

SMALL BUSINESS, RISING GIANT: POLICIES AND COSTS OF SECTION 8(A) CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS

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Under the Small Business Act, Alaska Native corporations (ANCs) not only have special contracting status under the Section 8(a) Business Development Program but also enjoy additional advantages over other small businesses. In recent years this legal treatment has come under scrutiny and criticism due to instances in which work under contracts awarded to ANCs without competitive bidding has been subcontracted out to large companies ineligible for 8(a) benefits. Two congressmen initiated an investigation into these no-bid contracts awarded to ANCs resulting in a report from the Government Accountability Office as well as a Congressional hearing focusing on the issue. Both appear to confirm much of the media's criticisms. This Note examines the laws granting special contracting advantages to ANCs, the costs and benefits of these advantages, as well as some possibilities for legislative and other reforms.

I. INTRODUCTION

Alaska Native corporations (ANCs) were established by the Alaska Native Claims Settlement Act of 1971 (ANCSA) to administer land settlements in Alaska.¹ Under the Small Business Act,² ANCs not only have special contracting status under the Section 8(a) Business Development Program but also enjoy unique privileges over and above other 8(a) small businesses. Most importantly, ANCs are exempt from the dollar limitation on contracts that can be received outside of the competitive bidding

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1. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(h) (2000)).

2. Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631-657(f) (2000)).

process that is applicable to other 8(a) businesses.³ In the past two years, this legal treatment has drawn intense, mostly negative media attention. In addition, a congressional investigation was spurred by the grant to ANCs, without competition, of large-value defense contracts that were then subcontracted to companies ineligible for 8(a) benefits.⁴

This Note will describe the legal edge that ANCs enjoy in receiving valuable government contracts and will discuss instances of alleged abuse. The Note will also show that while significant potential exists for this edge to improve the economic status of Alaska Natives, the unique access of ANCs to government contracts undermines the policy of competitive access, imposes high costs on taxpayers, and excludes other small and minority businesses' access to federal procurement dollars, while fostering a dependency by ANCs that obstructs true business development and independence and renders balanced reform difficult. Part II provides a brief background on the history of the legal establishment and economic performance of ANCs; Part III explains the legal substance of the contracting advantages for ANCs in the 8(a) Program; Part IV examines how these advantages are used in practice, focusing on the subcontracting practices which have drawn media scrutiny and a congressional investigation; Part V describes the results of the investigation; and Part VI analyzes the benefits and costs of the ANC preferences, some possible remedies to address the problems associated with the costs, and the potential difficulty of finding a balanced solution.

II. BACKGROUND ON ANCS

Any discussion of ANCs and their economic status today necessitates a brief overview of their legal creation under ANCSA. At a time when the legal validity of aboriginal rights and claims to lands within the state was unclear, ANCSA was drafted partly in response to rising pressures to settle these claims so that development and transportation of the state's oil resources could proceed in legal safety.⁵ ANCSA extinguished all claims based on

3. 13 C.F.R. § 124.506(b) (2006).

4. See, e.g., Michael Scherer, *Little Big Companies: How Did Corporations Like Halliburton Get Millions in Government Contracts Designated for Small Minority Businesses?* MOTHER JONES, Jan./Feb. 2005, at 26, available at http://www.motherjones.com/commentary/notebook/2005/01/11_400.html.

5. See FELIX S. COHEN ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ch. 14 § A (1982); see also Ben Summit, *The Alaska Native Claims Settlement Act (ANCSA): Friend or Foe in the Struggle to Recover Alaska Native Heritage*, 14 T.M. COOLEY L. REV. 607, 613–14 (1997).

aboriginal rights to land in Alaska by Alaska Natives against the federal and state governments,⁶ and, in turn, it distributed forty million acres of the land to Alaska Natives.⁷ A “Native” was defined as a United States citizen who is “one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof.”⁸ Broadly speaking, ANCSA mandated that the Secretary of the Interior divide lands in Alaska into twelve regions, each including Alaska Natives with “a common heritage and sharing common interests.”⁹ Twelve “regional corporations” and over two hundred “village corporations” were created to select lands for use within the twelve regions, as well as to administer their share of the monetary grant.¹⁰ A thirteenth regional corporation was created for nonresident natives, and it received money but no land.¹¹ The village corporations were to first select twenty-two million acres from the thirty-eight million granted under the law, and the regional corporations were to select the remaining sixteen million acres.¹² These sixteen million acres were required to be redistributed to the villages.¹³ Under the law, all resident Alaska Natives received one hundred shares of stock in one of the twelve regional corporations and also became shareholders in the village corporations that were organized for their respective villages.¹⁴ ANCSA also distributed \$462.5 million of congressional appropriations funds and \$500 million in oil royalties¹⁵ to the thirteen regional corporations, which were in turn required to

6. 43 U.S.C. § 1603 (2000).

7. *See* 43 U.S.C. § 1611 (2000).

8. 43 U.S.C. § 1602(b) (2000).

9. 43 U.S.C. § 1606(a) (2000); *see* COHEN ET AL., *supra* note 5, ch. 14 § A.

10. *See* 43 U.S.C. §§ 1606–1607 (2000); COHEN ET AL., *supra* note 5, ch. 14 § A.

11. *See* 43 U.S.C. § 1606(c), 1606(i). The thirteen regional corporations are: AHTNA, Inc., Arctic Slope Regional Corporation, Bering Straights Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc., Cook Inlet Tribal Council, Doyon, Limited, Koniag, Inc., Sealaska Corporation, Sitnasuak Native Corporation, and Thirteenth Regional Corporation. Alaska Native Corporations, Organizations and Informational Resources, <http://www.alaskans.com/alaskanative> (last visited Nov. 26, 2006).

12. *See* 43 U.S.C. § 1611.

13. *See* 43 U.S.C. § 1611(a)–(b).

14. *See* 43 U.S.C. §§ 1606(g), 1607.

15. 43 U.S.C. § 1605 (2000).

distribute the funds to the village corporations and to their shareholders who had no ownership in any village corporation.¹⁶

The economic performance of ANCs during the two decades after their creation was “surprisingly poor” with collective losses of \$380 million by 1993.¹⁷ Far from fulfilling their “impressive task of improving the social and economic status of Alaska Natives,”¹⁸ most of the ANCs generally teetered on the edge of insolvency until the early 1990s due to the inflation in the 1970s,¹⁹ the costs of compliance with ANCSA, and the costly litigation over its ambiguous provisions.²⁰ As a result, mergers between village corporations as well as between regional and village corporations became a “tactic for survival.”²¹ Moreover, it became apparent that the regional corporations experienced widely varying degrees of success despite receiving the same grants of cash and land under ANCSA.²² With wide ranges in dividend payouts and annual returns, some “provided hundreds of high-wage jobs for their Native shareholders, while others provided none.”²³ For instance, as of 1983, Cook Inlet Native Association and NANA, Inc. were generally successful, and Sealaska Corp. came in at 745th on *Fortune’s* list of the largest corporations in America, while Koniag, Inc. was having difficulty covering its bills.²⁴ Notably, while ANCs like Bering Strait Native Corp. entered bankruptcy by 1988 after a series of bad local investments and Calista Corp. employed under ten persons by 1991, Cook Inlet Region, Inc. made national broadcasting acquisitions with partners “who were able to take advantage of the Natives’ minority status to get preferences from” the Federal Communications Commission and earned more than

16. See 43 U.S.C. § 1606(j)–(m); COHEN ET AL., *supra* note 5, ch. 14 § A. Hereinafter in this Note, “ANCs” shall refer to both the thirteen regional corporations as well as the village corporations created under ANCSA.

17. Stephen Colt, *Alaska Natives and the “New Harpoon”*: *Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 155 (2005).

18. Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L. J. 1331, 1339 (1992).

19. See Summit, *supra* note 5, at 618.

20. Hirschfield, *supra* note 18, at 1339.

21. *Id.*

22. See Colt, *supra* note 17, at 156.

23. See *id.*

24. See Wallace Turner, *Alaska’s Native Corporations*, N.Y. TIMES, July 12, 1983, at D5.

“the combined cumulative income of the other eleven regional corporations.”²⁵

This fledgling state gradually changed, however, when Congress took notice. Michael Brown, a chief executive for one of Arctic Slope Regional Corporation’s subsidiaries, lobbied Congress in the 1980s, urging officials to examine the poverty and unemployment prevalent in rural Alaska villages.²⁶ He found Senator Ted Stevens, who at the time headed the Senate Appropriations Committee, to be particularly receptive.²⁷ In the 1990s, the ANCs “dramatically improved their financial performance,” moving from red to black in terms of cumulative earnings between 1991 and 1998.²⁸ A professor of economics at the University of Alaska in Anchorage pinpointed their seizure of “opportunities to provide professional and support services under contract to federal agencies” as one of four factors that led to this climb.²⁹

III. THE ANC “EDGE”³⁰

A. The 8(a) Business Development Program

The federal government’s policy of encouraging the participation of small businesses in government contracts was first announced during the Second World War amidst a heightened need to increase the industrial production base.³¹ Then, in 1953 the Small Business Administration (SBA) was created to contract with government procurement agencies to provide services and supplies, to subcontract with small businesses, and to encourage subcontracting by prime contractors with small businesses.³² This institution was made permanent by the Small Business Act of 1958 (“Act”), which governed all types of procurement not just those

25. Colt, *supra* note 17, at 161–62 (emphasis omitted).

26. See Scherer, *supra* note 4, at 28; see also T. Christian Miller, *Contracts Take Alaska to Iraq*, L.A. TIMES, Mar. 7, 2004, at A1.

27. See Scherer, *supra* note 4, at 28.

28. Colt, *supra* note 17, at 162–63.

29. *Id.*

30. See Robert O’Harrow, Jr. & Scott Higham, *Alaska Native Corporations Cash In on Contracting Edge*, WASH. POST, Nov. 25, 2004, at A1.

31. Small Business Assistance Act of 1942, Pub. L. No. 77-603, 56 Stat. 351 (1942); see 48 JOHN C. MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS: CYCLOPEDIA GUIDE TO LAW, ADMINISTRATION, PROCEDURE § 48.10 (2005).

32. Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (1953).

related to civil defense.³³ Under the Act, a “small-business concern” was defined as a business “independently owned and operated and which is not dominant in its field of operation.”³⁴

The Act created a “Minority Small Business and Capital Ownership Development” program,³⁵ commonly known as the 8(a) Business Development or 8(a) BD Program, in order “to assist eligible small disadvantaged business concerns compete in the American economy through business development.”³⁶ Under the 8(a) Program, the SBA has the power to contract with federal procurement agencies, departments, and officers to provide goods and services and to “arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns.”³⁷ The phrase “negotiating or otherwise letting subcontracts” has been interpreted to mean that the SBA may award contracts to 8(a) Program small businesses without using the competitive bidding process mandated³⁸ for the usual awards of federal procurement contracts.³⁹ These subcontracts may thus be awarded either on a sole-source basis directly to a specific small business within the 8(a) Program or on a competitive basis in a competition restricted to 8(a) small businesses.⁴⁰

Under the procedures set out by the SBA, there are three basic ways for a government procurement agency’s contracting officer to offer an 8(a) contract: (1) through competition among all 8(a) businesses that submit an offer; (2) as an open requirement, which means on a sole-source basis but without the nomination of a specific business; or (3) on a sole-source basis, offered on behalf of a specific business, in which case the procuring agency identifies in

33. Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631–657(f) (2000)).

34. 15 U.S.C. § 632(a)(1) (2000).

35. *See* 15 U.S.C. § 636(j)(10) (2000).

36. 13 C.F.R. § 124.1 (2006).

37. 15 U.S.C. § 637(a)(1)(A)–(B) (2000); *see also* 13 C.F.R. § 124.501(a).

38. *See* 41 U.S.C. § 253(a) (2000) (stating that a procurement agency must obtain “full and open competition through the use of competitive procedures” to procure property and services); 41 U.S.C. § 253(c)(5) (stating that a procurement agency may dispense with competitive procedures when a statute “expressly authorizes or requires that the procurement be made. . . from a specified source”).

39. *See Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 708–09 (5th Cir. 1973) (holding that “section 8(a) . . . clearly constitutes specific statutory authority to dispense with competition” and thus, “subcontracts under the section 8(a) program may be awarded on a noncompetitive basis”).

40. *See* 15 U.S.C. § 637(a)(1)(C)–(D).

its letter a specific 8(a) business that it nominates to receive the award.⁴¹ In the first case, the SBA then accepts the procurement contract on behalf of the entire 8(a) Program, and the procuring agency conducts the competition and evaluates offers received in accordance with the procedures set out in the Federal Acquisition Regulations,⁴² which govern usual competitive government contracts.⁴³ In the second case, the SBA selects an 8(a) business to receive the sole-source award, and in the third case, the SBA determines whether the nominated participant is an appropriate match for the sole-source award and may either negotiate the contract terms on behalf of the 8(a) business or authorize direct negotiations between the procuring agency and the 8(a) business.⁴⁴ In practice, when an 8(a) business becomes informed of a procuring agency's interest in offering a particular contract, it may "pitch" or market itself to the agency to be nominated for the award.⁴⁵

Federal agencies are encouraged to offer contracts to minority businesses under the 8(a) Program because the Act also requires the President to establish annual set-aside goals for contracts awarded by all federal agencies to various classifications of small businesses, including small businesses under the 8(a) Program.⁴⁶ Specifically, the head of each federal agency is to set the agency's own goals, not to drop below an annual minimum of five percent of the total value of contracts and subcontracts issued by that agency.⁴⁷

B. Legal Substance of Preferences for ANCs

Pursuant to its powers under the Act,⁴⁸ the SBA has issued regulations that contain the legal substance of the preferences for ANCs.⁴⁹ The edge ANCs enjoy above other 8(a) businesses consists primarily of their near automatic eligibility for the program

41. See 13 C.F.R. § 124.502(a)–(b).

42. 48 C.F.R. ch. 1. (2005).

