

HAL R. HORTON (1944 - 1998)

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## **Benefits of ANCs & 8(a) Business Development Program for Alaska**

### **Source information for J. DeVore Speech to Michigan Legislative Assembly**

#### **Background**

Section 8(a) of the Small Business Act, 15 USC § 637, provides for assistance and business development opportunities for disadvantaged small businesses. Particularly, the 8(a) Business Development (BD) program helps these businesses compete in the marketplace and access federal and private procurement markets that would likely be unavailable to them otherwise. The Small Business Administration (SBA), which is responsible for administering the program, defines a small business as one that is independently owned and operated, organized for profit, and not dominant in its field. Federal acquisition policies encourage federal agencies to award a certain percentage of their contracts to small businesses and 8(a) firms. See Federal Acquisitions Regulation (FAR) § 19-501 and 502; 48 CFR § 19-501 and 502. Additionally, 8(a) BD program participants can receive sole-sourced government contracts without participating in a competitive award process. See 15 USC § 637(a)(1)(d).

- Alaska's economy and citizens have reaped substantial benefits from the 8(a) BD program, both in terms of economic gain and social benefits.
- When measuring the benefits of the 8(a) BD Program to Alaska, it is particularly important to consider the positive impact the program has had on Alaska Native Corporations (ANCs) and their native shareholders. Native Alaskans and Native Americans currently comprise over 138,000 of Alaska's population of 710,000, according to Alaska's 2010 Census.<sup>1</sup> Participation by ANCs in the 8(a) Program has undoubtedly enabled many ANCs to provide their shareholders with greater dividends than those companies would have been able to without government contracting, as well as provide additional support for cultural programs and Alaskan jobs.

#### **Benefits of 8(a) Program for Alaska**

- Between 1988 and 2005, the number of 8(a) qualified ANC subsidiaries grew from one to 154 subsidiaries owned by 49 ANCs. The dollar amount of 8(a) contracts to ANCs grew from \$265 million in FY 2000 to \$1.1 billion in 2004, approximately 80 percent of which was in sole-source contracts.<sup>2</sup>

<sup>1</sup> State of Alaska Department of Labor and Workforce Development Research and Analysis – Demographic Profile for Alaska, available at <http://live.laborstats.alaska.gov/cen/dp.cfm>.

<sup>2</sup> "Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight" GAO Report (GAO-06-39) (April 2006) available at <http://www.gao.gov/new.items/d06399.pdf>.

- Alaska Native Corporations are not the only businesses in Alaska utilizing the benefits of the 8(a) Program. The State of Alaska has had 484 firms participate in the 8(a) Program throughout its lifetime, including 274 ANC-owned firms.<sup>3</sup> As of December 2011, there are 229 Alaskan firms currently 8(a)-certified or part of an 8(a) Joint Venture. The following is a breakdown of groups with significant involvement in the 8(a) Program:<sup>4</sup>
  - ANC-owned: 179 active firms, 274 total firms.
  - Self-Certified Small Disadvantaged Businesses: 130 active firms, 211 total firms.
  - Women-Owned Small Businesses: 23 active firms, 56 total firms.
  - Veteran Owned Small Businesses: 8 active firms, 29 total firms. Six of the active firms are owned by service-disabled veterans, and 16 total firms have been owned by service-disabled veterans.
  - Community Development Corporation Businesses: 2 active firms, 3 total firms.
- The most significant ANC benefit is the size and scope of the government contracts ANCs can obtain on a non-competitive basis.
  - The percentage of 8(a) contracts awarded to ANC-owned participants rose from 13 percent in 2004 to 26 percent in 2008, largely due to the ability of ANCs to obtain large, sole-source contracts.<sup>5</sup>
  - Federal 8(a) obligations to former and current ANC participants more than tripled between FY 2004 and FY 2008 from \$1.1 billion to \$3.9 billion respectively.
  - In FY 2007, the federal government spent 2.8 percent of all federal contracting on 8(a) contracts, totaling \$12.4 billion. Of those contracts, 26.2 percent, or \$3.2 billion, were awarded to ANC enterprises.<sup>6</sup>
- Why are ANC-owned businesses treated slightly differently? Unlike typical 8(a) corporations, whose profits are shared often by only a few individuals, Alaska Native Corporations are charged with the responsibility of providing benefits to hundreds or perhaps even thousands of shareholders.
- An NACA survey of ten regional corporations and two village corporations documented the **benefits flowing from 871 federal 8(a) contracts in 2005**: 3,170 jobs for shareholders; 9,750 jobs for Alaskans; 31,717 jobs nationwide in 49 states and 2 U.S. Territories; \$413,645,389 in Alaska payroll; \$33,663,803 in dividends paid to 86,516 shareholders; \$5,433,787 in donations to Native cultural and social programs, plus \$889,835 in donations to other community programs; \$9,575,511 in scholarships; \$7,334,781 for other shareholder programs; and an undisclosed amount in contributions to their permanent fund programs.<sup>7</sup>

