses generally will be found to be “affiliates” of a company with whom it shares common ownership or control. This

results in the agency considering the entities’ combined size when calculating the entity’s size on the procurement.¹⁶¹ The risk for non-NHO- or non-Tribal-owned concerns is that they cannot be affiliated with another company without potentially compromising their small business status.¹⁶² However, the regulations provide that:

Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act (43 USC [§] 1601 et seq.), Native Hawaiian Organizations (NHOs), . . . or wholly-owned entities of Indian Tribes, ANCs, [or] NHOs, . . . *are not considered affiliates of such entities.*¹⁶³

The regulations carve out the following additional exemption regarding affiliation for common ownership or management:

Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, . . . or wholly-owned entities of Indian Tribes, ANCs, [or] NHOs, . . . *are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management.* In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. *Affiliation may be found for other reasons.*¹⁶⁴

The exception to affiliation applies between the business owned by the NHO, ANC, or Tribe in question and exempts affiliation between the concern and other entities owned by NHO, ANC, or Tribe.¹⁶⁵ For entities related through “common administrative services,” the exception only applies if “adequate payment is provided for those services.”¹⁶⁶ As discussed below, this has not been the subject of a successful protest at the SBA’s OHA. In addition, an NHO-, ANC-, or Tribal-owned concern would be required to ensure that the services in question meet the definition of “common administrative services” as outlined in the regulations:

Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm.¹⁶⁷

The regulations proverbially split the baby when considering whether contract administration services constitute affiliation for NHO-, ANC-, and Tribal-owned concerns.¹⁶⁸ The distinction, and whether the activity qualifies as an exception to affiliation, appears to turn on how close at hand the activity is to activities directly related to federal contracting. Contract administration services that qualify and do not qualify for an exception to affiliation include:

(1) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.

(2) Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (*e.g.*, employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.¹⁶⁹

Similarly, there are limits to certain common administrative activities that qualify as an exception to affiliation. Specifically, certain business development activities may qualify as an affiliation exception:

Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered “common administrative services” under the exception to affiliation. However, at some point *the opportunity identified* by the holding company’s or parent entity’s business development efforts *becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be in-*

involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, *but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer.* In addition, *once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.*¹⁷⁰

This provides some guidance for mitigating the potential risk of a finding of affiliation. In brief, the Tribal-owned Participant should ensure that proposal preparation, contract performance, and attendant administration tasks are conducted and controlled by the specific entity awarded and performing the contract. The concern that will ultimately perform the contract should be integrated into the business development process rather than the holding or parent company conducting all business development on behalf of the concern.

In light of the foregoing exception to affiliation related to common management, ownership, and common administrative services (including certain contract administration services), size protests alleging affiliation based on grounds that qualify as an exception are regularly dismissed “so long as adequate payment is provided for those services.”¹⁷¹ Relatedly, protests alleging an NHO-, ANC-, or Tribal-owned concern is affiliated with other entities and likely to obtain a substantial unfair competitive advantage have been raised and largely unsuccessful. As noted previously, the SBA determines an NHO’s, ANC’s, or Indian Tribe’s status in the following manner:

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), each firm’s size shall be independently determined 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 [SBA] 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.*¹⁷²

Protests based on this line of argument—alleging an NHO-, ANC-, or Tribal-owned concern is likely to obtain a substantial unfair competitive advantage—have faced uphill battles at the OHA and have been

largely unsuccessful.¹⁷³ In short, this determination must be made by the SBA Administrator, not a protester in the first instance to an Area Office or on OHA appeal. Upon receipt of a size protest alleging that a tribal business has an unfair competitive advantage, the Area Office will be correct to deny a protest after determining that the SBA Administrator has not made this determination.¹⁷⁴

Despite the exceptions to affiliation discussed above, there are several reasons NHO-, ANC-, and Tribal-owned concerns should be diligent about adhering to the language of the regulations when teaming with or utilizing other entity-owned businesses. First, SBA OHA decisions suggest that the ostensible subcontractor rule could result in a finding of affiliation when an NHO-, ANC-, and Tribal-owned concern relies on sister-entities as subcontractors that will perform the primary and vital requirements of the contract.¹⁷⁵ Depending on the relationship structured for a particular procurement, it is possible that an NHO-, ANC-, or Tribal-owned concern is affiliated with its subcontractors under the ostensible subcontractor rule.¹⁷⁶

To ensure that a Tribal-owned entity does not run afoul of the ostensible subcontractor rule, tribal businesses should consider the factors that may suggest an “unusual reliance” on a subcontractor and, therefore, might give rise to a finding of affiliation. These factors are outlined by the OHA as follows:

- (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement;
- (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor;
- (3) the prime contractor’s proposed management previously served with the subcontractor on the incumbent contract; and
- (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.¹⁷⁷

NHO-, ANC- and Tribal-owned concerns should ensure that they are not relying to an undue extent on a subcontractor for the primary and vital functions of a

contract, even if the company is entity-owned. This can be accomplished through a clear delineation of responsibilities in a proposal that acknowledges the contributions of tribal business partners, with special consideration given to the language in the definition of “common administrative services” that may be provided by related entities.¹⁷⁸

Concerns should not wait to present evidence against a finding of affiliation in an OHA proceeding. Litigation is expensive, and tribal businesses that do not adequately address the potential risks of a protest at the outset may face surprise before the OHA. Delays associated with a protest also may jeopardize the timeline of a project and associated budgets, so when in doubt about whether a particular business arrangement may result in an allegation of affiliation, consult with counsel about how to mitigate such risks. Lastly, the exceptions to affiliation and attendant risks described above do not encompass issues that tribes may face when attempting to form joint ventures or rely on exceptions to affiliation related to joint ventures. Accordingly, NHOs, ANCs, and Indian Tribes should exercise the same diligence as non-designated groups participating in the 8(a) Program when entering those relationships.¹⁷⁹

False Claims Act Considerations

Contractors that misrepresent¹⁸⁰ the size or status of their business are potentially liable, civilly and criminally, under the False Claims Act (FCA). The civil FCA, codified at 31 U.S.C.A. §§ 3729–3733, imposes civil liability when any person or entity:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;
- (C) conspires to violate subparagraph (A), (B), (D), (E), (F), or (G) [of 31 U.S.C.A. § 3729(a)(1)];
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document

certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.¹⁸¹

The consequences for violating the FCA are steep, ranging from penalties of \$13,946 to \$27,894 per claim, plus three times the amount of damages that the Government sustains.¹⁸² The risk of treble damages and a large fine per each false claim submitted should force contractors to review their certifications to the government carefully. While programs exist to provide benefits to NHO-, ANC-, and Tribal-owned businesses, the Government is not lenient to such entities who make false claims regarding eligibility under the Program. For example, in 2019, an ANC settled a *qui tam* lawsuit from the ANC's former employee that alleged the ANC enrolled various subsidiary 8(a) entities into the Program that were in fact sham entities to circumvent the SBA's rules and requirements for participation in the Program.¹⁸³

The government may also pursue criminal FCA liability if the conduct is severe enough or when criminal liability is warranted. Codified at 18 U.S.C.A. § 287, the statute imposes imprisonment “not more than five years” and a fine to whomever “makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent.”