43. See 13 C.F.R. § 124.507(a).

44. See 13 C.F.R. §§ 124.503(a)(2), 124.503(c), 124.503(d).

45. See T. Christian Miller, *Army Outsources Security Positions*, ANCHORAGE DAILY NEWS, Aug. 13, 2004, ¶ 29 available at <http://www.adn.com/front/story/5421063p-5357044c.html>.

46. See 15 U.S.C. § 644(g) (2000).

47. *Id.*

48. 15 U.S.C. § 634(b)(6) (2000).

49. 13 C.F.R. pt. 124.

and their exemption from the dollar limitation on the amount of awards that may be sole-sourced.⁵⁰

Eligibility for the 8(a) Program has two basic requirements. First, to qualify for participation in the 8(a) Program, a business must qualify as “small” according to size standards set out in a voluminous and complex set of separate regulations, the details of which are beyond the scope of this discussion.⁵¹ Generally speaking, for government procurement purposes, a business concern must meet a variety of size standards based on employee numbers, output or capacity volume, or annual receipts.⁵²

Second, to qualify for participation in the 8(a) Program, a small business must be “socially and economically disadvantaged,” which requires that it is at least fifty-one percent “unconditionally owned” by and that its “management and daily business operations” are controlled by: (1) “one or more socially and economically disadvantaged individuals,” (2) an “economically disadvantaged Indian tribe (or a wholly owned business entity of such a tribe),” or (3) “an economically disadvantaged Native Hawaiian organization.”⁵³ “Indian tribe” is defined as “any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation.”⁵⁴ The Regulations explicitly define “Alaska Native Corporation” as those created under ANCSA.⁵⁵

As a special subgroup, business concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are entitled to some benefits over and above most 8(a) businesses.⁵⁶ For example,

50. See 43 U.S.C. § 1626(e)(1) (2000); 13 C.F.R. §§ 124.109(a)(2), 124.109(a)(4), 124.506. A full discussion of these preferences follows.

51. See generally 13 C.F.R. pt. 121 (2006).

52. See 13 C.F.R. §§ 121.201, 121.401, 121.402.

53. 15 U.S.C. § 637(a)(4) (2000); see also 13 C.F.R. §§ 124.105–106. In addition, the applicant must have “reasonable prospects for success in competing in the private sector if admitted” to the program as well as demonstrate good character. 13 C.F.R. §§ 124.107–108(a). “Economically disadvantaged individuals are those socially disadvantaged individuals 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.” 15 U.S.C. § 637(a)(6). To show oneself “economically disadvantaged,” individuals must submit a narrative statement and personal financial information. 13 C.F.R. § 124.104.

54. 15 U.S.C. § 637(a)(13); see also 13 C.F.R. § 124.3.

55. 13 C.F.R. § 124.3.

56. Compare 13 C.F.R. §§ 124.105–108 (ownership, control, potential for success, and good character requirements) with §§ 124.109–111 (requirements with

they all benefit from a special exemption from the affiliate rule in size determinations. In determining the size of most 8(a) businesses, the SBA includes the employees, receipts, or other measures of size for all the business's foreign and domestic affiliates.⁵⁷ For businesses owned and controlled by ANCs and Indian tribes, however, the size of the business is "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 one of these businesses might obtain "a substantial unfair competitive advantage . . ." ⁵⁸ Similar rules apply to businesses owned by NHOs and CDCs.⁵⁹ Therefore, businesses owned by ANCs, Indian tribes, NHOs, and CDCs are less likely to be ineligible on account of size.⁶⁰

Moreover, the structure of the definition of "socially and economically disadvantaged" indicates that those businesses falling under categories (2) and (3) are effectively exempted from demonstrating social disadvantage.⁶¹ Under these guidelines Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Black Americans, Hispanic Americans, and Asian Pacific Americans are all presumed to be "socially disadvantaged."⁶² Individuals not belonging to these groups must demonstrate their social disadvantage through a long list of evidentiary requirements.⁶³ Those individuals not belonging to one of these groups are clearly at a disadvantage as the burden is shifted to them to prove that they qualify as disadvantaged.

Furthermore, they all are exempt from the requirement that persons conducting the 8(a) business's management and daily operations be disadvantaged persons as defined under the regulations.⁶⁴ So, while the regulations require that a tribally-

respect to the same four items for concerns owned by Indian tribes, NHOs, and CDCs, respectively).

57. 13 C.F.R. § 121.103(a)(6).

58. 13 C.F.R. § 124.109(c)(2)(iii).

59. 13 C.F.R. §§ 124.110(b), 124.111(c).

60. *See* Size Appeals of: Valenzuela Eng'g, Inc. and Curry Contracting Co., No. 4151 (SBA Office of Hearings and Appeals Feb. 23, 1996), *available at* <http://www.sba.gov/oha/allcases/sizcases/siz-4151.txt> (denying a size protest against SMI, a wholly-owned subsidiary of The Aleut Corp., a regional corporation, that was based on a claim that it was affiliated with another wholly owned subsidiary of The Aleut Corp.).

61. *See* 13 C.F.R. § 124.109.

62. 13 C.F.R. § 124.103(b).

63. *See* 13 C.F.R. § 124.103(c).

64. 13 C.F.R. § 124.106.

owned business be controlled by the tribe through a disadvantaged individual, non-tribal members may also manage the business if the SBA determines that this is required to assist its development.⁶⁵

Finally, businesses owned by Indian tribes, ANCs, NHOs, and CDCs are all exempt from the limitation on ownership of multiple 8(a) businesses. For most 8(a) businesses, participants may not own more than a ten to twenty percent ownership interest in another 8(a) business.⁶⁶ Indian tribes, ANCs, NHOs, and CDCs, however, are prohibited only from owning more than fifty-one percent of another 8(a) business in the same primary line of business.⁶⁷ Additionally, they may own an unlimited number of other 8(a) businesses that are in a different primary line of business, even if those other businesses have a secondary line of business identical to the primary business of the original 8(a) company.⁶⁸

Additionally, businesses owned by ANCs and Indian tribes enjoy particularly preferential status. While the language of the provisions governing NHOs and CDCs still requires them to meet all eligibility criteria that apply to 8(a) businesses—as long as those criteria do not conflict with the special provisions for them—the provisions governing businesses owned by Indian tribes and ANCs contain no similar language.⁶⁹ This effectively means that NHOs and CDCs are subject to much more detailed requirements than Indian tribes and ANCs.⁷⁰

Even among tribally-owned businesses, businesses owned by ANCs enjoy unique eligibility benefits that make them a very specific and small group of especially privileged 8(a) beneficiaries.⁷¹ Like other businesses owned by Indian tribes, businesses owned by ANCs must meet size requirements applicable to all 8(a) participants.⁷² But while Indian tribe-owned businesses must establish economic disadvantage, ANCs and the businesses they own by a majority are automatically deemed to be economically

65. 13 C.F.R. § 124.109(c)(4).

66. See 13 C.F.R. § 124.105(g)–(h). The precise percentage of this limitation depends on disadvantaged status and other circumstances. *Id.*

67. 13 C.F.R. §§124.109(c)(3)(ii), 124.110(c), 124.111(d).

68. 13 C.F.R. §§ 124.109(c)(3)(ii), 124.110(c), 124.111(d).

69. Compare 13 C.F.R. § 124.109 (requiring that ANCs meet only the requirements of § 124.112 to the extent it is not inconsistent) with §§ 124.110–111 (requiring that NHOs and CDCs meet the requirements of §§ 124.101–108 and § 124.112 to the extent they are not inconsistent).

70. See 13 C.F.R. §§ 124.109–111.

71. See 13 C.F.R. § 124.109(a).

72. 13 C.F.R. § 124.109(c)(2).

disadvantaged under ANCSA.⁷³ This is true as long as Alaska Natives or their descendants own “a majority of both the total equity of the ANC and the total voting powers.”⁷⁴

Arguably the most powerful preference for ANCs within the 8(a) Program is the exemption from the dollar thresholds for sole-source contracts, a benefit available exclusively to businesses owned by Indian tribes and ANCs—not NHOs, CDCs, or any other small or 8(a) business.⁷⁵ A contract cannot be sole-sourced (in other words, 8(a) businesses must compete for the contract) if: (1) a “reasonable expectation” exists that at least two eligible 8(a) businesses will submit offers at fair market prices; (2) the price of the contract is anticipated to exceed five million dollars for contracts for manufacturing goods and three million dollars for other contracts; and (3) the contract was not accepted by the SBA “for award as a sole-source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.”⁷⁶ Thus, the structure of these three requirements effectively exempts businesses owned by Indian tribes and ANCs from the dollar limitations on sole-source contracts.⁷⁷

C. Limitations on Constitutional and Procedural Protections

The advantages for ANCs in receiving government contracts are amplified and entrenched by several factors that limit the extent to which outsiders can successfully challenge individual awards made based on those advantages.

1. Constitutionality. One potential way to challenge an award made to an ANC is to question the constitutionality of the advantages ANCs and other businesses enjoy under the 8(a) Program on Equal Protection grounds. At least one court has rejected this line of attack.⁷⁸

In 1995, the Supreme Court examined a federal practice of giving monetary incentives for general contractors to hire minority subcontractors.⁷⁹ The law at issue presumed “socially and

73. 43 U.S.C. § 1626(e)(1) (2000); 13 C.F.R. § 124.109(a)(2), (a)(4).

74. 13 C.F.R. § 124.109(a)(1), (a)(3).

75. See 13 C.F.R. § 124.506.

76. 13 C.F.R. § 124.506(a)(1).

77. See 13 C.F.R. § 124.506(b) (explicitly stating that the SBA may award a contract on a sole-source basis to such a business even where the anticipated value exceeds the thresholds).

78. See *Am. Fed’n of Gov’t Employees v. United States (AFGE)*, 330 F.3d 513, 516–17, 520–21 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088 (2003).

79. *Adardand Constructors v. Pena*, 515 U.S. 200, 204–05 (1995).

economically disadvantaged individuals” to include “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by” section 8(a) of the Act.⁸⁰ The Court held that all racial classifications are subject to strict scrutiny and thus must be narrowly tailored to further a compelling government interest.⁸¹ One might thus expect that the application of the 8(a) Program to “Indian tribes” would be subjected, and fatally so, to strict scrutiny.⁸²

The 8(a) provisions applicable to Indian tribes and ANCs have not been directly challenged. However, a 2003 opinion by the Court of Appeals for the District of Columbia Circuit, *American Federation of Government Employees v. United States*,⁸³ makes it unlikely that a court would strike down those provisions on constitutional grounds. *AFGE* upheld a provision of the Defense Appropriations Act of 2000⁸⁴ that allowed the federal government to bypass the normal award procedure for civil engineering contracts for firms with fifty-one percent “Native American” ownership.⁸⁵ The court held that federal legislation with respect to Indian tribes is a political classification subject to rational scrutiny and that “Native American” in the law at issue actually referred to members of federally recognized Indian tribes, a political classification.⁸⁶ At least two scholarly discussions have criticized this distinction between racial and political classification of “Indian tribes.”⁸⁷ Further, the Act clearly contemplates its own classification as one based on minority racial groups.⁸⁸ Thus, even through the Supreme Court has denied certiorari, flaws in the

80. *Id.* at 205.

81. *Id.* at 227.

82. See 13 C.F.R. § 124.109 (applying different criteria to business concerns owned by Indian tribes and ANCs).

83. 330 F.3d 513 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088 (2003).

84. Pub. L. No. 106-79, § 8014(3) (1999).

85. *AFGE*, 330 F.3d at 516, 523.

86. *Id.* at 520–21.

87. See Jessica Lynn Clark, *AFGE v. United States: The D.C. Circuit's Preferential Treatment of the Native American Preference in Government Contract Awards*, 34 PUB. CONT. L.J. 379, 398–404 (2005); Margaret B. Williams, *Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: CHAPTER: Constitutional Law*, 72 GEO. WASH. L. REV. 983, 1000–03 (2004).

88. See 13 C.F.R. § 124.103(a) (2006) (“Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society . . .”).

AFGE court's reasoning might leave the 8(a) Program open to future constitutional challenge.⁸⁹

2. *Protests.* Another possibility for curbing the impact of the ANC edge is for other small and 8(a) businesses to protest particular awards of contracts to ANCs. This approach is subject to several limitations, however, and is, in general, unlikely to succeed.

For instance, the only challenge known to this author to a contract awarded to an ANC partnered with a large corporation on the grounds that the combined entity no longer qualifies as a "small" business was rejected.⁹⁰ A small business receiving an 8(a) contract and its subcontractor are treated as joint venturers and thus are affiliates for the purposes of size determination if: (1) the subcontractor "performs primary and vital requirements of a contract" or (2) the prime contractor is "unusually reliant" upon it, determined with respect to a set of factors such as who manages the contract and what percentage of the work is subcontracted.⁹¹ Thus, if a subcontractor performs too much of the work under the contract, the joint venture between it and an ANC may exceed small business size limitations.⁹² However, the only known protest based on this argument has been unsuccessful on this point. A wholly-owned subsidiary of The Aleut Corp. subcontracted an award from the Air Force to Lockheed, a large business which then performed twenty percent of the labor under the contract.⁹³ The SBA Office of Hearings and Appeals rejected a protester's claim that the Alaska Native subsidiary would be unusually reliant on Lockheed and thus determined that they were not affiliates for size determination purposes.⁹⁴ The office emphasized that the subsidiary managed the contract and was responsible for the bulk

89. 540 U.S. 1088 (2003). Of course, even if these advantages are subject to strict scrutiny, they might be deemed to serve a compelling purpose. See Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 955-56 (2002).