<sup>3</sup> Small Business Administration Dynamic Small Business Search, available at [http://dsbs.sba.gov/dsbs/search/dsp\\_dsbs.cfm](http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm).

<sup>4</sup> Small Business Administration Dynamic Small Business Search, available at [http://dsbs.sba.gov/dsbs/search/dsp\\_dsbs.cfm](http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm).

<sup>5</sup> Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations. Report Number: 9-15, issued: 7-10-09. Prepared by the Office of the Inspector General U.S. Small Business Administration, at 26.

<sup>6</sup> Statement of Sarah Lukin, Executive Director, Native American Contractor Association, to the Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, U.S. Senate, 7-16-09, at 7.

<sup>7</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska, Prepared for Senator Mark Begich by the Institute of Social and Economic Research, University of Alaska Anchorage, July 7,

- ANCs contracting is not always on such grand scales as the large, sole-source awards. Out of the 176 ANC 8(a) contractors in Alaska in 2009, more than 80 of these were village corporations tasked with relatively small government contracts and employing the local people with whom the economic benefits of such contracts are shared in small, remote villages.<sup>8</sup>

### **Benefits of ANC Participation in the 8(a) program**

- While it is difficult to assess exactly how much of ANC shareholder dividends are derived from 8(a) dollars because the dividends are paid from total ANC profits which include non-8(a) revenue, many ANC parent companies report that most of their revenue comes from the 8(a) program.<sup>9</sup> Those related profits not only **pay shareholder dividends, but also contribute to cultural programs, subsistence activities, scholarships, and employment assistance such as jobs, training and internships.** It is clear that Alaska Natives and the State of Alaska more generally are benefitting from ANCs' utilization of this important government tool.
- ANCSA corporations are the largest component of Alaska's private sector economy controlled by Alaskans. 2009 revenues for the 12 regional corporations totaled \$7.15 billion.<sup>10</sup> Total dividends for those regional corporations for 2008 rose by 39% from \$125 million to \$171 million, which does not take into account the dividend and revenue data from the nearly 170 village corporations. Dividend ratio payout of 66% Estimated that 169 village corporations were active (2010) due to closures and mergers.<sup>11</sup>
- **One measure of the continuing success and growing strength of ANCs is that they comprise nearly half of the top businesses in Alaska.** Alaska Business Monthly's 2010 annual report of the Top 49 Alaska-owned and -operated companies based on gross revenues, (or "Top 49ers") reported that Native Corporations represented nearly 45 percent of the list with 22 ANCs represented. The Arctic Slope Regional Corporation has topped the list for the last 16 consecutive years, reporting \$1.95 billion in gross revenues for 2009.<sup>12</sup>
- **In 2009, the 12 ANCSA Corporations brought in \$7.1 billion dollars with a total net income of \$364.5 million,** and no individual corporation posted a loss. Four Corporations (Arctic Slope Regional Corporation, Bristol Bay Native Corporation, NANA Regional Corporation and Chugach Corporation) each have an annual revenue

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2009 at 17, citing ("Advocacy Packet," Native American Contractors Association, (NACA 2009), available at <http://www.nativecontractors.org/media/pdf/NACA-Advocacy-Packet-2009.pdf>).

<sup>8</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska, Prepared for Senator Mark Begich by the Institute of Social and Economic Research, University of Alaska Anchorage, July 7, 2009 at D.