You may be wondering, what about tribal immunity? As you may know, Indian Tribes cannot be sued like any other private entity because of the principle of tribal sovereign immunity that treats Native American

tribes as independent nations with the same powers and benefits afforded to a sovereign nation. Since 1832, the U.S. Supreme Court has recognized the territorial sovereignty of Indian Tribes against state laws and some federal laws.¹⁸⁴ Tribes are “domestic dependent nations” and exercise “inherent sovereign authority” subject to the control of Congress.¹⁸⁵ More recently, the U.S. Court of Appeals for the Seventh Circuit analyzed the interplay between tribal sovereign immunity and the FCA, holding that the FCA's anti-retaliation prohibition did not abrogate a tribe's sovereign immunity unless Congress' authorization was “crystal clear.”¹⁸⁶

In general, NHO-, ANC-, and Tribal-owned Participants are required, as a condition of participation in the 8(a) Program, to include a waiver of sovereign immunity against the Federal Government in applicable organizational documents. The SBA regulations state:

Where an applicant or participating concern is owned by a federally recognized tribe, the concern's articles of incorporation, partnership agreement, limited liability company articles of organization, or other similar incorporating documents for tribally incorporated applicants *must contain express sovereign immunity waiver language, or a “sue and be sued” clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance.*¹⁸⁷

This regulation has recently been litigated in *AQuate II LLC v. Myers*, a dispute between two Tribal-owned concerns in which the defendant was alleged to have utilized the plaintiff's trade secrets to boost its bid under the 8(a) Program.¹⁸⁸ The defendant sought to dismiss the suit based on sovereign immunity. Analyzing the question of tribal immunity, the court noted that one question to resolving tribal immunity is whether the tribe “expressly and unmistakably waived its right to sovereign immunity from suit.”¹⁸⁹ For the 8(a) Program, such a waiver is required. In *AQuate II, LLC*, the court held that a litigant's trade secrets claims against a contractor “related to” the contractor's 8(a) BD program participation.¹⁹⁰ The court's broad definition of “related to” implies that most events that occur in order to obtain or further a contract under the 8(a) Program may be found to have been waived, including

false claims made in furtherance of an NHO-, ANC-, or Tribal-owned concern's activities under the 8(a) Program.

What's On The Horizon?

Pending Regulatory Activity

The FAR Council is currently accepting comments on a proposed regulation to the FAR to implement changes made from SBA regulations that clarify that ANCs are excluded from the requirement to submit a subcontracting plan, as they are statutory small businesses. This change implemented equivalent sections of the Small Business Regulations, where it is already implemented. The proposed rule was published on June 7, 2024, and the public comment period ended on August 6, 2024.¹⁹¹ Similarly, in August 2024, the SBA held several tribal consultation meetings to discuss forthcoming proposed revisions to the SBA regulations, including how best to implement EO 14112, *Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination*.¹⁹² Issued December 6, 2023, EO 14112 directed agencies to take action that increases accessibility of Federal funding and support programs to Indian Tribes, including promoting “compacting, contracting, co-management, co-stewardship, and other agreements with Tribal Nations that allow them to partner with the Federal Government to administer Federal programs and services.”¹⁹³ It remains to be seen what forthcoming changes may result from EO 14112 SBA implementation.

An Uncertain Future: Constitutional Challenges To The 8(a) Preferences For Tribal Businesses

As explained previously, ANCs are presumed to be economically disadvantaged,¹⁹⁴ while Indian Tribes and NHOs are required to demonstrate that they are economically disadvantaged.¹⁹⁵ The SBA regulations also provided that there “is a rebuttable presumption that” NHOs, ANCs, and Indian Tribes are socially disadvantaged and, on that basis, could rely on that presumption when applying to be a part of the 8(a) Program.¹⁹⁶

However, in 2023, a federal court decision found that Congress neither intended nor prohibited the use of a rebuttable presumption of social disadvantage in a determination of 8(a) eligibility. In *Ultima Services Corp. v. U.S. Department of Agriculture*, the U.S. District Court for the Eastern District of Tennessee stated that the language of the statute permitted the SBA to “make ‘determinations . . . with respect to whether a group [had] been subjected to prejudice or bias[.]’ ”¹⁹⁷ To determine whether the rebuttable presumption was a legitimate method of making that determination, the court looked to whether using racial classifications could survive strict scrutiny, finding it could not.¹⁹⁸ Among other reasons, the court determined that the agency could not show that there was a compelling interest in the use of racial classifications since the evidence it provided of such use was not “supported with precise evidence.”¹⁹⁹ Following the court's enjoinder of the use of a rebuttable presumption of social disadvantage, the SBA issued guidance on August 18, 2023, that in order for an individual-owned 8(a) Participant to receive new 8(a) contracts, “SBA must make an affirmative determination that the individual upon whom eligibility is based has established personal social disadvantage without the presumption.”²⁰⁰ With respect to entity owned firms, such as firms owned by NHOs, ANCs, and Indian Tribes, the SBA provided additional guidance online:

The Court's decision does not impact entity-owned firms, such as firms owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations. These firms will not need to submit social disadvantage narratives.

All current entity-owned 8(a) participants received a direct communication from SBA on or about Monday, August 21, 2023 clarifying that the participant may proceed with federal contract awards. SBA posted the Social Disadvantage Qualification letter to the participant's documents in the Certify system. This letter affirms continued participation in the 8(a) Program.

Current 8(a) participants should continue to submit their annual review and continuing eligibility materials to SBA.²⁰¹

More recently the 8(a) Program has been challenged again in the courts, this time on SBA's presumption that Tribal-owned and ANC-owned firms are socially

and economically disadvantaged. In *Advanced Simulation Technology Inc. v. United States*, the plaintiff, ASTi, protested the government's award of a contract to an ANC-owned concern, alleging among other things that the award was unconstitutional under the Fifth Amendment's Equal Protection Clause (an argument that prevailed in *Ultima Services Corp.*), stating that the "only permissible Indian preferences are those that are tied to Indian lands, to uniquely sovereign interests, or to the special relationship between the federal government and the Indian tribes."²⁰² ASTi's constitutional challenge, however, was not resolved as the Court of Federal Claims dismissed its protest following the government's corrective action and cancellation of the contract.²⁰³ Nevertheless, *Advanced Simulation Technology Inc.* and *Ultima Services Corp.* are indicators of future possible challenges that may be brought against the 8(a) Program.