90. See Size Appeals of: Valenzuela Eng'g, Inc. and Curry Contracting Co., No. 4151 (SBA Office of Hearings and Appeals Feb. 23, 1996), available at <http://www.sba.gov/oha/allcases/sizcases/siz-4151.txt>.

91. 13 C.F.R. § 121.103(h)(4) (2006).

92. *Id.*

93. Size Appeals of: Valenzuela Eng'g, Inc. and Curry Contracting Co., No. 4151 (SBA Office of Hearings and Appeals Feb. 23, 1996), available at <http://www.sba.gov/oha/allcases/sizcases/siz-4151.txt>.

94. *Id.*

of the work, and thus it performed “the vital and primary tasks of the contract.”⁹⁵

Another limitation on potential challenges to contracts awarded to ANCs is the inability of “any other party” to challenge the eligibility of an 8(a) business for an 8(a) contract before the SBA “or any administrative forum,” in a bid or other protest.⁹⁶ This means that no competing contractor can challenge the eligibility of an ANC for a particular contract.⁹⁷

Finally, the threshold for review of decisions to award contracts to 8(a) businesses is stacked high against a non-8(a) business wishing to protest the decision, even where the non-8(a) business had been performing that contract for a long time. The Comptroller General, which handles certain government contract protests, takes the position that the SBA and contracting agencies have “broad discretion” to select procurement contracts for the 8(a) Program.⁹⁸ As a result, it will decline to hear any protest that a contract should not have been placed in the 8(a) Program unless the protester meets a burden of showing that the officials acted in bad faith or violated a specific law or regulation.⁹⁹

This barrier to protest can be seen in how easy it is for an incumbent non-8(a) business performing an existing contract with an agency to lose that contract to an ANC when there are changes to the contract. Under its own regulations, the SBA does not accept a contract into the 8(a) Program if it would have an “adverse impact” on another small business.¹⁰⁰ Such impact is presumed to exist where an incumbent small business had been performing the contract, unless changes to the contract effect a price change of at least twenty-five percent, in which case the contract is considered a “new requirement” and the protection for the incumbent does not apply.¹⁰¹ In at least two cases where incumbent contractors protested the award of their contract to an ANC under the 8(a) Program, they lost under the heavily deferential standard of review despite close disputes about whether

95. *Id.*

96. 13 C.F.R. § 124.517(a).

97. *See id.*

98. OMNI Gov’t Servs., Nos. B-297240.2; B-297240.3; B-297240.4 (Comp. Gen. Mar. 22, 2006), *available at* <http://www.gao.gov/decisions/bidpro/2972402.pdf>; Catapult Technology, Ltd., Nos. B-294936; B-294936.2 (Comp. Gen. Jan. 13, 2005), *available at* <http://www.gao.gov/decisions/bidpro/294936.pdf>.

99. Catapult Technology, Ltd., Nos. B-294936; B-294936.2 (Comp. Gen. Jan. 13, 2005), *available at* <http://www.gao.gov/decisions/bidpro/294936.pdf>.

100. 13 C.F.R. § 124.504(c).

101. 13 C.F.R. § 124.504(c)(1)(ii)(C).

the requirement was “new.”¹⁰² In one case, the SBA even admitted that it had failed to perform an adverse impact analysis as required by its own regulations, but the Comptroller General denied the protest on grounds that the failure did not prejudice the protester.¹⁰³ Even if the SBA had performed such an analysis, the Comptroller General concluded, deference is owed to the SBA’s interpretation of its own regulations.¹⁰⁴ The SBA interpretation gives the SBA discretion to find adverse impact not to exist even if the presumption for adverse impact is met.¹⁰⁵ These unsuccessful challenges indicate that a heavily deferential standard of review limits the usefulness of the protest system for incumbents losing contracts to ANCs under the 8(a) Program.

IV. 8(A) ADVANTAGES IN PRACTICE

The use of the ANC edge in the award and performance of sole-source government contracts has been a mixed story of rags-to-riches and loophole exploitation.¹⁰⁶ The advantages available to ANCs and other tribally-owned corporations have been thought to be responsible for a large jump in the value of 8(a) contracts in recent years, which doubled from \$5.6 billion in 2002 to \$10.1 billion just one year later.¹⁰⁷ The size of the contracts awarded to ANCs and their partners has been a surprise relative to the original visions for the program. Contracting officials at the Pentagon, for instance, thought the exemptions for ANCs would be used to procure “occasional small contracts, not as a way to bypass federal competitive-bidding rules for \$100 million projects” for “everything under the sun.”¹⁰⁸ Government contracts to native-owned

102. See OMNI Gov’t Servs., Nos. B-297240.2; B-297240.3; B-297240.4 (Comp. Gen. Mar. 22, 2006), available at <http://www.gao.gov/decisions/bidpro/2972402.pdf>; Catapult Technology, Ltd., Nos. B-294936; B-294936.2 (Comp. Gen. Jan. 13, 2005), available at <http://www.gao.gov/decisions/bidpro/294936.pdf> (denying such protests).

103. See OMNI Gov’t Servs., Nos. B-297240.2; B-297240.3; B-297240.4 (Comp. Gen. Mar. 22, 2006), available at <http://www.gao.gov/decisions/bidpro/2972402.pdf>.

104. *Id.*

105. *Id.*

106. Compare, e.g., Allison Connolly, *A Tiny Alutiiq Village in Alaska is Reaping Millions in Defense Contracts in Hampton Roads and Throughout the Country as a Result of Laws Giving Its Company Preferential Treatment as Restitution for Lost Land*, THE VIRGINIAN-PILOT, July 17, 2005, at A1, with O’Harrow & Higham, *supra* note 30, at A1.

107. Jim Snyder, *Native Corporation Trade Association Forms*, THE HILL, Feb. 9, 2005, at 15.

108. See Scherer, *supra* note 4, at 28.

companies rose steadily between 1999 and 2003 and spiked sharply in 2003, with the vast majority of the value of the contracts being sole-sourced.¹⁰⁹ By 2003, when native corporations received \$1.3 billion in such sole-sourced contracts, accounting for almost fifteen percent of the 8(a) Program, the advantages and exemptions for ANCs have made some small village corporations “rising giant[s] in the world of federal contracting.”¹¹⁰

The public attention in the past year and a half, however, has been much more focused on a few high-profile cases of alleged abuse of exclusive 8(a) privileges by ANCs and their partners.¹¹¹ Three themes seem to run through the recent flurry of public discussion of ANCs and their 8(a) edge that may explain the antagonistic atmosphere in mainstream media. First, as will become clear in the discussion to follow, many of the most high-profile ANC contracts have been awarded by the Department of Defense. Neal Fried, an economist at Alaska’s Department of Labor, has noted that ANCs depending on Alaska’s natural resources have struggled while “those that have joined the war effort have thrived.”¹¹² Since that agency annually doles out the “bulk of federal acquisition dollars,” any tendency to grant contracts to ANCs somewhat reflects a trend in government procurement as a whole.¹¹³

Second, the fact that many of the largest contract awards have been for work in security and defense implicates a heightened degree of public concern in the post-September 11 world. Several subsidiaries of ANCs have been sole-source awarded million-dollar contracts issued by the Department of Defense for military and reconstruction work in Iraq and Afghanistan as well as at home.¹¹⁴ For example, days after September 11, a \$2.2 billion contract for management of information technology systems issued by the National Geospatial Intelligence Agency was sole-sourced to Chenega and Arctic Slope, two of the thirteen regional corporations, an award that “raised eyebrows.”¹¹⁵ Moreover, in 2002, the Customs Service awarded a \$500 million contract for

109. *See id.* (Chart: Government Contracts to Tribal Companies).

110. *See id.* at 26.

111. *See, e.g.,* O’Harrow & Higham, *supra* note 30, at A1; Miller, *supra* note 26, at A1; Turner, *supra* note 24, at D5.

112. Connolly, *supra* note 106, at A1.

113. Major Thomas J. Hasty, III, *Minority Business Enterprise Development and the Small Business Administration’s 8(a) Program: Past, Present, and (Is There a) Future?* 145 MIL. L. REV. 1, 87 (1994).

114. *See* Scherer, *supra* note 4, at 28–29.

115. Connolly, *supra* note 106, at A1.

maintenance of customs inspection equipment on a sole-source basis to Chenega Technology Services Corp.¹¹⁶ Chenega Corp., as noted by *The Washington Post*, had “little experience” doing this type of work, prompting it to subcontract to big companies with no native ownership.¹¹⁷

The third factor fueling negative media attention is the ANCs’ use of large multinational corporations as subcontractors. For example, over \$225 million in military construction contracts were awarded to Olgoonik Corporation, a village corporation based in the small village of Wainwright, Alaska.¹¹⁸ Much of the work under these contracts is being performed not by Wainwright natives but by Olgoonik’s partner, Halliburton.¹¹⁹

The role of these large corporate entities illustrates the primary criticism of the ANC edge: that it creates a loophole through which corporate entities that would not themselves qualify for small or minority business assistance may, without competition, access work under contracts of unlimited dollar value by becoming a subcontractor for an ANC.¹²⁰ For instance, two names that surface time and again in media discussion of ANCs’ government contracting advantages are Wackenhut Services and Vance International. These large security firms which have been subcontracted by Alutiiq Security and Technology, a subsidiary of Afognak Native Corp., and Chenega Corp., respectively, to fulfill defense contracts issued by the Pentagon to install guards at military bases across the country.¹²¹ Specifically, Wackenhut serves as Alutiiq’s subcontractor, and, while they jointly recruit security guards, they specify in the contract that fifty-one percent of them are to be considered Alutiiq employees and the other forty-nine percent Wackenhut employees.¹²² Critics charge that allowing ANCs to subcontract with the likes of Wackenhut and Vance, which otherwise would not qualify for small business government contracting advantages, has created a loophole through which these large non-minority and non-disadvantaged corporations are able to

116. O’Harrow & Higham, *supra* note 30, at A1.

117. *Id.*

118. *See* Scherer, *supra* note 4, at 26.

119. *Id.*

120. *See* Leslie Wayne, *Security for the Homeland, Made in Alaska*, N.Y. TIMES, Aug. 12, 2004, at C1.

121. *Id.*; T. Christian Miller, *Army Turns to Private Guards*, L.A. TIMES, Aug. 12, 2004, at A1; Jay Price & Joseph Neff, *Tribes Reap No-Bid Deals*, THE NEWS & OBSERVER (Raleigh, NC), Nov. 28, 2004, at A1.

122. Miller, *supra* note 121, at A1.

access enormous government contracts noncompetitively.¹²³ So, when the Pentagon awarded a contract with a face value of \$194 million (and which could be worth up to \$500 million with the exercise of options) to provide security guards at military bases to the Alutiiq/Wackenhut and Chenega/Vance joint ventures without using competitive bidding, it was not constrained by the dollar threshold on contracts that could be sole-sourced in this manner because the ANC recipients are exempt from such limitations.¹²⁴ Thus Wackenhut and Vance have been called the “main beneficiaries” of these deals because by partnering with ANCs, they can access these multi-million dollar contracts on a sole-source basis.¹²⁵

Such partnerships are indeed a smart move for both firms involved, as the ANC might lack experience that its large subcontracting partner can provide in return for access to the contract. Thus “Alutiiq provided the contracting speed, and Wackenhut provided the experience.”¹²⁶ With the boom in contracts awarded to ANCs in recent years, partnerships between these corporations and large multinational businesses also “skyrocketed,” in a phenomenon described by federal procurement experts as “a loophole gone wild.”¹²⁷ Thus, critics complain that a law intended to benefit ANCs is being used to extend special advantages to non-disadvantaged corporations.¹²⁸ Military officials cite the urgency with which private security manpower is needed to replace the soldiers being shipped overseas to Iraq, but critics respond that “in the long run,” the no-bid nature of these contracts is accompanied by “no accountability, no oversight and no alternatives if the performance is not good.”¹²⁹

To further arm critics on this point, both Wackenhut and Vance have lost bids on other military contracts when forced to bid competitively.¹³⁰ Thus these are not only corporations that do not qualify for small or minority business assistance, but they are also corporations that have failed to perform adequately in the competitive process, implying that they are now accessing valuable contracts they might not deserve.¹³¹ To add fuel to the fire, as well

123. Wayne, *supra* note 120, at C1.

124. *Id.*; 13 C.F.R. § 124.506(b) (2006).

125. Wayne, *supra* note 120, at C1.

126. Miller, *supra* note 121, at A1.

127. Scherer, *supra* note 4, at 26.

128. Wayne, *supra* note 120, at C1.

129. *Id.*

130. *Id.*; Scherer, *supra* note 4, at 28.