<sup>9</sup> Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations at 5.

<sup>10</sup> Debbie Cutler, "Alaska's Top 49ers: Still Growing Strong," Alaska Business Monthly October 2010.

<sup>11</sup> "Transformations: Alaska Native Corporations Economic Data 2010," Alaska Native Claims Settlement Act Regional Association, available at:

[http://www.ciri.com/content/history/documents/ANCSA\\_EconomicReport\\_2010.pdf](http://www.ciri.com/content/history/documents/ANCSA_EconomicReport_2010.pdf).

<sup>12</sup> Debbie Cutler, "Alaska's Top 49ers: Still Growing Strong," Alaska Business Monthly October 2010.

exceeding \$1 billion. The dividends for 2009 ranged from \$1 per share to \$57.12 per share.<sup>13</sup>

### Jobs

- ANCs significantly contribute to the Alaskan economy through salaries paid to Alaska employees, making purchases from Alaskan suppliers and service companies, corporate taxes, scholarships and contributions to Alaskan charities.
- **In 2008, 35,430 jobs from entry to executive level around the world were attributed to the business activities of the 12 Alaska Native regional corporations with a worldwide payroll of \$1.68 billion and an average of \$47,000 per employee. Jobs increased by 5,000 between 2005 and 2008 alone.<sup>14</sup> Of these jobs, 13,848 were in Alaska, with a \$774 million payroll at an average of \$56,000 per employee, marking a significant part of the private sector employment.<sup>15</sup> In 2010, the 22 ANC Top 49ers reported an average 25 percent Alaskan workforce.<sup>16</sup>**
- Additionally, federal law allows ANCs to exercise a preference for hiring Alaska Natives and American Indians, and the shareholders encourage ANCs to follow this hiring practice. ANCSA corporations are a particularly important source of employment to the Alaska Native community. In 2008 the regional corporations employed 3,577 Alaska native people; over 10% of the ANCSA total employment base is Native Alaskan.<sup>17</sup>

### Shareholder Dividends

- Many firms derived at least 50 percent or more of their revenues from 8(a) Program participation, and some even reported they attributed 90 percent or more of their revenue to participation in the 8(a) Program. These firms pay out the majority of their profits in shareholder dividends.
- Because Alaska Natives are not able to sell their shares and therefore cannot profit from capital gains, the dividend distributions are designed to have a greater social benefit and financial impact compared to other public corporations. **In 2008, the 12 regional ANCs distributed 66% of net profits to shareholders, representing \$171 million in dividends.<sup>18</sup> The 12 regional ANCs paid an average price of \$15.27 per share out to their shareholders based on 2009 Revenues.<sup>19</sup> These shareholder dividend make up an important part of Native Alaskans' income from assets, which accounts for about**

<sup>13</sup> 2009 Alaska Economic Performance Report, February 2011 at 8, available at: <http://www.commerce.state.ak.us/oed/>

<sup>14</sup> "Transformations: Alaska Native Corporations Economic Data 2010," Alaska Native Claims Settlement Act Regional Association, at 18, available at:

[http://www.ciri.com/content/history/documents/ANCSA\\_EconomicReport\\_2010.pdf](http://www.ciri.com/content/history/documents/ANCSA_EconomicReport_2010.pdf).

<sup>15</sup> Id.

<sup>16</sup> Debbie Cutler, "Alaska's Top 49ers: Still Growing Strong," Alaska Business Monthly October 2010.

<sup>17</sup> Id.

<sup>18</sup> "Transformations: Alaska Native Corporations Economic Data 2010."

<sup>19</sup> "Alaska's Top 49ers: Still Growing Strong."