Proactive Steps To Maximize Profits And Mitigate Risks In Light Of Regulatory Developments

NHOs, ANCs, and Indian Tribes that wish to benefit from the opportunities of the 8(a) Program can profit immensely from statutory and regulatory advantages afforded to them. But these entities should not underplay factors that may jeopardize advantages meant to benefit the communities they serve, particularly in light of recent challenges to the 8(a) Program. Understanding the intricacies of size protests, affiliation issues, and 8(a) compliance issues is critical to avoiding legal pitfalls and subsequent compliance costs. Such pitfalls may be avoided by prioritizing a thorough understanding of the regulatory framework, 8(a) eligibility criteria, and a detailed knowledge of exceptions meant to benefit NHO-, ANC-, and Tribal-owned concerns. Such an understanding allows such businesses to navigate federal contracting more effectively and position themselves for success in securing contracts and fostering sustainable partnerships with federal agencies. Additionally, actively monitoring industry trends, seeking legal guidance when needed, and capitalizing on sole-source contracting opportunities can empower NHO-, ANC-, and Tribal-owned concerns to enhance their competitiveness and contribute meaningfully to rapidly developing Agency needs.

To maximize their opportunities and ensure compliance, NHOs, ANCs, and Indian Tribes must remain attentive to regulatory changes including complying with the attendant ownership and control requirements, and comply with federal and state documentation standards. By leveraging the strengths and opportunities unique to them, understanding the regulatory landscape, and staying attuned to evolving requirements and opportunities, NHOs, ANCs, and Indian Tribes can forge successful partnerships with government agencies, drive economic growth within their communities, and contribute meaningfully to the government contracting sector while upholding the values of integrity, transparency, and accountability. This approach is key to maintaining the viability of the 8(a) Program.

Guidelines

ANCs, Indian Tribes, and NHOs are uniquely situated to reap tremendous benefits from federal contracting opportunities. That said, it is vitally important that all of these entities—including potential teaming, joint venture, and subcontracting partners—understand how to navigate the regulatory maze within which these entities exist. Here are 10 tips that are designed to help guide your company to mitigate risk and to maximize profit. They are not, however, a substitute for professional representation in any specific situation.

1. Special 8(a) Program Participation: ANCs, Indian Tribes, and NHOs can participate in the SBA 8(a) BD Program, which is designed to help disadvantaged small businesses gain access to federal contracting opportunities. These entities are subject to different rules than other 8(a) businesses, which allow for greater flexibility in the pursuit and performance of government contracts. Unlike other 8(a) businesses, ANCs, Indian Tribes, and NHOs are statutorily presumed to be socially disadvantaged. In addition, ANCs are also statutorily presumed economically disadvantaged, which is a unique designation among the socially and economically disadvantaged designated groups under the 8(a) Program.

2. No Sole-Source Dollar Limits: Unlike other 8(a) participants, ANCs, Indian Tribes, and NHOs are exempt from typical sole-source contract award limits

(e.g., \$4.5 million for services and \$7 million for manufacturing), provided the SBA has not already accepted the requirement into the 8(a) Program as a competitive procurement. Although a contracting officer must justify a proposed 8(a) sole source contract to an ANC, Indian Tribe, or NHO once the value exceeds \$25 million (\$100 million for DoD), these entities are still eligible to receive sole-source contracts of any size, making them attractive partners for federal contracts, particularly when coupled with the fact that the SBA regulations do not require a procurement be competed whenever possible before its acceptance by the SBA on a sole-source basis.

3. Exemption From Affiliation Rules: ANC, Tribal, and NHO-owned businesses are exempt from the SBA's affiliation rules. This allows them to operate subsidiaries without the risk of violating small business size standards, giving them flexibility to operate across various industries and business ventures. This exemption has often provided a pivotal rebuttal to size protests alleging that an ANC, Tribal, or NHO-owned business is affiliated with its sister concerns.

4. Community Impact: Profits generated by ANC, Tribal, and NHO-owned businesses are often reinvested into their respective communities, providing essential services, scholarships, and economic development. This social mission may align with the goals of some federal programs, offering additional justification for partnership. As agencies consider available actions to increase the accessibility of federal funding and support programs as directed by EO 14112, additional support to these communities is expected.

5. Teaming Opportunities: Federal contractors can form joint ventures or mentor-protégé relationships with ANC, Tribal, or NHO-owned entities to leverage their 8(a) status. This can be a strategic way to access lucrative federal contracts while also supporting the economic development goals of these organizations. This synergistic relationship also fosters the overarching purpose of the 8(a) Program, which serves to assist small disadvantaged business concerns compete in the American economy and the underserved communities they support.

6. Competitive Advantages: Working with ANCs,

Indian Tribes, and NHOs can offer competitive advantages in the federal marketplace. Their special status allows for streamlined contracting, especially through sole-source awards, making them valuable partners for companies looking to secure federal contracts quickly. Coupled with exemptions from typical sole-source contract award limits, ANCs, Indian Tribes, and NHOs offer attractive options for federal buyers to procure goods and services in efficient manner.

7. Potential for Long-Term Relationships: Federal contractors that develop successful partnerships with ANCs, Indian Tribes, and NHOs can benefit from long-term, mutually beneficial relationships. These organizations often have extensive networks, offering ongoing collaborative opportunities beyond a single contract. Building these strong relationships also further the goals of the 8(a) Program for these disadvantaged groups by providing much needed economic development and improvement.

8. Compliance with SBA Regulations: Although ANCs, Indian Tribes, and NHOs have exemptions from certain SBA rules, they still must comply with other federal regulations. Each of these entities needs to ensure that they are in full compliance with SBA requirements to avoid penalties or contract issues. This will require a detailed understanding of the operative regulations and a careful review of existing and potential business opportunities.

9. Contracts Support Economic Development: When working with these entities, it's important to understand that federal contracts are not just a revenue source but a means to foster economic development in historically underserved communities. Many contracts are designed to address the socio-economic needs of Native American and Native Hawaiian populations. Thus, as part of its annual financial statement submission, ANC, Tribal, and NHO-owned businesses must provide information to the SBA, demonstrating what benefits they have provided to Tribal or native members, as a result of the concern's participation in the 8(a) Program.

10. Cultural Competency: Understanding the cultural, historical, and legal context of ANCs, Indian Tribes, and NHOs is essential. These entities have

unique histories and ties to their communities, and sensitivity to their specific values and needs is critical for building long-term, successful partnerships. Understanding a group's traditions and priorities is critical to ensuring any benefits provided through the 8(a) Program are aligned to serve the community at-large.