131. *Id.*

as another layer of aggravation for watchdog organizations,¹³² Wackenhut's foreign ownership and questions of its competency have led to concerns about the appropriateness of awarding it important national-security contracts.¹³³ For instance, Wackenhut had previously been "reprimanded for underperforming" on its other federal contracts at the time it received the Pentagon deal.¹³⁴

The strength of these criticisms has, in at least two instances, "stymied" no-bid contracts of this nature. In 2004, a forty million dollar contract issued by the Energy Department to provide security services in Idaho nuclear laboratories was initially sole-sourced to Alutiiq and Wackenhut.¹³⁵ The contract was later withdrawn after Idaho congressmen opposed the deal, pointing out that Wackenhut was accessing the work without competition.¹³⁶ That same year, the Transportation Security Administration abandoned plans to sole-source a technology maintenance contract to Chenega and decided to open it for competitive bidding because "the competitive bidding process provides the right avenue to a contractor that will provide the government the best value" and thus is what the agency should do as "good stewards of the taxpayers' dollars."¹³⁷

The culmination, perhaps, of the public scrutiny into ANC contracting advantages took place in March of 2005 when Representative Thomas M. Davis III (R-Virginia), Chairman of the House Government Reform Committee, and Representative Henry A. Waxman (D-California) jointly signed letters to the Government Accountability Office (GAO) requesting an investigation of defense and military contracts awarded to ANCs.¹³⁸ In similar letters to the Department of Homeland Security (DHS), the Pentagon, and the State Department, they requested documents and information on such contracts.¹³⁹ The two letters

132. See Serv. Employees Int'l Union, *Case Study, Alutiiq's 'back-door deal' with Wackenhut*, <http://www.ancwatch.org> (click "Case Study" in the left-hand list) (last visited Nov. 7, 2006).

133. Wayne, *supra* note 120, at C1.

134. Scherer, *supra* note 4, at 28.

135. Wayne, *supra* note 120, at C1; Press Release, PR Newswire, After Criticism, U.S. Energy Dep't. Opts to Keep Idaho Nuclear Lab Security In-House (May 6, 2004).

136. *Id.*

137. Robert O'Harrow, Jr., *TSA Reconsiders Technology Contract*, WASH. POST, Nov. 30, 2004, at A4.

138. Scott Higham & Robert O'Harrow, Jr., *Probe of Security Contracts Sought*, WASH. POST, Mar. 5, 2005, at A4.

139. *Id.*

single out ANCs as the recipients of sole-source federal contracts that have increased in number and value,¹⁴⁰ a phenomenon said to raise “important questions about whether the interests of the taxpayer are being protected.”¹⁴¹ The letter sent to the DHS, the Pentagon, and the State Department requested audits, price reasonableness assessments, and reports for sole-source contracts awarded to ANCs by several defense agencies.¹⁴² The letter also specifically requested documents, especially performance assessments and decisions or justification documents, for several of the high-profile, large-dollar-value contracts to ANCs, including: the \$2.2 billion contract by the National Geospatial Intelligence Agency to Chenega and Arctic Slope, the Army contracts to Alutiiq/Wackenhut and Chenega/Vance for security guards, the Customs Service’s \$500 million contract for maintenance of customs inspection services awarded to Chenega Technology Services Corporation, the Transportation Security Administration to Chenega in 2004, and the \$225 million contracts to Olgoonik for military base construction work.¹⁴³ Additionally, the letter to the GAO was accompanied by a list of specific questions requested for review by the GAO, including how many native Alaskans were employed by the ANCs to work under the contracts, whether federal officials could be sure that the price of contracts to ANCs was reasonable, and what the impact of ANC contracts was on “native Alaskan” employment, income, education, and economic development.¹⁴⁴

V. ANSWERS FROM THE HILL

Starting in the spring of 2006, the government began issuing responses that appeared to echo and confirm the media’s

140. Letter from Tom Davis, House Representative and Chairman of the House Comm. on Gov’t Reform, and Henry A. Waxman, Ranking Minority Member of the House Comm. on Gov’t Reform, to David M. Walker, U.S. Comptroller Gen. (Mar. 4, 2005) *available at* <http://www.democrats.reform.house.gov/Documents/20040204161047-71446.pdf> [hereinafter *Letter to GAO*]; Letter from Tom Davis, House Representative and Chairman of the House Comm. on Gov’t Reform, and Henry A. Waxman, Ranking Minority Member of the House Comm. on Gov’t Reform, to Donald H. Rumsfeld, Sec’y of Def., Michael Chertoff, Sec’y of Homeland Sec., and Condoleezza Rice, Sec’y of State (Mar. 4, 2005) *available at* <http://www.democrats.reform.house.gov/Documents/20050304160958-87063.pdf> [hereinafter *Letter to DHS, DOD, and State Dept.*]

141. *Letter to DHS, DOD, and State Dept.*, *supra* note 140, at 1.

142. *Id.* at 2–4.

143. *Id.*

144. *Letter to GAO*, *supra* note 140, at 3–4.

suspensions and grievances toward the ANC edge. In April, two separate reports from the GAO singled out ANCs in citing inadequate oversight in government contracting, one in response to questions about the Army's management of its acquisition program,¹⁴⁵ and the other in response to the letters of Representatives Davis and Waxman.¹⁴⁶ Then, in June, a congressional hearing was convened to answer the issues raised by the latter of these reports.¹⁴⁷

The April 2006 GAO report charged that the Army had relied heavily and inappropriately on 8(a) sole-source contracts for its program of supplying security guards to military installations in the U.S.¹⁴⁸ According to the GAO's findings, two of the four firms providing security personnel under these guard contracts are ANCs, and the Army sole-sourced contracts totaling \$495 million to these two ANCs.¹⁴⁹ The criticism focused on the fact that the Army did this even though: (1) competitive procedural alternatives were available that were not conclusively shown to be more burdensome than sole-sourcing; (2) the ANCs were of dubitable qualification to provide the contract personnel; and (3) competitive contracts the Army used at the same time cost less.¹⁵⁰ The report also zeroed in on the ANCs' practice of subcontracting up to forty-nine percent of the work to large security firms, citing that \$200 million had been subcontracted under the guard contracts as of December 2005.¹⁵¹ The report further criticized the adequacy of the security guards being supplied under the Army's contracts, pointing to evidence of inadequacy in screening procedures and training of the personnel.¹⁵² Though these portions of the report

145. U.S. GOV'T ACCOUNTABILITY OFFICE, ARMY'S GUARD PROGRAM REQUIRES GREATER OVERSIGHT AND REASSESSMENT OF ACQUISITION APPROACH, GAO-06-284 (2006), available at <http://www.gao.gov/new.items/d06284.pdf> [hereinafter GAO GUARD PROGRAM REPORT].

146. U.S. GOV'T ACCOUNTABILITY OFFICE, INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT, GAO-06-399 (2006), available at <http://www.gao.gov/new.items/d06399.pdf> [hereinafter GAO 8(A) REPORT].

147. See *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (opening statement of Chairman Tom Davis), available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=45302>.

148. GAO GUARD PROGRAM REPORT, *supra* note 145, at 2.

149. *Id.* at 8, 9.

150. *Id.* at 9, 13–14.

151. *Id.* at 15.

152. *Id.* at 16, 20.

did not single out ANCs, the implication that the inadequacies of the personnel can be traced to the inadequacy of the ANCs' performance seems quite clear given the report's emphasis on the Army's heavy reliance on ANCs for these contracts.¹⁵³ The GAO concluded by calling for stronger Army oversight of its contracting process and urged among six other recommendations that the Army "reassess its acquisition strategy for contract security guards," and, in particular, that it use competitive procedures for contracts in the future.¹⁵⁴

The GAO report in response to the letters of Representatives Davis and Waxman followed slightly over two weeks later and reflected broader concerns over ANC participation in the 8(a) Program.¹⁵⁵ The report provided some concrete data on ANC participation in federal 8(a) contracts, painting a picture that seemed to substantiate the media perception that the 8(a) Program is a substantial part of the life of an ANC and that ANCs, in turn, dominate the 8(a) landscape. According to the GAO's findings, 4.6 billion total federal dollars were obligated to ANCs from 2000 to 2004, 63%, or \$2.9 billion, of which were through the 8(a) Program; 77%¹⁵⁶ of that \$2.9 billion were sole-source awards.¹⁵⁷ Moreover, the ANC share of the 8(a) pie appears to be growing as 8(a) dollars to ANCs increased from \$265 million in 2000 to \$1.1 billion in 2004, representing a growth from 5% to 13% of total 8(a) dollars devoted to ANCs.¹⁵⁸

The central conclusion of the GAO report, however, is that oversight by contracting agencies is unduly lax, particularly in enforcing limitations on subcontracting of awards sole-sourced to ANCs under the 8(a) Program.¹⁵⁹ Rather than pointing to ANCs or the firms who subcontract with them as abusers of the system, the GAO focused on the inadequate oversight of contracting officials, who are "confused about whose responsibility it is to monitor compliance with the subcontracting limitations," as well as "unclear about how to monitor" such limitations.¹⁶⁰ The GAO also

153. *Id.* at 9.

154. *Id.* at 32–33.

155. GAO 8(A) REPORT, *supra* note 146.

156. The seventy-seven percent figure reflects GAO analysis of six different agencies. *Id.* at 11.

157. *Id.*

158. *Id.* at 11–12.

159. *Id.* at 21 (finding "almost no evidence that the agencies are effectively monitoring compliance with this requirement, particularly where 8(a) ANC firms have partnered with large firms").

160. *Id.* at 21–22.

suggested that there is some conscious circumvention of the system, citing contracting officers who say they are often approached directly by large firms wanting to “partner” with ANCs.¹⁶¹ Additionally, there was as at least one allegation of a “pass-through” contract in which an agency awarded the contract to an ANC with the explicit requirement that a large firm, which it actually wanted to use but to which it could not sole-source, do “most of the work” as a subcontractor.¹⁶² The report also suggests that some contracting agencies consider contracts with ANCs to be an “open checkbook” and that they expect few checks on compliance with the rules.¹⁶³

Blame also fell on the SBA. The GAO admonished the SBA for failing to ensure that ANCs’ multiple subsidiaries were not generating 8(a) revenue in the same primary lines of business, which the regulations prohibit,¹⁶⁴ failing to protect other incumbent small businesses from losing contracts to sole-source opportunities to ANCs, failing to make size determinations with sufficient reference to whether admitting an ANC into the 8(a) Program would produce unfair competitive advantage,¹⁶⁵ failing to sufficiently monitor whether large firms are taking undue advantage of partnership relationships with ANCs, and failing to maintain adequate information on ANCs and their 8(a) activities in general.¹⁶⁶

The GAO report concluded by calling upon the SBA to “tailor its regulations and policies as well as to provide greater oversight in practice” and for contracting agencies to “ensure that [ANCs] are operating in the program as intended.”¹⁶⁷ Several recommendations require the SBA to revise its regulations and policies to amend the shortcomings pointed out in the report, while requiring specific contracting agencies to develop guidance for ensuring contract compliance.¹⁶⁸

161. *Id.* at 22–23.

162. *Id.*

163. *Id.* at 17. One contracting officer was quoted describing contracting with ANCs as an “open checkbook,” referring to the lack of dollar limitations. *Id.* Another contracting officer was quoted as saying he would be “laughed out of the office” for attempting to terminate an ANC contract for lack of compliance with subcontracting limitations. *Id.* at 23.

164. See 13 C.F.R. § 124.109(c)(3)(ii) (2006).

165. See 13 C.F.R. § 124.109(c)(2)(iii).

166. GAO 8(A) REPORT, *supra* note 146, at 33.

167. *Id.* at 39.

168. *Id.* at 40–41.

Though the SBA expressly disagreed with and criticized some of the recommendations,¹⁶⁹ three days after the release of the final GAO report, it quietly published a proposed package of five amendments to the 8(a) Program regulations.¹⁷⁰ One of these amendments would change the rules to exclude sole-source contracts to joint ventures between a tribally-owned business or ANC within the 8(a) Program and “other concerns” from the exemption from the dollar limitation on sole-source contracts.¹⁷¹ Another amendment would permit NHOs to secure defense contracts above the competitive threshold.¹⁷² As for the part involving NHOs, the Department of Defense has followed through cooperatively by adopting, in June 2006, a final rule amending its own acquisition regulations to permit awarding sole-source contracts to NHOs above the five million and three million dollar thresholds.¹⁷³ It remains to be seen whether the recommendation to exclude joint ventures from the dollar limit exemption will be adopted.¹⁷⁴

Yet another GAO report was released in May that tangentially addressed the ANC edge in an investigation of waste in contracting, concluding that the Army Corps of Engineers sole-sourced a \$39.5 million contract for construction of classrooms in the wake of Hurricane Katrina in 2005 despite being in possession of information that the classrooms should have cost much less.¹⁷⁵ The Corps, the GAO concluded, “could have, but failed to, negotiate a lower price.”¹⁷⁶

VI. POLICIES, COSTS, BENEFITS, AND SOLUTIONS

These results of the congressional investigations as well as the volume of negative media attention on the ANC edge call for an

169. *Id.* app. II at 53–54.

170. 8(a) Business Development/Small Disadvantaged Business Status Determinations, 71 Fed. Reg. 23,498 (Apr. 24, 2006).

171. *Id.*

172. *Id.*

173. Defense Federal Acquisition Regulation Supplement; Sole Source 8(a) Awards to Small Business Concerns Owned by Native Hawaiian Organizations, 71 Fed. Reg. 34,831 (June 16, 2006) (to be codified at 48 C.F.R. § 219.805-1).

174. The proposal package is accompanied by no legal deadline. *See* 8(a) Business Development/Small Disadvantaged Business Status Determinations, 71 Fed. Reg. at 23,498.

175. U.S. GOV'T ACCOUNTABILITY OFFICE, HURRICANE KATRINA, ARMY CORPS OF ENGINEERS CONTRACT FOR MISSISSIPPI CLASSROOMS, GAO-06-454 (2006), at 1–2.