**eight percent of income.**<sup>20</sup> Approximately one-third of thirty ANCs studied by the Government Accountability Office in 2006 reported they had created permanent funds to build reserves for future dividends, and two reported that those funds allowed them to pay dividends to shareholders even in unprofitable years.<sup>21</sup> Other firms contribute funds directly to their elders' trust funds.<sup>22</sup> These special distributions are meant to ensure that Native elders enjoy a comfortable quality of life, and these dividends are not included in the annual dividend distributions.<sup>23</sup>

### Scholarships

- The Alaska Native Corporations have demonstrated a commitment to invest in the development of their individual shareholders. In 2008, \$11.1 million in contributions were made to 3,200 individual scholars and to endowments.<sup>24</sup>

### Charitable Donations

- Alaska Native Corporations play an important role in strengthening their communities through charitable donations. **From 2005 to 2008, the regional corporations made \$70.5 million in charitable contributions to nonprofit and community organizations,** such as the Alaskan Native Science and Engineering Program at the University of Alaska Anchorage.<sup>25</sup> Many ANCs donate to other nonprofit organizations, including those which advocate for Native Alaskans.<sup>26</sup>
- Additionally, ANCs support numerous programs that better the living situations in rural Alaskan communities and seek to preserve Natives' unique cultural heritage, including community infrastructure, cultural programs, subsistence support and burial assistance.<sup>27</sup>
- While ANCs have provided their communities and shareholders with substantial economic benefits, it is impossible to measure the substantially greater social benefits that ANCs participation in the 8(a) program provides to Alaska Natives and the state of Alaska more generally.

### Local Impact//Community Infrastructure

- **Community infrastructure:** Several corporations invested in the infrastructure of their villages. For example, after the Department of the Interior's Bureau of Indian Affairs ceased barge service to its remote village, one corporation established a transportation company that became the only mechanism to bring goods to the community.

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<sup>20</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska at 6.

<sup>21</sup> Id. at 9.

<sup>22</sup> Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations at 15.

<sup>23</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska at 9.

<sup>24</sup> "Transformations: Alaska Native Corporations Economic Data 2010" at 19.

<sup>25</sup> Id. at 18.

<sup>26</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska at 13.

<sup>27</sup> Id.

- Alaska Native corporations spend corporate profits on a variety of programs that enhance life in remote rural communities, such as subsistence lifestyle support and advocacy, burial assistance, elder benefits, police and emergency services, habitat protection, early childhood education and a range of other services. The GAO noted that the direct benefits which ANCs provide their shareholders ranged from **low-cost Internet infrastructure** and death benefits to scholarships and heating oil subsidies.
- In Southeast Alaska, Sealaska Corporation, Sealaska Timber Corporation, and Sealaska Heritage Institute spent \$41 million in 2007 in support of corporate and timber-related operations in Southeast Alaska. This spending included payroll and the purchase of goods and services, including timber harvest-related contracts. Spending was spread throughout the Southeast region. Approximately 350 businesses and organizations in 19 Southeast communities received spending from Sealaska-related activities. Including direct and indirect employment and payroll, Sealaska-related employment totaled nearly 580 workers and approximately \$22 million in payroll in Southeast Alaska in 2007.<sup>28</sup>

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<sup>28</sup> Benefits of Alaska Native Corporations and the SBA 8(a) Program to Alaska Natives and Alaska at 16.

## HUBZone Requirements & Indian Territories

### Basic HUBZone Requirements

- It must be a small business by SBA standards;
- It must be owned and controlled at least 51% by U.S. citizens; or is wholly owned by one or more of the following: a Community Development Corporation, an agricultural cooperative, an ANC, or an Indian Tribal Government<sup>1</sup> in combination with U.S. citizens and/or other Small Business Concerns (SBCs);
- Its principal office<sup>2</sup> must be located within a "Historically Underutilized Business Zone," (HUBZone) which includes lands considered Indian Country and military facilities closed by the Base Realignment and Closure Act; and
- At least 35% of its employees must reside in a HUBZone.

Existing businesses that choose to move to qualified areas are eligible.