ENDNOTES:

¹13 C.F.R. § 124.1.

²13 C.F.R. § 124.2(a).

³Small Business Investment Act of 1958, Pub. L. No. 85-536, § 8(a)(1)–(2), 72 Stat. 384, 389–90 (1958) (codified as amended at 15 U.S.C.A. § 637(a)(1)(A)–(B)).

⁴Small Business Investment Act of 1958, Pub. L. No. 85-536, § 8(a)(2), 72 Stat. 384, 390 (1958) (codified as amended at 15 U.S.C.A. § 637(a)(1)(B)).

⁵Small Business Investment Act of 1958, Pub. L. No. 85-536, § 8(a)(2), 72 Stat. 384, 390 (1958) (codified as amended at 15 U.S.C.A. § 637(a)(1)(B)).

⁶Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, § 201, 92 Stat. 1757, 1760 (1978) (amending Small Business Act § 2(e)(1)(A)–(B)) (codified as amended at 15 U.S.C.A. § 631(f)).

⁷Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, § 201, 92 Stat. 1757, 1760 (1978) (amending Small Business Act § 2(e)(2)(A)–(C)) (codified as amended at 15 U.S.C.A. § 631(f)(2)(A)–(C)).

⁸Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, § 202(a), 92 Stat. 1757, 1762 (1978) (amending Small Business Act § 8(a)(4)(A)–(B)) (codified as amended at 15 U.S.C.A. § 637(a)(4)(A)–(B)).

⁹Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, § 202(a), 92 Stat. 1757, 1762 (1978) (amending Small Business Act § 8(a)(5)) (codified as amended at 15 U.S.C.A. § 637(a)(5)).

¹⁰Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, § 202(a), 92 Stat. 1757, 1762–63 (1978) (amending Small Business Act § 8(a)(6)) (codified as amended at 15 U.S.C.A. § 637(a)(6)(A)).

¹¹See 15 U.S.C.A. § 637(a)(1)(A)–(B).

¹²Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015(b), (d), 100 Stat. 82, 370–71 (1986) (amending Small Business Act § 8(a)) (codified as amended at 15 U.S.C.A. § 637(a)(4), (a)(13)). In 1992, ANCs were also included as economically disadvantaged. See Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 10, 106 Stat. 2112, 2115 (1992) (codified as amended at 43 U.S.C.A. § 1626(e)).

¹³Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 207, 102 Stat. 3853, 3861–62 (1988) (amending Small Business Act § 8(a)) (codified as amended at 15 U.S.C.A. § 637(a)(4), (a)(15)).

¹⁴13 C.F.R. §§ 124.101–124.112.

¹⁵13 C.F.R. §§ 124.201–124.207.

¹⁶13 C.F.R. §§ 124.501–124.521.

¹⁷13 C.F.R. §§ 124.300–124.305.

¹⁸See 13 C.F.R. § 124.506(a)(2)(ii). The regulations also require that there be a reasonable expectation that at least two eligible Participants will submit offers at market price and that the requirement has not been accepted by the SBA for award as a sole source to a Participant owned by an Indian Tribe or ANC. 13 C.F.R. § 124.506(a)(2)(i), (iii).

¹⁹13 C.F.R. § 124.506(b)(1)–(5).

²⁰An SDB “for purposes of any Federal subcontracting program is a concern that qualifies as small . . . and that is owned and controlled by one or more socially and economically disadvantaged individuals . . . includ[ing] Indian tribes, ANCs, . . . and NHOs.” 13 C.F.R. § 124.1001(a).

²¹Small Bus. Admin., 8(a) Program Administration, Meet your agency goals for small disadvantaged businesses (Sept. 17, 2024, 9:47 a.m.), <https://www.sba.gov/partners/contracting-officials/contracting-program-administration/8a-program-administration>.

²²Small Bus. Admin., Small business procurement scorecard overview (Sept. 17, 2024, 9:48 a.m.), <https://www.sba.gov/document/support-small-business-procurement-scorecard-overview>.

²³Exec. Order No. 13985, Sec. 1, 86 Fed. Reg. 7009 (Jan. 25, 2021).

²⁴Exec. Order No. 13985, Sec. 6(b), 86 Fed. Reg. at 7010.

²⁵Exec. Order No. 14091, Sec. 1, 88 Fed. Reg. 10825, 10826 (Feb. 22, 2023).

²⁶Exec. Order No. 14091, Sec. 7(a), 88 Fed. Reg. at 10831. The 15% by FY 2025 was initially a goal, not driven by law.

²⁷Small Bus. Admin., Small business procurement scorecard overview (Sept. 17, 2024, 9:48 a.m.), <https://www.sba.gov/document/support-small-business-procurement-scorecard-overview>.

²⁸Small Bus. Admin., Small business procurement scorecard overview (Sept. 17, 2024, 9:48 a.m.), <https://www.sba.gov/document/support-small-business-procurement-scorecard-overview>.

²⁹Office of Mgmt. & Budget, Strategies for Meeting and Exceeding the Small Disadvantaged Business

Goal for Fiscal Year 2022 (June 29, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/07/SDB-Quick-Hits-Memo-508-1.pdf>.

³⁰Office of Mgmt. & Budget, M-24-01, Increasing the Share of Contract Dollars Awarded to Small Disadvantaged Businesses for Fiscal Year (FY) 2024 and in Subsequent FYs (Oct. 25, 2023), available at <https://www.whitehouse.gov/omb/information-for-agencies/memoranda/>.

³¹Office of Mgmt. & Budget, Increasing Small Business Participation on Multiple-Award Contracts (Jan. 25, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/01/REV_Increasing-Opportunities-to-Small-Businesses-under-MACs-CATS-Final-Copy-1-25-24.pdf.

³²Office of Mgmt. & Budget, Increasing Small Business Participation on Multiple-Award Contracts 5 (Jan. 25, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/01/REV_Increasing-Opportunities-to-Small-Businesses-under-MACs-CATS-Final-Copy-1-25-24.pdf.

³³Small Bus. Admin. Dynamic Small Business Search, 8(a) Certified or 8(a) Joint Venture: Required (Active Certifications Only) (Sept. 17, 2024, 10:11 a.m.), https://dsbs.sba.gov/search/dsp_dsbs.cfm.

³⁴Small Bus. Admin. Dynamic Small Business Search, 8(a) Certified or 8(a) Joint Venture: Required (Active Certifications Only) (Sept. 17, 2024, 10:11 a.m.), https://dsbs.sba.gov/search/dsp_dsbs.cfm. When “Other Native American,” which is not a defined term under the governing statute and regulations, is included with “Tribally Owned,” there are 1,399 entities. Small Bus. Admin. Dynamic Small Business Search, 8(a) Certified or 8(a) Joint Venture: Required (Active Certifications Only) (Sept. 17, 2024, 10:13 a.m.), https://dsbs.sba.gov/search/dsp_dsbs.cfm.