176. *Id.* at 2.

evaluation of whether the edge is still, or ever was, justified, both as a policy and in terms of its costs. This question is inherently complex because it requires balancing several distinct interests that cannot be ordered and may not be compatible. These include the interests of Alaska Natives (especially those in Alaska's still impoverished rural villages), the interests of other small and disadvantaged businesses, the interests of taxpayers, the interest in having affirmative action that is fair, and the interest in maintaining competition in federal procurement. Such a multifaceted issue does not present an easy solution, such as the complete removal of the ANCs from the 8(a) Program, as some have indeed suggested.¹⁷⁷ The remainder of this Note is an attempt to untangle the various competing interests involved in the controversy over the ANC edge, in order to: (1) ask whether the edge makes good sense both as a policy and in terms of costs and benefits and (2) evaluate some possible solutions. Ultimately, this Note will show that the most serious flaw of the ANC edge is that it fosters a dependency by ANCs that is not only problematic policy-wise and cost-wise, but that also makes any balanced remedies difficult.

A. Consistency with the Policy of the Act and the 8(a) Program

1. Unique Power to Circumvent Competition. The powerful exemption of ANCs from the dollar limitation on amounts they can receive on a sole-source basis makes them more disconnected than other 8(a) businesses from the Act's policy of promoting competition.¹⁷⁸ The Act as a whole, as well as the 8(a) Program itself, embodies Congress's underlying policy of promoting competition in federal procurement by fostering the ability of small and minority businesses to participate in that competitive process.¹⁷⁹ For instance, the Act was premised on the idea that developing the potential of small businesses is essential to free

177. See *Northern Lights and Procurement Plights, The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Gov't Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (statement of Harry C. Alford, President/CEO, National Black Chamber of Commerce, Inc.), available at <http://reform.house.gov/UploadedFiles/NBCC%20-%20Alford%20Testimony.pdf> [hereinafter Alford Statement]; Nat'l Indian Bus. Ass'n., *Senator Kerry's Staff Scrutinizes Congressional Investigation of Alaska Native Corporations*, <http://www.nibanetwork.org/ANC%20Article.htm> (last visited Oct. 2, 2006) [hereinafter Nat'l Indian Bus. Ass'n.].

178. See 15 U.S.C. § 631(a), 631(f)(2) (2000).

179. See *id.*

competition in private enterprise.¹⁸⁰ Thus, it sought to ensure that “a fair proportion” of federal contracts is allotted to these small businesses.¹⁸¹ The 8(a) Program specifically was to serve as a “tool for developing business ownership among groups that own and control little productive capital.”¹⁸² The goal of advancing such development was also to encourage “competition among such suppliers”¹⁸³ Thus, the purpose of the 8(a) Program was grounded not in a minority preference policy but in a competition policy of helping small, disadvantaged businesses “compete on an equal basis.”¹⁸⁴

ANCs, like other 8(a) businesses, are able to circumvent the competitive process for government contracts by receiving sole-source awards, and their ability to receive such awards without dollar limitation allows them to achieve that circumvention to a greater extent than other 8(a) businesses.¹⁸⁵ As a matter of policy, this exemption from the dollar limitation is the most significant benefit for ANCs and other tribally-owned businesses because it marks the deepest cut into the ideal of “free competitive enterprise.”¹⁸⁶ Specifically, the dollar limitation threshold serves as an important limitation on the ability of most 8(a) businesses to circumvent the competitive process for government contracts and receive them directly. Exempting ANCs and other tribally-owned businesses from that limitation places them further away than other 8(a) businesses from compliance with the policy goal of free competitive enterprise that was behind the Act and the 8(a) Program.¹⁸⁷ Almost as if to highlight this question, the SBA explicitly declares that no requirement exists that a procurement be “competed whenever possible before it can be accepted on a sole-source basis for a tribally-owned or ANC-owned concern.”¹⁸⁸

2. *Fostering Dependent ANCs.* Furthermore, the use of the ANC edge in practice indicates that the rationales that justify the

180. See 15 U.S.C. § 631(a).

181. *Id.*

182. 15 U.S.C. § 631(d)(2)(A)(vi).

183. 15 U.S.C. § 631(f)(1).

184. 15 U.S.C. § 631(f)(2).

185. See 13 C.F.R. § 124.506(b) (2006).

186. 15 U.S.C. § 631(a).

187. See 15 U.S.C. § 631(f)(2).

188. 13 C.F.R. § 124.506(b). The provision clarifies that, while a contract cannot be removed from competition once it has already been placed there, it can be granted to an Indian- or ANC-owned corporation without ever going through standard competitive procedures.

ability of 8(a) businesses to circumvent the competitive process are not met in the case of ANCs.¹⁸⁹ The 8(a) Program allows for sole-sourcing of awards to eligible businesses to “promote the business development of” such businesses in order to train them to “compete on an equal basis in the American economy.”¹⁹⁰ This rationale is premised on Congress’s belief that, at the time of the Act’s passage, small businesses were incapable of receiving federal contracts through the competitive process and that encouraging their participation in procurement by permitting them to partially circumvent that process would allow them to eventually become self-sufficient, viable businesses capable of competing effectively in the marketplace.¹⁹¹ Consistent with this rationale, small businesses that participate in the program “graduate” after nine years of participation,¹⁹² or earlier if the SBA determines that they have “demonstrated the ability to compete in the marketplace without assistance” or that they are no longer economically disadvantaged.¹⁹³ In general, they are not then eligible to re-enroll into the program.¹⁹⁴

In the case of ANCs, however, the legal advantages that allow ANCs to receive enormous contracts without going through the competitive process cultivate a dependency on those advantages.¹⁹⁵ For instance, at least one commentator has pointed out that the ability to access sole-source contracts with no dollar limitation “reduce[s] the incentive to develop the skills, infrastructure and core competencies that are necessary to become a viable business in a competitive market” and that this actually constitutes a “disservice to ANCs” because the companies’ future generations are not being “prepared for the day when ANCs no longer receive special treatment or must compete with hungrier firms.”¹⁹⁶ For example, should an ANC graduate or become so profitable that it no longer qualifies for the 8(a) Program, it will not be able to access multi-million dollar sole-source contracts, yet it will not have

189. See 15 U.S.C. § 631(f)(2).

190. *Id.*

191. See *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 708 (5th Cir. 1973).

192. 13 C.F.R. § 124.2.

193. 13 C.F.R. § 124.302.

194. See 13 C.F.R. § 124.108(b) (“Once a concern or a disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.”).

195. See Dave Nadler, *Contracting Advantages Do Not Prepare Alaska Firms for Future Competition*, Mar. 7, 2005, <http://www.fcw.com/article88164-03-06-05>.

196. *Id.*

developed the building blocks to win these contracts through competitive bidding.¹⁹⁷ This is because the sole-source awards did not train it to compete, and the size of those awards did not force it to supplement its income with other economic activities.¹⁹⁸ Akin to a transfer payment rather than a training program targeted at economic sovereignty, the ANC edge in this way cultivates long-term dependence.

The GAO's 2006 findings shed light on the possibility that some ANCs, having outgrown the sheltered harbor of the 8(a) Program, are nevertheless reluctant to wade into the open waters of competitive contracting. In connection with its conclusions on SBA oversight, the GAO focused a substantial portion of its report on the sophistication of ANCs' business practices. For instance, ANCs engage in a variety of structural maneuvers in order to promote their revenue-generating power under the 8(a) Program, including the ownership of several subsidiaries, each of which also participates in the 8(a) Program.¹⁹⁹ They recruit non-Alaska Native outside management to pilot their 8(a) operations (often for compensation that is significantly higher than that of other executives), hire marketing firms to help secure contracts, enter into joint ventures and partnerships with non-8(a) businesses as well as 8(a) businesses, and create holding companies.²⁰⁰

It appears from the report that, using these practices, ANCs have pushed the edge that they hold under the 8(a) Program to its legal limits. The report singles out the creation of multiple subsidiaries, each of which participates in the 8(a) Program, as a "Key Practice."²⁰¹ It also gives examples in which a subsidiary has been created in anticipation of the graduation of an existing subsidiary or the expiration of that subsidiary's 8(a) contract, so that the new subsidiary will take on a "follow-on" contract to essentially continue the work of the former subsidiary under the 8(a) Program.²⁰² This practice has continued despite the GAO report's less-than-glowing depiction of it. For instance, as recently as August 2006, the National Guard decided to award Bowhead Manufacturing a \$300 million, five-year no-bid contract, just as a

197. *See id.*

198. *See id.*

199. *See* 13 C.F.R. §§ 124.109(c)(3)(ii), 124.110(c), 124.111(d).

200. GAO 8(A) REPORT, *supra* note 146, at 25–32.

201. *Id.* at 25.

202. *Id.* at 28 tbl. 4.

\$50 million, five-year no-bid contract with another subsidiary of Bowhead Manufacturing's ANC parent company was expiring.²⁰³

The GAO's dissection of ANCs' business practices led to the conclusion that the SBA has failed to "tailor[] its policies and practices to account for ANCs' . . . growth in federal contracting, even though officials recognize that ANCs enter into more complex business relationships than other 8(a) participants."²⁰⁴ The implication appears to be that as ANCs have developed into sophisticated business entities able to use complex business practices to maximize their revenue-generating power, they have outgrown the protective shelter of the 8(a) Program, which must now be adjusted to be less deferential to them.

The practices of creating subsidiaries to take on follow-on contracts and of creating holding companies²⁰⁵ have the effect of perpetuating the ANC's benefit from the 8(a) Program when it possibly has outgrown the preference. The circumvention of graduation and other aspects of the 8(a) Program not only diverts 8(a) resources and opportunities away from new small disadvantaged businesses but also hurts the ANCs by delaying their entry into the world of competitive contracting. This can thwart the development of any accompanying drive to prepare their businesses to succeed in that world.

Thus, the ANCs themselves can be said to be adversely impacted by their preferential access to government contracts. The degree to which ANCs and their shareholders may flounder without the ANC edge might be tested in the near future, as the Army decided in April 2006 against renewing its security guard contracts with Chenega Integrated Solutions and Alutiiq Security and Technology in response to the GAO's report on the Army's acquisition program.²⁰⁶ Both Alutiiq and Chenega have expressed their intent to bid for the contracts competitively following this decision.²⁰⁷ Whether or not they succeed may provide an isolated but still important indicator of the performance of ANCs in a competitive environment.

203. Pamela Hess, *Analysis: \$300M, No-bid Guard Contract*, UNITED PRESS INT'L, Aug. 16, 2006, available at <http://www.upi.com/SecurityTerrorism/view.php?StoryID=20060816-033059-5548r>.

204. GAO 8(A) REPORT, *supra* note 146, at 33.

205. ANCs engage in these practices in part to share administrative employees between subsidiaries so that the subsidiaries may maintain a "lean staff" and avoid losing their eligibility for 8(a) participation due to size. *See id.* at 32.

206. Sam Bishop, *Army Won't Renew Alaska Native Firms' Military Security Contracts*, FAIRBANKS DAILY NEWS-MINER, Apr. 21, 2006.

207. *Id.*

Finally, strong dependence on sole-sourced government contracts may ultimately pit the ANCs against each other. These preferences may invoke a race to capture the most lucrative sole-source contracts, with intense lobbying between ANCs to be nominated for them. The potential for this race was perhaps foreshadowed by what one commentator called a “scramble for money and power” in which villages and regions were “pitted against one another” by ANCSA provisions that required regional corporations to share natural resource profits with each other.²⁰⁸

B. Costs and Benefits

1. Impact on Alaska Natives: Increased Jobs and Dividends.

The ANC edge has undeniably created jobs and sent dividend checks to Alaska Natives.²⁰⁹ Statistics bear out the conclusion that at least some of the dollar power of these contracting successes has flowed back to Alaska Natives in the state. In 2003, for instance, the thirteen regional corporations and the twenty-eight village corporations collectively owned assets of \$2.8 billion; made revenues of \$2.9 billion; employed 10,541 workers within Alaska, 2685 of whom were Alaska Natives; paid \$78 million to shareholders as dividends; contributed \$7 million of charitable donations; and gave \$4.2 million worth of scholarships to over 2000 students.²¹⁰ In 2004, fifteen ANCs with 8(a) contracts distributed \$27.14 million in dividends; donated \$5.39 million to cultural programs; and paid \$141 million to 7700 employees within the state, out of 27,800 nation-wide employees.²¹¹ Moreover, there have been media reports of success stories involving benefits derived from ANC profits within Alaska.²¹² Countering the strong media scrutiny of Alutiiq in its partnership with Wackenhut, for instance, is a lengthy article on the uses of Alutiiq profits, “[m]uch of” which “have gone back to the tribe.”²¹³ From a half-million dollar loss in 2001, Alutiiq’s net income exceeded \$20 million in 2004, the year in which it received the defense contract when

208. Summit, *supra* note 5, at 617.

209. See Margaret Bauman, *Report on Native Corporations Show in Revenue Growth*, ALASKA J. OF COM., Nov. 20, 2005, available at http://www.alaska-journal.com/stories/112005/loc_20051120031.shtml.

210. *Id.*

211. Press Release, Association of ANCSA Regional Corporation Presidents/CEOs, Alaska Native Corporations Annual Economic Report (July 18, 2005) (available at <http://www.chugach-ak.com/pdf/7136ANCSA2005report.pdf>).