³⁵Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 207, 102 Stat. 3853, 3861–62 (1988) (amending Small Business Act § 8(a)) (codified as amended at 15 U.S.C.A. § 637(a)(4), (a)(15)).

³⁶15 U.S.C.A. § 637(a)(4)(A)(i)(III), (ii)(III).

³⁷15 U.S.C.A. § 637(a)(15); see 13 C.F.R. § 124.3 (definition of Native Hawaiian Organization).

³⁸Defined to mean “any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.” 13 C.F.R. § 124.3.

³⁹13 C.F.R. § 124.3 (definition of Native Hawaiian Organization); see 15 U.S.C.A. § 637(a)(15).

⁴⁰ “[A] small business concern admitted to participate in the 8(a) BD program.” 13 C.F.R. § 124.3.

⁴¹13 C.F.R. § 124.110(a) (“[NHO] concerns must meet all eligibility criteria set forth in §§ 124.101

through 124.108 and § 124.112 to the extent that they are not inconsistent with this section.”).

⁴²13 C.F.R. § 124.101.

⁴³13 C.F.R. § 124.102(a)(1). “Primary industry classification means the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant.” 13 C.F.R. § 124.3. Size standards used to define small business concerns are covered at 13 C.F.R. § 121.201.

⁴⁴13 C.F.R. § 124.102(a)(2).

⁴⁵See 13 C.F.R. § 124.103(b)(1).

⁴⁶13 C.F.R. § 124.104(a).

⁴⁷ “Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.” 13 C.F.R. § 124.3.

⁴⁸13 C.F.R. § 124.105.

⁴⁹ “Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant. [Rather,] [d]isadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern.” 13 C.F.R. § 124.106.

⁵⁰13 C.F.R. § 124.106. The regulations further note that control is different from ownership and that “although both may reside in the same person, SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.” 13 C.F.R. § 124.106.

⁵¹13 C.F.R. § 124.106(a)(3).

⁵²13 C.F.R. § 124.107. In five instances, the SBA may waive the requirement of two years’ experience. See 13 C.F.R. § 124.107(b)(1)(i)–(v).

⁵³13 C.F.R. § 124.108(a).

⁵⁴13 C.F.R. § 124.108(b).

⁵⁵13 C.F.R. § 124.112(b)(1)–(9).

⁵⁶13 C.F.R. § 124.110(a).

⁵⁷13 C.F.R. § 124.110(b). “In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage

within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally . . . consider[ing] the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard." 13 C.F.R. § 124.110(b)(1). However, the fact an NHO-owned concern appears to have an unfair competitive advantage locally, but is not dominant on a national basis, does not result in a finding of affiliation. See 13 C.F.R. § 124.110(b)(2).

⁵⁸See 13 C.F.R. § 124.110(c) ("Once an NHO establishes that it is economically disadvantaged in connection with the application of one NHO-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation . . .").

⁵⁹13 C.F.R. § 121.103(a)(1). The SBA considers control to be either affirmative or negative, with negative control including but not limited to, "instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." 13 C.F.R. § 121.103(a)(3).

⁶⁰13 C.F.R. § 121.103(a)(6).

⁶¹See 13 C.F.R. § 124.103(b)(1).

⁶²To demonstrate how it will principally benefit Native Hawaiians, an NHO must provide evidence on "the economic condition of the Native Hawaiian community that it intends to serve," including the size of the community, unemployment rates, per capita income, percentage of those in the community below the poverty level, and their access to capital. 13 C.F.R. § 124.110(c)(1)(i)–(v).

⁶³13 C.F.R. § 124.110(c). At the time of its 8(a) application, an NHO "should describe any activities that it has done to benefit Native Hawaiians at the time its NHO-owned firm applies to the 8(a) BD program," including "statements in its bylaws or operating agreements identifying the benefits Native Hawaiians will receive from the NHO [and] a detailed plan that shows how revenue earned by the NHO will principally benefit Native Hawaiians. As part of an annual review . . ., SBA will review how the NHO is fulfilling its obligation to principally benefit Native Hawaiians." 13 C.F.R. § 124.110(c)(2).

⁶⁴13 C.F.R. § 124.110(c).

⁶⁵13 C.F.R. § 124.110(c).

⁶⁶13 C.F.R. § 124.110(d).

⁶⁷Compare 13 C.F.R. § 124.106 with 13 C.F.R. § 124.110(d)(1).

⁶⁸13 C.F.R. § 124.110(d)(2).

⁶⁹13 C.F.R. § 124.110(g).

⁷⁰13 C.F.R. § 124.110(d)(3)(iii).

⁷¹See generally 13 C.F.R. § 124.110(c).

⁷²13 C.F.R. § 124.110(h).

⁷³13 C.F.R. § 124.110(f).

⁷⁴13 C.F.R. § 124.110(f). That said, once the second applicant is admitted to the 8(a) Program, "it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO." 13 C.F.R. § 124.110(f)(1).

⁷⁵13 C.F.R. § 124.110(f)(2).

⁷⁶See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015(b), (d), 100 Stat. 82, 370-71 (1986) (amending Small Business Act § 8(a)) (codified as amended at 15 U.S.C.A. § 637(a)(4), (a)(13)).

⁷⁷See Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 10, 106 Stat. 2112, 2115 (1992) (codified as amended at 43 U.S.C.A. § 1626(e)).

⁷⁸15 U.S.C.A. § 637(a)(13) ("For purposes of this subsection, the term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]) which—(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.").

⁷⁹13 C.F.R. § 124.3; see 43 U.S.C.A. § 1602(b) (definition of "Native" the SBA regulations rely upon).

⁸⁰" 'Regional Corporation' means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this chapter." 43 U.S.C.A. § 1602(g).

⁸¹" 'Village Corporation' means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter." 43 U.S.C.A. § 1602(j).

⁸²" 'Group Corporation' means an Alaska Native Group Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for

and on behalf of members of a Native group in accordance with the terms of this chapter.” 43 U.S.C.A. § 1602(n).

⁸³“ ‘Urban Corporation’ means an Alaska Native Urban Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of an urban community of Natives in accordance with the terms of this chapter.” 43 U.S.C.A. § 1602(o).

⁸⁴13 C.F.R. § 124.3; see 43 U.S.C.A. § 1602(m) (definition of “Native Corporation”).

⁸⁵See generally 13 C.F.R. § 124.101.

⁸⁶See generally 13 C.F.R. § 124.103(b)(1).