212. See, e.g., Connolly, *supra* note 106, at A1.

213. *Id.*

partnered with Wackenhut, \$8.8 million of which was distributed in dividends to its 650 tribe member shareholders.²¹⁴ This translated to \$17,100 for the average shareholder, “enough to buy a car or make a down payment on a house.”²¹⁵ Profits also go towards teaching young tribe members about the nearly extinct Alutiiq tribe, as well as cultural programs, scholarships that help young tribe members learn about their heritage, and even archeological projects supporting heritage museums.²¹⁶

Moreover, the ANC edge is in a unique position to provide jobs for Alaska Natives residing within Alaska. For instance, most ANCs provide hiring preferences to Alaska Natives, cast in the form of preferences for Native Americans, Alaska Natives, shareholders, or close relatives of shareholders.²¹⁷ These preferences benefit Alaska Natives in two important ways: First, ANC hiring may prove critical to the employment future of a young Alaska Native population, which will face a growing need for jobs in the near future.²¹⁸ Second, Alaska Natives practice, and are highly dependent on, a mixed economy which combines “subsistence economies,” including activities such as fishing, hunting, and trapping, with modern jobs in construction.²¹⁹ Participation in a subsistence economy requires adherence to a traditional lifestyle which makes workers less available for modern jobs during the hunting and fishing seasons.²²⁰ This puts Alaska Natives at a disadvantage relative to incoming non-Natives who do not tend to adhere to such lifestyles when they are competing for jobs with non-Native employers who cannot or do not structure job opportunities “to accommodate this dependence on subsistence.”²²¹ ANCs, on the other hand, “are uniquely able to structure jobs in a

214. *Id.*

215. Paula Dobbyn, *Some Say No-bid, No-limit Government Commissions for Natives are Unfair*, ANCHORAGE DAILY NEWS, Mar. 19, 2006.

216. *See* Connolly, *supra* note 106, at A1.

217. James P. Mills, *The Use of Hiring Preferences by Alaska Native Corporations After Malabed v. North Slope Borough*, 28 SEATTLE U. L. REV. 403, 404 (2005).

218. In 2000, over forty percent of Alaska Natives were below the age of majority, eighteen. *Id.*

219. Lee Huskey, *Alaska's Village Economies*, 24 J. LAND RESOURCES & ENVTL. L. 435, 447-48 (2004) (arguing that subsistence activities are important to the “future of village economies” and “should not be thought of as the economy of last resort”); *see also* Mills, *supra* note 217, at 408.

220. *See* Mills, *supra* note 217, at 408.

221. *Id.*; *see also* Huskey, *supra* note 219, at 457 (observing that village residents “may choose only limited participation in the labor force because wage work conflicts with subsistence activities”).

manner that is compatible with the subsistence needs of their shareholders and other village residents,” because their corporate leaders, drawn from the Native population, “are keenly aware of the needs of the shareholders in their regions and often participate in the subsistence activities themselves.”²²²

A second reason that ANCs might be in a unique position to benefit Alaska Natives is related to what at least one economic expert has deemed a limited potential for the efficient economic development of natural resources within rural Alaska.²²³ This is due to the principle that the development of local resources can be “economically feasible only if resources can be produced and delivered to market at cost or below the current market price.”²²⁴ The total cost of the resources brought to market will be increased by the “small size and remoteness of the villages,” which leads to lower economies of scale in production, dependence on imports, and raised transportation costs.²²⁵ Moreover, high costs of capital, due to “increased risk and transaction costs associated with doing business in small, remote places,” make investment projects from outside unlikely to earn a competitive rate of return.²²⁶ The lack of profitable investment opportunities within rural areas explains a limited capital flow from outside the state. Thus, with limited potential for economic activities within the state to improve the welfare of rural Alaska, the ANCs’ contracting activities on the national and international levels may indeed be the best or most efficient route to achieving that improvement.²²⁷

2. *But Not Enough Jobs and Dividends.* The common view among media commentators, however, seems to be that the ANC edge has not trickled as much benefit down to Alaska Natives as it should have.²²⁸ One specific charge is that ANCs do not hire enough Alaska Natives.²²⁹ For instance, in 2004, only thirty-three of Chenega Corp. and its subsidiaries’ 2300 employees were “Native Alaskans.”²³⁰ Moreover, a key criticism of ANCs’ practice

222. Mills, *supra* note 217, at 409–10.

223. See Huskey, *supra* note 219, at 456–60.

224. *Id.* at 458–59.

225. *Id.*

226. *Id.* at 459.

227. See *id.*

228. Scherer, *supra* note 4, at 26–28 (citing the opinion of a government contracts expert that the ANC edge has produced profits for exploiting companies rather than jobs for Alaska Natives).

229. See O’Harrow, *supra* note 137, at A04.

230. *Id.*

of subcontracting to non-Native corporations for performance of the sole-sourced contracts they receive is that, partly as a result of these subcontracts, few or no Alaska Natives are actually employed for the work.²³¹ The SBA's regulations do not require that Alaska Natives perform the work under a contract to an ANC, and they impose arguably weak limitations on subcontracting by requiring that certain percentages of the work under an 8(a) contract be performed by the 8(a) contractor in order "[t]o assist the business development of" 8(a) businesses.²³² Specifically, an 8(a) business receiving a contract under the Program must perform at least fifty percent of the labor cost of a service contract with its own employees.²³³ Thus, an ANC would be in compliance with these regulations as long as its subcontractor performs no more than forty-nine percent of the work under a contract.²³⁴ For instance, in the Alutiiq/Wackenhut partnership to perform the Army contract for security guard services, the two firms jointly recruited security guards to fulfill the manpower required by the contract, and in their subcontracting agreement they designated fifty-one percent as Alutiiq employees and forty-nine percent as Wackenhut employees.²³⁵ Therefore, though on paper the employment arrangement complies with the requirement that the ANC provide at least fifty percent of the personnel in the contract,²³⁶ no Alaska Native need actually be hired. In fact, Alutiiq itself admitted they only hired one Alaska Native guard.²³⁷ Similarly, Olgoonik Corp. has subcontracted to Halliburton a portion of military construction contracts worth over \$225 million, such that much of the work is being performed not by Wainwright natives but by Halliburton.²³⁸ Critics observe that the contracts are being performed on a national and international level rather than in the communities of the ANCs and that "the only impact on Wainwright has been some funds to remodel the town's hotel and store."²³⁹ These

231. Scherer, *supra* note 4, at 28.

232. 13 C.F.R. § 124.510(a) (2006).

233. Other limitations include at least fifty percent of the manufacturing costs of a contract to provide supplies or products, at least fifteen percent of the cost of a contract for general construction with its own employees, and at least twenty-five percent of the cost of a construction contract by special trade contractors. 13 C.F.R. § 125.6(a) (2006).

234. *See id.*

235. Miller, *supra* note 45, ¶ 29.

236. *See* 13 C.F.R. § 125.6(h).

237. *See* Miller, *supra* note 45, ¶ 30.

238. Scherer, *supra* note 4, at 26.

239. *Id.*

subcontracting practices have prompted one expert on federal procurements to proclaim that he sees “little evidence that this produces jobs in Alaska as opposed to profits for those entrepreneurs skillful enough to exploit it.”²⁴⁰

3. *Padding the Taxpayer Bill.* Another concern with sole-source awards is that, due to the lack of competitive bidding, the final contract price is higher than it otherwise would be; thus “without competition it’s hard to ensure that taxpayers are getting their money’s worth.”²⁴¹ A government procurement expert has made an observation that strongly supports this argument, pointing out that in many cases where the work is subcontracted out to non-8(a) firms, the ANC is otherwise unable to perform the contract alone.²⁴² Sole-sourcing such contracts to partnerships like Alutiiq/Wackenhut inflates the contract price from the price that might be obtained if either Alutiiq or Wackenhut were to win the contract through competitive bidding on its own “by adding a layer of overhead.”²⁴³ Thus, these sole-source awards result in not only reduced competition but also inflated prices, translating into higher costs to taxpayers. The vice president of policy for Taxpayers for Common Sense, for instance, has called ANCs’ advantages “a horrible deal for taxpayers.”²⁴⁴

These charges have largely been borne out by the results of a government inquiry in 2006. The GAO’s investigation into the Army’s reliance on ANCs in its security guard contract program pointed out that, in a “three-phased approach” to acquisition, the Army contracted with ANCs in an initial phase, used four competitive contracts in a second phase, and in the final phase inexplicably reverted to the ANCs used in the first phase for additional work despite knowledge that the cost per employee of the competitive contracts was twenty-five percent lower than the ANC contracts.²⁴⁵ The latest development in this charge of “wasteful spending” has taken place in the wake of Hurricane Katrina when Representative Waxman wrote to the GAO again.²⁴⁶

240. *Id.*

241. *Id.*

242. Patience Wait, *Tribal Companies’ Edge Stirring a Backlash?* 24, no. 2 GOV’T COMPUTER NEWS 12, Jan. 24, 2005.

243. *Id.*

244. O’Harrow & Higham, *supra* note 30, at A1 (internal quotations omitted).

245. GAO GUARD PROGRAM REPORT, *supra* note 145, at 10, 14.

246. Letter from Henry Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to David M. Walker, U.S. Comptroller Gen. (Sept. 13, 2005),

He warned that the history of no-bid contracts, especially in Iraq, has led to “[w]aste, fraud, and abuse” that “appear to have squandered hundreds of millions of taxpayer dollars,” and that the same appears likely to continue in “contracts for recovery and rebuilding of the devastated Gulf Coast” since the first round of contracts had been issued without competition.²⁴⁷ He urged the GAO to establish an audit to monitor contract spending for reconstruction.²⁴⁸ His concerns were confirmed by the GAO report in 2006.²⁴⁹

4. *Excluding Other Small Businesses and 8(a) Businesses.* Other 8(a) businesses that are not owned by ANCs or Indian tribes also allegedly suffer from the advantages granted exclusively to ANCs and tribally-owned firms. They are excluded from contracts they otherwise might have secured through competition as well as subjected to the dollar limitations on the amount of awards they can be sole-sourced.²⁵⁰ For instance, an African-American or Asian-American-owned business could not be sole-sourced the \$500 million contract that was awarded to Chenega without competition. This creates an exclusionary effect on the access of non-tribally owned 8(a) businesses to contracts of such size.²⁵¹ This disadvantage seems to be borne out by statistics. For instance, in 2003, eight tribally owned businesses, including seven ANC subsidiaries, made the list of *Washington Technology's* Top 25 8(a) businesses in terms of primary contracting dollars in the information technology sector.²⁵² Tribally owned businesses made the top four of the top twenty-five, and that top four included three subsidiaries of ANCs.²⁵³ A Chenega subsidiary came in at number one primarily due to its \$500 million, ten-year contract awarded by the Department of Homeland Security to provide maintenance and technical support for customs inspection equipment.²⁵⁴ Moreover,

available at http://housedemocrats.gov/news/librarydetail.cfm?library_content_id=504.

247. *Id.*

248. *Id.*

249. U.S. GOV'T ACCOUNTABILITY OFFICE, HURRICANE KATRINA: ARMY CORPS OF ENGINEERS CONTRACT FOR MISSISSIPPI CLASSROOMS 1-2 (2006).

250. See 13 C.F.R. § 124.506 (2006).

251. *Id.*

252. Patience Wait, *Tribal Companies Dominate Top 25 8(a)s*, WASH. TECH., Sept. 13, 2004, available at http://www.washingtontechnology.com/news/19_12/special-report/24486-1.html.

253. *Id.*

254. *Id.*

in 2002, ANCs constituted less than two percent of all small businesses, but twelve percent of government contracts awarded to small businesses were awarded to them.²⁵⁵

These criticisms from the non-Alaska Native minority small business communities have become even more charged after the release of the GAO report on ANC participation in the 8(a) Program this year. Harry Alford, president of the National Black Chamber of Commerce, stated bluntly that the “ANC ‘game’” is “a tool for avaristic manipulators” that is “reeking [sic] havoc on 8(a) firms and the African American, Hispanic, Asian and, yes, the Native American communities” and that ANCs “have become predators on the minority business community.”²⁵⁶ Alford concluded by suggesting that ANCs be “separate[d]” from the 8(a) program.²⁵⁷

Leaders of the Indian community have responded with charges of “business jealous[y],” characterizing such complaints as an unfortunate backlash against the marginal success of American Indians’ “catching up” with the rest of the minority community.²⁵⁸ However, the force behind the exclusion argument is gathering rapidly. Alford has been a strong voice behind this line of reasoning, arguing that ANCs’ “disproportionate share of” 8(a) contracts has adversely affected the Black business community, pointing to specific instances of what he considers “abusive” contracting in which ANCs act as “fronts for large non-Native contractors” rather than subcontracting to other minority businesses.²⁵⁹ Alford’s latest example illustrating these alleged problems was the awarding of a contract to an ANC to provide portable classrooms in Mississippi at a price of thirty-nine million dollars, even when a local African American business was available to do the work at a quoted price of twenty-five million dollars and had decades of previous experience doing the exact same work.²⁶⁰ Similar grievances have come from Steve Denlinger, President of the Latin American Management Association, who relayed the

255. See Miller, *supra* note 26, at A1.

256. Alford Statement, *supra* note 177, at 3.

257. *Id.*

258. Pete Homer, *Congressional Probe of Alaska Native Corporations an Attack on Indian Country’s Economic Future*, INDIAN COUNTRY TODAY, Mar. 19, 2005, available at <http://www.indiancountry.com/content.cfm?id=1096410593>.