⁸⁷See generally 13 C.F.R. § 124.107. Guidelines for demonstrating potential for success applicable to ANC-owned and Tribal-owned entities are provided at 13 C.F.R. § 124.109(c)(6).

⁸⁸See generally 13 C.F.R. § 124.108. For ANC- and Tribal-owned concerns, 13 C.F.R. § 124.109(c)(7)(ii) also requires that “[t]he officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (see § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (see § 124.108(e)).”

⁸⁹See generally 13 C.F.R. § 124.112.

⁹⁰13 C.F.R. § 124.103(b)(1).

⁹¹43 U.S.C.A. § 1626(e)(1) (“For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.”); see 13 C.F.R. § 124.109(a)(2) (“An ANC that meets the requirements set forth in [13 C.F.R. § 124.109(a)(1)] is deemed economically disadvantaged under 43 U.S.C.A. [§] 1626(e), and need not establish economic disadvantage as required by [13 C.F.R. § 124.109(b)].”).

⁹²See 13 C.F.R. § 124.110(c) (requirements to demonstrate economically disadvantaged for NHOs); see also 13 C.F.R. § 124.109(b)(2) (requirements to demonstrate economically disadvantaged for Indian Tribes).

⁹³13 C.F.R. § 124.109(a)(1).

⁹⁴Compare 13 C.F.R. § 124.109(a)(3) (“an ANC can be either for profit or non-profit”) with 13 C.F.R.

§ 124.3 (an NHO is “any community service organization . . . which is a not-for-profit organization”).

⁹⁵13 C.F.R. § 124.109(a)(3).

⁹⁶13 C.F.R. § 124.109(a)(3).

⁹⁷13 C.F.R. § 124.109(a)(4).

⁹⁸13 C.F.R. § 124.109(a)(7). 13 C.F.R. § 124.105(i) sets forth the general requirements for an 8(a) Participant to change its organization and structure. Absent certain limited exceptions that still require notice to the SBA within 60 days of a change in ownership, a change may not occur without prior written approval from the SBA to the change. Compare 13 C.F.R. § 124.105(i) with 13 C.F.R. § 124.105(i)(2). The ANC, however, must notify the SBA to the change within 60 days. See 13 C.F.R. § 124.109(a)(7).

⁹⁹See 13 C.F.R. § 124.109(a) (“ANC-owned concerns are subject to the same conditions that apply to tribally-owned concerns, as described in [13 C.F.R. § 124.109 (b) & (c)].”).

¹⁰⁰See 13 C.F.R. § 124.109(a)(2) (“ANCs need not establish economic disadvantage as required by [13 C.F.R. § 124.109(b)(2)]”), (a)(5) (“[13 C.F.R. § 124.109(b)(3)(i), (ii), and (iv)] are not applicable to an ANC, provided its status as an ANC is clearly shown in its article of incorporation”), (a)(6) (“[13 C.F.R. § 124.109(c)(1)] is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a ‘sue and be sued’ clause”).

¹⁰¹Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015(b), (d), 100 Stat. 82, 370–71 (1986) (amending Small Business Act § 8(a)) (codified as amended at 15 U.S.C.A. § 637(a)(4), (a)(13)).

¹⁰²15 U.S.C.A. § 637(a)(13).

¹⁰³13 C.F.R. § 124.3.

¹⁰⁴13 C.F.R. § 124.3 (definition of Tribally-owned concern).

¹⁰⁵13 C.F.R. § 124.103(b)(1); see 13 C.F.R. § 124.109(b)(1).

¹⁰⁶See 13 C.F.R. § 124.3.

¹⁰⁷Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 104, 108 Stat. 4791, 4792 (1994) (codified as amended at 25 U.S.C.A. § 5131). This list is published annually no later than every January 30. 25 U.S.C.A. § 5131(b).

¹⁰⁸89 Fed. Reg. 944 (Jan. 8, 2024).

¹⁰⁹U.S. Gov’t Accountability Office, GAO-12-348, Indian Issues: Federal Funding for Non-Federally Recognized Tribes, App. III (Apr. 12, 2012).

¹¹⁰Univ. of Ariz., Governance Under State Recognition, Native Nations Institute (Sept. 17, 2024, 9:03

a.m.), <https://nni.arizona.edu/our-work/research-policy-analysis/governance-under-state-recognition>.

¹¹¹13 C.F.R. § 124.109(b)(2).

¹¹²Compare 13 C.F.R. § 124.109(b) (applicable to Indian Tribes and ANCs) with 13 C.F.R. § 124.110(c) (applicable to NHOs).

¹¹³13 C.F.R. § 124.109(b).

¹¹⁴13 C.F.R. § 124.109(b)(2). This is not required for ANCs. See 13 C.F.R. § 124.109(a)(2).

¹¹⁵13 C.F.R. § 124.109(b)(2)(i)–(vii).

¹¹⁶See 13 C.F.R. § 124.110(c)(1)(i)–(v).

¹¹⁷13 C.F.R. § 124.109(c)(1)(vi)–(vii). Indian Tribes must also submit certain documents such as the tribe’s constitution, evidence of its recognition as a tribe eligible for special programs, articles of incorporation, and materials needed to show the tribe’s economically disadvantaged status. 13 C.F.R. § 124.109(b)(3)(i)–(iv). For ANCs, they need only submit copies of their articles of incorporation and bylaws provided the ANC’s status is clearly shown therein. 13 C.F.R. § 124.109(a)(5).

¹¹⁸13 C.F.R. § 124.109(c)(1).

¹¹⁹13 C.F.R. § 124.109(c)(1).

¹²⁰13 C.F.R. § 124.109(a)(6).

¹²¹See 13 C.F.R. § 124.109(c)(2)(ii); see also 13 C.F.R. § 124.109(c)(2)(i) (small requirement for Tribal-owned and ANC-owned applicants to the 8(a) Program).

¹²²13 C.F.R. § 124.109(c)(2)(iii).

¹²³Compare 13 C.F.R. § 124.110(b)(1)–(2) (substantial unfair competitive advantage analysis for NHOs) with 13 C.F.R. § 124.109(c)(2)(iv)(A)–(B) (substantial unfair competitive advantage analysis for Indian Tribes and ANCs).

¹²⁴13 C.F.R. § 124.109(c)(3)(i).

¹²⁵13 C.F.R. § 124.109(c)(3)(ii)(A).

¹²⁶13 C.F.R. § 124.109(c)(3)(ii)(B).

¹²⁷See 13 C.F.R. § 124.109(b).

¹²⁸13 C.F.R. § 124.109(c)(3)(iii).

¹²⁹13 C.F.R. § 124.109(c)(3)(iv).

¹³⁰13 C.F.R. § 124.109(c)(4)(i).

¹³¹13 C.F.R. § 124.109(c)(4)(i)(B).