259. See Nat’l Indian Bus. Ass’n, *supra* note 177.

260. *Experiences and Challenges of Hurricane Katrina Evacuees*, Before the H. Select Comm. on Katrina Response Investigation (Dec. 6, 2005) (statement of Harry C. Alford, President/CEO, The National Black Chamber of Commerce, Inc.).

complaint of five employees of an 8(a) company.²⁶¹ They complained that Chugach Alaska Corp., after being sole-sourced a one hundred million dollar contract for work within New Mexico, subcontracted out of state rather than to their New Mexico business which had previously performed that contract and had expected to be subcontracted by Chugach.²⁶² The Women Impacting Public Policy group has likewise spoken out, stating that its members have “lost opportunities to ANCs” due to the ANC edge in the 8(a) Program.²⁶³

Arguments in support of special treatment for ANCs primarily cite two ways in which these corporations are different than other small and disadvantaged 8(a) businesses. First, the contracting preferences accorded to ANCs under the 8(a) Program derive from a political relationship with the federal government unique to Native Americans.²⁶⁴ Proponents of this argument frame the issue as “warring tensions between competing, and arguably irreconcilable, clusters of public policy issues,” seeing the procurement policy of competition pitted against “federal Indian policy,” including Congress’ obligations to Alaska Natives under ANCSA.²⁶⁵ Under this line of reasoning, the federal government’s policy on Indians, including the 8(a) ANC edge, is “rooted in the extraordinary government-to-government relationship of the Federal Government and Indian tribes,”²⁶⁶ which is expressed in the Indian Commerce Clause of the United States Constitution²⁶⁷ and other laws.²⁶⁸ The ANC edge is thus justified even if it grants

261. See Nat’l Indian Bus. Ass’n., *supra* note 177.

262. *Id.*

263. *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations, Before the H. Comm. on Government Reform and the H. Comm. on Small Business, 109th Cong. (2006)* (statement of Ann Sullivan on behalf of Women Impacting Public Policy), available at <http://reform.house.gov/UploadedFiles/WIPP%20-%20Sullivan%20Testimony.pdf>.

264. See *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business, 109th Cong. (2006)* (statement of Chris McNeil, Jr., Chairman, Native American Contractors Association), available at <http://reform.house.gov/UploadedFiles/NACA%20-%20McNeil%20Testimony.pdf>. [hereinafter McNeil Statement].

265. William K. Walker, *Feature Comment: Alaska Native Participation in Government Contracts: Victims of Success*, 47, no. 28 GOV’T CONTRACTOR 1, 1 (2005).

266. *Id.* at 4.

267. U.S. CONST., art. I, § 8.

268. See Walker, *supra* note 265, at 4–7.

preferences over and above those given to other small minority businesses because Native Americans “have a lexical first priority in the distribution of Government benefits.”²⁶⁹

Second, ANCs are responsible for benefiting entire communities of Alaska Native shareholders, while other minority businesses are geared for individual success.²⁷⁰ Supporters use this argument to re-characterize the GAO’s data regarding ANCs’ participation in 8(a) contracting as “[a] [s]liver of the [p]ie,” noting that the thirteen percent of all 8(a) contract dollars in 2004 were awarded to ANCs that “represent 100,000 Alaska Native shareholders,” while the other eighty-seven percent were doled out “to roughly 9000 individually owned 8(a) companies”—a powerful contrast designed to highlight the greater need of ANCs.²⁷¹ Additionally, supporters point out that ANCs, because they incur high administrative costs that are unusual for business entities, such as the costs of selecting land and operating a department to administer land, are “structurally noncompetitive and inherent money-losers.”²⁷² Thus, if they have an edge in the 8(a) Program, it is in part to compensate them for these additional burdens.

C. Solutions and Alternatives

To sum up the discussion thus far, since the ANC edge has the potential to return dividend income to Alaska Native shareholders as well as to create jobs and promote other development for Alaska Natives, a blunt approach such as removal of ANCs from the program appears unwise.²⁷³ On the other hand, a major criticism of ANCs’ use of their edge is that such dividends, jobs, and other benefits simply are insufficient in magnitude.²⁷⁴ Additionally, many worry about excessive circumvention of the competition policy underlying the Act and the 8(a) Program arising

269. *Id.*

270. See *Northern Lights and Procurement Plight: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (statement of Helvi Sandvik, President, NANA Development Corporation), available at <http://reform.house.gov/UploadedFiles/NANA%20-%20Sandvik%20Testimony.pdf> [hereinafter Sandvik Statement] (pointing out that NANA Development Corporation provides benefits to its 11,200 shareholders, which is the “very significant distinction between a traditional, individually owned 8(a) company and an ANC-owned 8(a) company”).

271. McNeil Statement, *supra* note 264.

272. Walker, *supra* note 265, at 6.

273. See *supra* Part VI.B.1.

274. See *supra* Part VI.B.2.

from the unique advantages available to ANCs.²⁷⁵ Other complaints include negative impacts on the taxpayer dollar, other small and 8(a) businesses, and even the ANCs and Alaska Natives themselves.²⁷⁶

1. Some Possibilities and Dilemmas. One clear need above all emerges from this overview: to strike a balance between discontinuing these advantages simply because of negative sentiment toward the enormous success of unlikely parties and allowing these advantages to be exploited to the point where the rich (and non-disadvantaged) companies get richer at the expense of minority small businesses, overcharged taxpayers, and increasingly dependent ANCs. Ideal solutions would allow the benefit of potential for job and dividend generation to continue and grow while adopting measures that target the costs in a focused way.

a. GAO Proposed Solutions. Though the 2006 GAO reports provided some answers,²⁷⁷ the investigations primarily created two additional phenomena, neither of which is particularly conducive to the task of finding a lasting solution to the real problems associated with the ANC edge. First, the investigations inspired rounds of finger-pointing and blame-shifting between the different entities responsible for oversight of contracts performed by 8(a) businesses. For instance, the GAO's report on ANC participation in Army security guard contracts indicated the Army contracting official did not adequately ensure that the ANCs are complying with the limits on subcontracting.²⁷⁸ In response, the official simply "pointed to [the] SBA."²⁷⁹ The SBA, in turn, passed the blame to institutional defects, and in effect Congress, contending that the "issues addressed in the report come from activities that are part of the program as Congress designed it."²⁸⁰

275. See *supra* Part VI.A.1.

276. See *supra* Parts VI.A.2, VI.B.3–4.

277. See *supra* Part V.

278. GAO GUARD PROGRAM REPORT, *supra* note 145, at 15.

279. *Id.*

280. *Northern Lights and Procurement Plight: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (statement of Calvin Jenkins, Deputy Associate Deputy Administrator, Office of Government Contracting and Business Development, U.S. Small Business Administration), available at <http://reform.house.gov/UploadedFiles/SBA%20-%20Jenkins%20Testimony.pdf> [hereinafter Jenkins Statement].

Second, the reports have set off a battle of anecdotes and a war of statistics. To put the GAO report's data on the ANC share of 8(a) contracting "in perspective," the president of NANA Development Corporation cited another study showing that Alaska Native companies were awarded only 0.2 percent of all federal contracts from 1998 to 2003 and only 6.22 percent of all 8(a) contracts from 2001 to 2003.²⁸¹ More specifically, the toll of the ANC edge on taxpayers is muddled rather than brought to light by the GAO's report. The GAO reported that government agencies contract with—in particular, sole-source to—ANCs in order to "quickly, easily, and legally award contracts for any value" while meeting not only its small business goals but also its small, disadvantaged business goals, taking "credit in more than one small business category."²⁸² Several examples were then cited in which agencies contracted on a sole-source basis to ANC's especially when under-staffed because such contracts consumed less administrative resources and time.²⁸³ This may suggest that contracting with ANC's translates into lower administrative costs in government procurement. Yet, at the same time, the report also offered a counter example to these administrative savings, where an agency went to great lengths to accept ANC contracts even when the proposal price was unsatisfactory, resulting in both a higher cost of the ultimate contract as well as resources consumed in extensive negotiations over price.²⁸⁴

Is the net result a wash? The president of NANA Development Corporation argued in response to the GAO report that time and money are spent "up front" in an 8(a) contract to an ANC in negotiations, "rather than analyzing multiple proposals and references after contract terms, conditions, and requirements [are] published" as in a normal contract and that, as a result, the negotiation process in awarding an 8(a) contract "ensures the best value for the government."²⁸⁵ However, whether the costs of negotiation are always lower than the costs of analyzing multiple proposals is unclear.

Also, the GAO report could not confirm or deny the existence of "an explicit link between the revenues generated from the 8(a) Program and benefits provided to shareholders," except to say that

281. Sandvik Statement, *supra* note 270.

282. GAO 8(A) REPORT, *supra* note 146, at 16, 19.

283. *Id.* at 16–18.

284. *See id.* at 17 (citing an example wherein the State Department "negotiated extensively for over a month" with an ANC only to accept a final price that "was still slightly over the government's estimate").

285. Sandvik Statement, *supra* note 270.

benefits—including dividends, scholarships, and cultural programs—do exist, but that a high level of 8(a) revenues do not necessarily guarantee a high level of shareholder benefit.²⁸⁶ For this conclusion, the report cited three examples: one example in which a corporation with high 8(a) revenues provided a high level of benefits, a second example in which a corporation with high 8(a) activity provided a low level of benefits, and a third example in which an ANC with low 8(a) participation still provided a high level of benefits.²⁸⁷ Indeed, the president of NANA Development Corporation cited his corporation as an example of an ANC that pays almost all of its profits out as dividends.²⁸⁸

Finally, most of the results of the legislative investigations are subject to multiple interpretations. For one, critics of the GAO findings argue that the reports treat ANCs unfairly by attributing to ANCs problems that are universal to federal procurement.²⁸⁹ Thus, defenders argue that ANCs have been made “a convenient scapegoat” for “well-documented systemic problems with the procurement system.”²⁹⁰ Also using this strategy, the SBA was quick to point out that federal dollars devoted to other small disadvantaged businesses, such as women-owned businesses, disabled veterans’ businesses, and small businesses in general had also increased significantly during the same period of time.²⁹¹ Moreover, supporters of ANCs emphasize that the report “is remarkable for what it does not contain,”²⁹² noting that it “did not cite any waste, fraud, or abuse on the part of ANCs,” but rather focused on the inadequacy of the SBA and contracting officials rather than the contractors.²⁹³ Others hasten to add their interpretation that the report did not “call for legislative changes”

286. GAO 8(A) REPORT, *supra* note 146, at 24.

287. *Id.* at 24–25.

288. Sandvik Statement, *supra* note 270.

289. *See id.* (arguing that the GAO report relied on “anecdotes and vignettes [that] are equally applicable to any aspect of the federal contracting domain”).

290. McNeil Statement, *supra* note 264.

291. GAO 8(A) REPORT, *supra* note 146, app. II at 53–54.

292. McNeil Statement, *supra* note 264.

293. *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (statements of Helvi Sandvik, President, NANA Development Corporation; Julie Kitka, President, Alaska Federation of Natives; Charles Totemoff, Chief Executive Officer, Chenega Corporation), available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=45302> [hereinafter Sandvik, Kitka & Totemoff Statement].

to the 8(a) Program.²⁹⁴ To this, the critics respond that “nowhere in the GAO report is there a statement that the contracts were awarded to ANCs because of the quality or value of the performance offered.”²⁹⁵ The SBA, meanwhile, offers its own interpretation that “there is no indication within this report of wrongdoing by *any* participant in the program” and that it actually represents a criticism of flaws in the 8(a) Program “as Congress designed it.”²⁹⁶

The recommendations proposed by the GAO’s reports in 2006 focused primarily on oversight by the SBA and compliance with the regulations by contracting agencies.²⁹⁷ These measures should be taken because enforcement of the regulations already in place would help ensure that the ANC edge in practice conforms to its legal parameters. However, conformity with the legal parameters of the 8(a) Program does not seem to be the heart of the problem, and increased oversight and compliance may not be enough if the problems which have inspired the bulk of criticism are not that the laws are being violated or even circumvented. As many have pointed out, the GAO reports did not cite or even suggest outright fraud by ANCs or other contractors.²⁹⁸ Rather, the implication of the findings is that the spirit of the laws is being violated by practices which are perfectly legal but either lie at the outer edges of legality of the preferences or take advantage of loopholes in the laws. For example, the ANC practice of owning multiple subsidiaries that also participate in the 8(a) Program and creating new subsidiaries to lengthen the life of existing subsidiaries’ 8(a) contracts when they expire is fully legitimate under the regulations but runs counter to the spirit of the 8(a) regulatory framework.²⁹⁹ Thus, strengthening oversight and compliance may not be the complete answer; rather, the design of the system is due for an

294. McNeil Statement, *supra* note 264.

295. *Northern Lights and Procurement Plights, The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006) (statement of Rep. Tom Davis, Chairman, H. Comm. on Government Reform), *available at* <http://reform.house.gov/UploadedFiles/TMD%20ANC%20Opener.pdf>.

296. Jenkins Statement, *supra* note 280 (emphasis added).

297. See GAO GUARD PROGRAM REPORT, *supra* note 145, at 32–33; see also GAO 8(A) REPORT, *supra* note 146, at 39–41.

298. Sandvik, Kitka & Totemoff Statement, *supra* note 293.

299. See GAO 8(A) REPORT, *supra* note 146, at 27–28 (“ANCs use their ability to own multiple businesses in the 8(a) program, *as allowed by law*, in different ways.”) (emphasis added).

overhaul. Some possible solutions and their ability to do this are explored in the rest of this discussion.

b. Other Possible Solutions. One solution that would seemingly silence all complaints against the ANC edge is to limit it. Short of the drastic measure of taking ANCs out of the program altogether,³⁰⁰ one method might be to discontinue sole-sourcing of federal contracts for ANCs. This, however, may effectively take ANCs out of the 8(a) Program. While it would certainly alleviate practically all of the above concerns regarding the ANC edge, it raises serious fairness concerns if other minority 8(a) firms continue to be sole-sourced contracts. Moreover, because the link between sole-source 8(a) revenue and benefits to Alaska Native shareholders has not conclusively been established or disproved,³⁰¹ removing the sole-source advantages may be unduly harsh.

A more focused solution is perhaps to discontinue the practice of automatically qualifying ANCs as socially and economically disadvantaged for purposes of eligibility for the 8(a) Program.³⁰² This measure would not, however, cure any current abuses by ANCs that are already in the program and is only likely to keep out ANCs that have yet to enter the federal contracting arena and are, as a result, much less well-off. Thus, it may be unsound as a matter of fairness.

Another interesting solution that has been proposed is to create a special procurement program for “representative organizations,” businesses like ANCs that represent the economic interests of many minority individuals and communities rather than individual businesses.³⁰³ This alternative would indeed be best at addressing the unique economic needs of ANCs and other Native corporations, but depending on the features of such a program, it seems to have the potential to anger other small minority businesses even further because it would merely accentuate the uniqueness and the special preferential status of ANCs.

Two solutions hold the most potential for addressing the ANC edge’s negative impact on competition, the taxpayer, and other 8(a) businesses at once. One is to remove the exemption of ANC and tribally-owned businesses from the dollar limitation threshold on sole-source awards.³⁰⁴ This would certainly mitigate the extent

300. See Nat’l Indian Bus. Ass’n., *supra* note 177.

301. GAO 8(A) REPORT, *supra* note 146, at 24.

302. See 43 U.S.C. § 1626(e)(1) (2000); 13 C.F.R. § 124.109(a)(2), (4) (2006).

303. Walker, *supra* note 265, at 7.

304. See 13 C.F.R. § 124.506 (detailing at what dollar threshold an 8(a) procurement must be competed among eligible participants).

to which ANCs can circumvent the competitive process for receiving government contract awards, as well as reduce stress on the taxpayer and put ANCs on a level playing field with other 8(a) businesses. The SBA's proposed changes to the 8(a) Program in April 2006, on the heels of the GAO report, provide solutions of this nature, by first removing the exemption for joint ventures between ANCs/tribally-owned businesses and non-8(a) entities and then by enabling NHOs to receive contracts above the competitive threshold, but only with the Department of Defense.³⁰⁵

These are steps in the right direction, but they may not fully alleviate the problems associated with the absence of dollar limitations on sole-source contracts. For one, removing the exemption for an ANC/non-ANC joint venture does not, in theory, prevent the same large contract from being awarded to one of the ANC's subsidiaries and then subcontracted up to forty-nine percent to that same joint venturer. This highlights what is likely a recurring dilemma in the search for effective regulatory solutions: that any changes to the system may well create more loopholes while closing existing ones, especially given that at least some ANCs have become sophisticated business entities with the full range of corporate reorganization maneuvers at their disposal, a phenomenon highlighted in the GAO's report.

The other solution is to directly limit the sole-sourced awards to corporations by requiring an ANC receiving a sole-sourced contract to: (1) subcontract the work to other minority or 8(a) businesses;³⁰⁶ (2) perform the entire work; or (3) perform a percentage of the work much higher than fifty percent. The second and third route are plagued with the possibility that ANCs' access to federal contracts may be drastically reduced as a side effect because their much-publicized inexperience with respect to some of the military and defense contracts they have received might make it either impossible or enormously costly for them to receive such contracts.³⁰⁷ The first option, a requirement to subcontract to other minority or 8(a) firms, seems to be the most sensible in that it not only prevents non-disadvantaged firms like Wackenhut from exploiting the subcontracting loophole, but it also increases

305. Defense Federal Acquisition Regulation Supplement; Sole Source 8(a) Awards to Small Business Concerns Owned by Native Hawaiian Organizations, 71 Fed. Reg. 34,831 (June 16, 2006) (to be codified at 48 C.F.R. § 219.805-1).

306. See Yasmin Anwar, *Small-business Aid Goes to Few*, HONOLULU ADVERTISER, Aug. 12, 2001, at 1A (citing suggestions to this effect by some 8(a) firms in Hawaii that have received a disproportionately lower amount of work from the program).

307. O'Harrow & Higham, *supra* note 30, at A1.

minority participation in and access to federal contracts, alleviating the exclusion of other 8(a) businesses from the procurement pie.³⁰⁸

However, a key policy dilemma is raised by the two favored solutions: while they may succeed in mitigating the ANC edge, they may, at the same time, devastate the ANCs that are now dependent on government contracts for survival.³⁰⁹ These two modifications of the ANC edge may seem justified in part because there is a serious question of whether certain ANCs, those that have seen the most contracting successes, are still “economically disadvantaged” in light of those successes.³¹⁰ For instance, in June 2005 the Internal Revenue Service (IRS) discontinued its practice, dating back to the passage of ANCSA in 1971, of exempting ANC shareholder dividends from federal tax levies on property, in part because ANC dividends, at least for some ANCs, “have increased substantially over the years,” “indicating there’s money to be captured.”³¹¹

The argument that ANC contracting advantages should be discontinued on the grounds that certain ANCs have become so successful that they no longer need such assistance is subject to a paradox of sorts, in that practically the *only* reason that certain ANCs have become so successful has been their privileged access to enormous government contracts with no dollar limitation. To illustrate, statistics indicate that the vast majority of federal contracts awarded to ANCs and other tribally-owned businesses between 1999 and 2003 were sole-sourced.³¹² This means that if the ANC edge is removed, a real question remains as to whether ANCs would not experience just as quick and drastic a flight into the state of near-bankruptcy as some of them endured before taking advantage of government contracts.³¹³

The downward flight might happen in several ways. For one, subjecting ANCs to the same dollar limitation as other minority small businesses may conceivably lead to a dramatic reduction in the benefit being trickled down to Alaska Native shareholders.³¹⁴ For instance, Michael Brown’s justification for the exemption from sole-source dollar limitation for ANCs was that ANCs have greater needs than the usual small business; in his words, “if it’s a guy and

308. Wayne, *supra* note 120, at C2; Alford Statement, *supra* note 177.

309. *See supra* Part VI.A.2.

310. *See* 13 C.F.R. § 124.104 (2006).

311. *See* Paula Dobbyn, *IRS Alters Policy on Native Firms*, ANCHORAGE DAILY NEWS, June 16, 2005, at F1.

312. *See* Scherer, *supra* note 4, at 28 (providing a chart on “Government Contracts to Tribal Companies”).

313. *See id.*

314. *See* Connolly, *supra* note 106, at A1.

his wife, then a \$3- million project can provide significant economic benefit . . . [b]ut if you're dealing with a tribe with several million people, you've got to have larger contracts."³¹⁵ Some 2003 statistics show that there is a real trickle-down phenomenon: \$78 million of the \$2.8 billion in revenues—slightly below one third of one percent—was translated into shareholder profits.³¹⁶ Imposing three million and five million dollar limits on the value of contracts ANCs may be sole-sourced may mean that each native shareholder would see dramatically leaner checks.³¹⁷

That potential reduction in welfare might not be as drastic if ANCs were able to replace one \$500 million contract with either hundreds of sole-source contracts under the dollar limitation or a single \$500 million contract won through the competitive bidding process. The ability of ANCs to competitively win such enormous awards, however, is uncertain because their receipts of multimillion dollar sole-source contracts based on the ANC edge indicate nothing about their capability to perform the work at the lowest cost when compared to multiple bidders, and the laws that have enabled them to receive such sole-source awards thus far do not encourage or develop that ability.³¹⁸ Even relatively modest cutbacks to the system that produces the ANC edge, such as higher restrictions on subcontracting, could translate to dramatic reductions in ANC success. For instance, the GAO report on the Army's reliance on ANC firms for its security guard contracts stated that before the sole-source contracts were awarded, the Defense Contract Management Agency had rated one of the two ANCs as "high risk" in performance due to inexperience in service provision.³¹⁹ However, the contract was awarded because this "risk was mitigated somewhat" due to the firm's choice to "team up with a subcontractor experienced in providing security guard services."³²⁰

As a matter of fact, the legal advantages that allow ANCs to receive contracts of such enormous proportion without going through the competitive process merely cultivate a dependency on those advantages.³²¹ This all means that the inquiry of whether the ANC edge ought to be discontinued runs into a dilemma: the legal advantages have fostered not an independent ability to compete in

315. Miller, *supra* note 26, at A1.

316. Bauman, *supra* note 209, ¶¶ 2–3.

317. See Connolly, *supra* note 106, at A1.

318. See *supra* Part VI.A.2.

319. GAO GUARD PROGRAM REPORT, *supra* note 145, at 13.

320. *Id.*

321. See *supra* Part VI.A.2; see also Nadler, *supra* note 195.

the marketplace but a dependence on that assistance without which it is doubtful that ANCs could continue their current success.³²² Thus, it is difficult to take away these advantages without substantially hurting their intended beneficiaries.

2. *Caveats and Alternatives to Legislative Reform.* One caveat is the possibility that modifying the ANC edge may open the door to other reforms which are undesirable at this stage of Native Americans' and Alaska Natives' economic development.³²³ Leaders of the Native American community have spoken out against any drastic changes to the 8(a) Program's advantages for businesses owned by Indian Tribes and ANCs, warning that, while negative congressional and media attention has been focused on ANCs, reforms based on such attention may harm tribal federal contracting in the rest of the country as well as open the door to erosion of tribal gaming and other rights and programs for all Native Americans.³²⁴

Moreover, before any enactment of concrete measures, ANCs should be given more time to prove that advantages from their contract awards truly do benefit Alaska Natives who would otherwise be impoverished. For instance, Neal Fried, Alaska's Department of Labor economist, offered his opinion that ANCs "are just starting to make an impact on the tribes," suggesting that given more time, their contracting activities may lead to more pronounced improvement in the welfare of Alaska Natives.³²⁵ This is especially true in light of the fact that some ANCs are only beginning to be successful in the 8(a) contracting arena.³²⁶

Finally, there are some alternatives to substantive legislative reform for mitigating the ANC edge's negative effects. Procedural protection, for one, should be more fully explored. For example, the law does contain a provision that presents possibilities for limiting the exclusionary effect of the ANC edge on small

322. *See id.*

323. *See* Pete Homer, *Congressional Probe of Alaska Native Corporations an Attack on Indian Country's Economic Future*, Indian Country Today, Mar. 19, 2005, available at <http://www.indiancountry.com/content.cfm?id=1096410593>; *see also* Nat'l Indian Bus. Ass'n., *supra* note 177.

324. *See id.*

325. Connolly, *supra* note 106, at A1.

326. Sam Bishop, *Expansion of Alaska Native No-bid Deals Sparks Debate*, FAIRBANKS DAILY NEWS-MINER, June 25, 2006, ¶ 1, available at <http://newsminer.com/2006/06/25/590/> (noting that "several Native firms from Interior Alaska have a growing share of the work just as some members of Congress are questioning the rules . . .").

businesses outside of the 8(a) Program,³²⁷ though as far as known by the author it has not been used. Under the SBA's own regulations, it may make a determination that accepting an 8(a) award would create "adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs," in which case it will not accept the award under 8(a).³²⁸ The limitation is "designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program," and in certain circumstances the adverse impact is presumed to exist, such as when a small business not under the 8(a) Program has been performing the contract in question for at least two years.³²⁹ Thus, if the contracts to ANCs continue to expand, the potential for that expansion to squeeze out other small businesses from the government procurement pie may be curbed by this adverse impact determination. However, there are significant drawbacks to this tool. It is unable to protect other 8(a) businesses, and contracts for construction, a large, important category of contracts, are considered "new requirements" and are immune from the adverse impact determinations.³³⁰

Most importantly, measures that can be taken by ANCs themselves rather than legislators should be emphasized. Some suggested strategies have focused on reforming both the structure and the federal contracting practices of ANCs so that they become more involved in developing skills to compete in the national and international markets independently, without special sole-source contracting advantages.³³¹ For instance, it has been suggested that they should integrate boards of directors into daily management, train native shareholders to participate in running the companies, and set goals for winning competitive contracts.³³² These measures would certainly reduce the dependency on sole-source awards fostered by the ANC edge. Given time, ANCs may then become more able competitors, alleviating the concerns with regard to competition policy, taxpayer bills, and exclusion of other 8(a) businesses.

327. See 13 C.F.R. § 124.504(c) (2006).

328. *Id.*

329. *Id.*

330. 13 C.F.R. § 124.504(c)(1)(B).

331. Nadler, *supra* note 195.

332. *Id.*

VII. CONCLUSION

In sum, while the ANC edge has undeniably led to jobs and dividends for Alaska Natives, it has also imposed costs on competition itself, taxpayers, other small and minority businesses, and ANCs themselves. The most serious flaw in the unique legal preferences accorded to ANCs is not the creation of loopholes that allow large corporations like Wackenhut to access government contracts to which they would not otherwise have access.³³³ This problem, while serious and pervasive, can be alleviated in a direct and focused way through more rigorous legal limitations on subcontracting.³³⁴

The more serious problem, it seems, lies in the potential of the ANC edge to foster a dependence by ANCs. This undermines the possibility of reforms that would control the ANC edge's impact on taxpayers and other 8(a) businesses without significantly hurting Alaska Natives at the same time.³³⁵ Therefore, any reforms should primarily target reduction and prevention of a permanent reliance on the ANC edge. Perhaps most importantly, ANCs should focus on developing other economic activities besides government contracting with the defense sector as a way to promote business development and the ability to compete effectively in the marketplace on a self-sufficient basis. These abilities could reduce their reliance on the ANC edge and thus alleviate its negative impact on competition, taxpayers, and other 8(a) participants.

333. See Wayne, *supra* note 120, at C2.

334. See *supra* notes 306–308 and accompanying text.

335. See *supra* Part VI.C.1.B.