¹³²See 13 C.F.R. § 124.109(c)(4)(iii)(C).

¹³³13 C.F.R. § 124.109(c)(5).

¹³⁴Compare 13 C.F.R. § 124.110(i) (prospects for success for NHOs) with 13 C.F.R. § 124.109(c)(6) (prospects for success for Indian Tribes and ANCs).

¹³⁵13 C.F.R. § 124.109(c)(7)(i)(A)–(B).

¹³⁶13 C.F.R. § 121.1001(a)(2).

¹³⁷13 C.F.R. § 121.1001(a)(2)(i)–(iii).

¹³⁸13 C.F.R. § 121.1003. In addition to forwarding a size protest to the SBA Government Contracting Area Office serving the area in which the offeror’s headquarters is located, the contracting officer must provide the SBA with additional information pertaining to the procurement. See 13 C.F.R. § 121.1006(b)(1)–(7).

¹³⁹13 C.F.R. § 121.1004(a)(1) (protest must be submitted “prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified interested parties of the identity of that low bidder”).

¹⁴⁰13 C.F.R. § 121.1004(a)(2) (protest must be submitted “prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee”).

¹⁴¹13 C.F.R. § 121.1004(a)(3) (the timeline to protest for long term contracts is the same as for negotiated procurements).

¹⁴²13 C.F.R. § 121.1004(b).

¹⁴³13 C.F.R. § 121.1009(a)(1).

¹⁴⁴See 48 C.F.R. subpt. 33.1.

¹⁴⁵See 13 C.F.R. § 121.1009(a)(2).

¹⁴⁶13 C.F.R. § 134.102(k); see 13 C.F.R. § 134.302(a) (“Appeals from size determinations and NAICS code designations may be filed with OHA by . . . [a]ny person adversely affected by a size determination”).

¹⁴⁷13 C.F.R. § 134.304(a), (c).

¹⁴⁸13 C.F.R. § 134.311.

¹⁴⁹13 C.F.R. § 134.310.

¹⁵⁰13 C.F.R. § 124.1002(a). Requests that the SBA review the SDB status of a concern are to be forwarded to the SBA Associate Administrator for Business Development in Washington, D.C. 13 C.F.R. § 124.1002(b).

¹⁵¹13 C.F.R. § 124.1002(c).

¹⁵²13 C.F.R. § 124.1002(c).

¹⁵³13 C.F.R. § 124.1002(d).

¹⁵⁴13 C.F.R. § 134.102(j)(1)–(2).

¹⁵⁵See 13 C.F.R. § 124.303 (identifying 20 grounds for which the SBA may terminate a Participant from the 8(a) Program).

¹⁵⁶13 C.F.R. § 134.401(c) (rules of practice applicable to all appeals to OHA from “[t]ermination pursuant to [13 C.F.R.] §§ 124.303 and 124.304”).

¹⁵⁷13 C.F.R. § 124.517(a).

¹⁵⁸13 C.F.R. § 124.517(e).

¹⁵⁹13 C.F.R. § 124.517(b).

¹⁶⁰13 C.F.R. § 124.517(d)(1)–(2).

¹⁶¹For a full explanation of affiliation and the ostensible subcontractor rule, see Maria Panichelli & Philip Lee, “Ostensible Clarity: SBA Rule Addresses Ostensible Subcontractor Rule in General Construction Contracts and DoverStaffing Factors,” *McCarter & English* (June 1, 2023) (discussing DoverStaffing, Inc., SBA No. SIZ-5300 (Dec. 14, 2011), 2011 WL 7101064), available at <https://www.governmentcontracts.com/2023/06/ostensible-clarity-sba-rule-addresses-ostensible-subcontractor-rule-in-general-construction-contracts-and-doverstaffing-factors/>.

¹⁶²See generally 13 C.F.R. § 121.103(a) (“General Principles of Affiliation”).

¹⁶³13 C.F.R. § 121.103(b)(2)(i) (emphasis added).

¹⁶⁴13 C.F.R. § 121.103(b)(2)(ii) (emphasis added).

¹⁶⁵13 C.F.R. § 121.103(b)(2)(i)–(ii).

¹⁶⁶13 C.F.R. § 121.103(b)(2)(ii).

¹⁶⁷13 C.F.R. § 121.103(b)(2)(ii)(A).

¹⁶⁸See 13 C.F.R. § 121.103(b)(2)(ii)(B) (“Contract administration services include both services that could be considered . . . under the [common administrative services] exception to affiliation and those that could not.”).

¹⁶⁹13 C.F.R. § 121.103(b)(2)(ii)(B)(1)–(2).

¹⁷⁰13 C.F.R. § 121.103(b)(2)(ii)(C) (emphasis added).

¹⁷¹13 C.F.R. § 121.103(b)(2)(ii). See *Olgoonik Diversified Servs., LLC*, SBA No. SIZ-5825, 2017 WL 1739975 (Apr. 21, 2017) (SBA Area Office decision appellant was other than small reversed for erroneously determining ANC-owned appellant was affiliated with other ANC-owned concerns because of the common ownership, common management, or performance of common administrative services exception to affiliation); see also *Synergy Sols., Inc.*, SBA No. SIZ-5843, 2017 WL 3374424 (July 17, 2017) (appellant’s appeal that ANC-owned concern was other than small denied and the ANC-owned concern’s reliance on its sister company, an aspect of their common ownership and common management, was not considered affiliated under the SBA’s size regulations).

¹⁷²15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (emphasis added); see 13 C.F.R. § 124.110(b) (SBA will determine an NHO’s size “independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, . . . unless the [SBA] determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to

obtain, a substantial unfair competitive advantage within an industry category.”); see also 13 C.F.R. § 124.109(c)(2)(iii) (similar analysis for ANCs and Indian Tribes).

¹⁷³See *The Emergence Grp.*, SBA No. SIZ-5766, 2016 WL 4158180 (July 28, 2016); see also *Revis Eng’g., Inc.*, SBA No. SIZ-5080, 2009 WL 5485966 (Oct. 13, 2009); see also *Comput. Cite*, SBA No. SIZ-5014, 2008 WL 5485445 (Dec. 9, 2008).

¹⁷⁴See, e.g., *Valenzuela Eng’g., Inc. & Curry Contracting Co.*, SBA No. 4151, 1996 WL 88045, at 4 (Feb. 23, 1996) (appellant’s appeal alleging ANC-owned prospective awardee was other than small and not disadvantaged denied, with OHA noting that the regulations at 13 C.F.R. § 124.109(c)(2)(iii) do not require “the Administrator to make a determination of unfair competitive advantage [and] is not only contrary to the text of the regulation, but would place a considerable additional administrative burden on the Agency”).

¹⁷⁵An ostensible subcontractor is defined to mean a subcontractor that is not a similarly-situated entity (having the same small business program status as the prime contractor) that “performs primary and vital requirements of a contract” or that “the prime contractor is unusually reliant.” 13 C.F.R. § 121.103(h)(3). Under the ostensible subcontractor rule, “[a] contractor and its ostensible subcontractor will be treated as joint venturers for size determination purposes.” 13 C.F.R. § 121.103(h)(3); see *Roundhouse PBN, LLC*, SBA No. SIZ-5383, 2012 WL 3683527, at 15 (Aug. 17, 2012) (SBA Area Office determination that ANC-owned appellant was affiliated with its sister companies reversed with OHA finding that ostensible subcontractor rule “does not apply because there is no indication that Tepa or the sister companies are subcontractors to Appellant a on this procurement.”).

¹⁷⁶*Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343, 2013 WL 1784795 (Apr. 16, 2012) (SBA Area Office finding that Tribal-owned appellant is other than small undisturbed because appellant did not challenge the specific finding); *Olgoonik Diversified Servs., LLC*, SBA No. SIZ-5825, 2017 WL 1739975 (Apr. 21, 2017) (OHA reverses SBA Area Office determination that ANC-owned appellant was affiliated with its ANC-owned sister entities under the ostensible subcontractor rule because there is no contractor/subcontractor relationship between the appellant and the ANC’s exercise of common management appellant relies upon is a clear exception to a finding of affiliation.).

¹⁷⁷*C2 Alaska, LLC*, SBA No. SIZ-6149, 2022 WL 1303102 (Apr. 19, 2022).

¹⁷⁸13 C.F.R. § 121.103(b)(2)(ii)(A)–(C).

¹⁷⁹See 13 C.F.R. § 125.8 (requirements a joint venture must satisfy to submit an offer for a procure-

ment set aside or reserved for small businesses); see also 13 C.F.R. § 121.103(h) (affiliation based on joint ventures).

¹⁸⁰A contractor's misrepresentation of its size or status under the 8(a) Program may also expose them to liability under the Program Fraud Civil Remedies Act of 1986 (PFCRA). Codified at 31 U.S.C.A. §§ 3801–3812, the PFCRA allows the SBA or other federal agencies to pursue administrative remedies, including “civil penalties and assessments against persons making false claims and statements.” 13 C.F.R. § 142.1(a). Civil penalties under the PFCRA shall not be more than “\$13,946 for each statement or claim, regardless of whether property, services, or money is actually delivered or paid by SBA.” 13 C.F.R. § 142.1(b). Procedures for investigations, responding to a complaint, and appealing an adverse decision, are provided at 13 C.F.R. §§ 142.7–142.11, 142.12–142.14, and 142.30–142.41, respectively.

¹⁸¹31 U.S.C.A. § 3729(a)(1)(A)–(G).

¹⁸²See 28 C.F.R. § 85.5, Table 1; see also 89 Fed. Reg. 9764, 9766, at Table 1 (Feb. 12, 2024).

¹⁸³U.S. ex rel. Ben Ferris v. Afognak Native Corp., et al., Civ. No. 3:15-cv-00150 (D. Alaska). This case settled out of court for an undisclosed sum. See Matt Wright, “Alutiiq False Claims Act Settlement Highlights Significant Government Contract Compliance Risks for Tribal, NHO, and ANC 8(a) Subsidiaries,” McCarter & English (May 16, 2019), <https://www.governmentcontractslaw.com/2019/05/alutiiq-false-claims-act-settlement-highlights-significant-government-contract-compliance-risks-for-tribal-nho-and-anc-8a-subsidiaries/>.

¹⁸⁴Worcester v. State of Ga., 31 U.S. 515 (1832); As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890, 106 S. Ct. 2305, 2312 (1986).

¹⁸⁵Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

¹⁸⁶Mestek v. LAC Courte Orielles Cmty. Health Ctr., 72 F.4th 255 (7th Cir. 2023).

¹⁸⁷13 C.F.R. § 124.109(c)(1).

¹⁸⁸AQuate II LLC v. Myers, 100 F.4th 1316 (11th Cir. 2024) (district court erred in granting appellant's claim on the basis of sovereign immunity as appellee's alleged theft of appellant's trade secrets to improve appellee's own bid on an 8(a) procurement was “related” to appellee's participation in the 8(a) Program).

¹⁸⁹AQuate II LLC, 100 F.4th at 1320 (11th Cir. 2024).

¹⁹⁰AQuate II LLC, 100 F.4th at 1321 (11th Cir. 2024).

¹⁹¹89 Fed. Reg. 48540 (June 7, 2024).

¹⁹²89 Fed. Reg. 59010 (July 22, 2024).

¹⁹³88 Fed. Reg. 86021, 86024, Sec. 5(a)(i) (Dec. 11, 2023).

¹⁹⁴See Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 10, 106 Stat. 2112, 2115 (1992) (codified as amended at 43 U.S.C.A. § 1626(e)).

¹⁹⁵See 13 C.F.R. § 124.110(c) (establishing economically disadvantaged for NHOs); see also 13 C.F.R. § 124.109(b)(2) (establishing economically disadvantaged for Indian Tribes).

¹⁹⁶See 13 C.F.R. § 124.103(b)(1).

¹⁹⁷Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745, 756 (E.D. Tenn. 2023) (quoting 15 U.S.C.A. § 637(a)(8)).

¹⁹⁸683 F. Supp. 3d at 774 (“[SBA has] failed to show that the use of the rebuttable presumption in the 8(a) program is narrowly tailored [to survive strict scrutiny].”).

¹⁹⁹683 F. Supp. 3d at 769.

²⁰⁰Small Bus. Admin., Impact of Recent Court Decision (Ultima Servs. Corp. v. Dep't of Ag. (E.D. Tenn.)) on the use of the 8(a) Program (Aug. 18, 2023), available at <https://www.sba.gov/document/policy-guidance-impact-recent-court-decision-ultima-servs-corp-v-dept-ag-ed-tenn-use-8a-program>.

²⁰¹Small Bus. Admin., Current entity-owned 8(a) participants (firms owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations or Community Development Corporations), Updates on the 8(a) Business Development Program (Sept. 17, 2024, 3:30 p.m.), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program>.

²⁰²Complaint at 23, ¶ 56, Advanced Simulation Tech. Inc. v. United States, No. 1:23-cv-02201-MRS (Fed. Cl. Dec. 29, 2023), ECF No. 1 (citing U.S. v. Antelope, 430 U.S. 641, 646 (1977)).

²⁰³Opinion and Order, Advanced Simulation Tech. Inc. v. United States, No. 1:23-cv-02201-MRS (Fed. Cl. Aug. 9, 2024), ECF No. 53.