### What are the different types of HUBZone area designations?

There are several types of HUBZones, including:

- A qualified census tract (QCT)
- A qualified non-metropolitan county (QNMC)
- Lands within the external boundaries of an Indian reservation (a qualified Indian reservation (QIR))
- A Qualified Base Closure Area (QBA)
- A Redesignated Area (Ra)

### Indian Territories & HUBZone Qualification

Lands within the external boundaries of an Indian reservation are designated HUBZones. There are a few important definitions and caveats. *Lands within the external boundaries of an Indian reservation* include all lands within the perimeter of an *Indian reservation*, whether tribally owned and governed or not. For example, land that is individually owned and located within the perimeter of an Indian

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<sup>1</sup> *Indian Tribal Government* means the governing body of any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

<sup>2</sup> *Principal office* means the location where the greatest number of the concern's employees at any one location perform their work. However, for those concerns whose "primary industry" (see 13 CFR 121.107) is service or construction (see 13 CFR 121.201), the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations. 13 CFR 126.103.

reservation qualifies, but an Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not "lands within the external boundaries of an Indian reservation."<sup>3</sup>

Under 13 CFR 126.103, "Indian Reservation" is defined as having the same meaning as the term "Indian country" in 18 U.S.C. 1151,<sup>4</sup> except that such it does not include:

(i) Any lands that are located within a State in which a tribe did not exercise governmental jurisdiction as of December 21, 2000, unless that tribe is recognized after that date by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (25 CFR part 83); and

(ii) Lands taken into trust or acquired by an Indian tribe after December 21, 2000 if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status as of December 21, 2000.<sup>5</sup>

### Benefits of the HUBZone Program

The federal government has a goal of awarding 3% of all dollars for federal prime contracts to HUBZone-certified small business concerns. The program's benefits for HUBZone-certified companies include:

- Competitive and sole source contracting
- 10% price evaluation preference in full and open contract competitions, as well as subcontracting opportunities.

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<sup>3</sup> 13 CFR 126.103.

<sup>4</sup> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means : (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

<sup>5</sup> 13 CFR 126.103. There is also a special definition for Indian reservations in Oklahoma: An Indian Reservation in the State of Oklahoma, means lands that (i) are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and (ii) are recognized by the Secretary of the Interior as of December 21, 2000, as eligible for trust land status under 25 CFR part 151. 13 CFR 126.103.

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## How does a tribally-owned business qualify for the SBA 8(a) BD Program? (June 2011)

In order to qualify as a tribally owned 8(a) BD business, the tribe must (1) establish that the Indian Tribe is economically disadvantaged under 124.109(b)(2), and (2) that the specific tribally-owned business seeking 8(a) BD certification is a qualified 8(a) BD concern under 124.109(c).<sup>1</sup> Once the Tribe establishes its economically disadvantaged status with SBA, it will not have to reestablish this factor for future applications, unless it is specifically requested to do so by the Associate Administrator of the Office of Business Development (AA/BD).<sup>2</sup>

### **Economically Disadvantaged Status**

To establish that the Indian Tribe is economically disadvantaged, the Tribe must provide data demonstrating its economic condition. SBA's analysis will include, but is not limited to, the following seven factors:<sup>3</sup>

1. number of tribal members,
2. present tribal unemployment rate,
3. per capita income of tribal members, excluding judgment awards,
4. percentage of the local Indian population below the poverty level,
5. the tribe's access to capital,
6. tribal assets as disclosed in a current tribal financial statement<sup>4</sup>, and
7. a list of wholly owned or partially owned tribal enterprises or affiliates.<sup>5</sup>

<sup>1</sup> 13 CFR 124.109(b). "In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian Tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Once an Indian Tribe establishes that it is economically disadvantaged in connection with the application for one Tribally-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. An Indian Tribe may request to meet with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires for it to establish economic disadvantage. Each Tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section."

13 CFR 124.109(b).

<sup>2</sup> 13 CFR 124.109(b).

<sup>3</sup> 13 CFR 124.109(b)(2).

<sup>4</sup> "The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated." 13 CFR 124.109(b)(2)(vi).

<sup>5</sup> This list must include the primary industry classification of each enterprise/affiliate. "The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors." 13 CFR 124.109(b)(2)(vii).

The regulations do not establish any specific thresholds for these economic indicators. The SBA did consider using an asset or net worth test, but it rejected this approach on the grounds that such a test could be “misleading.”<sup>6</sup> After researching decisions from SBA’s Office of Hearings and Appeals, there do not seem to be any cases regarding a tribe’s “economically disadvantaged” status. Thus, a tribe may not be able to predict whether it will be granted economically disadvantaged status before applying to the program. To help combat some of the uncertainty, the SBA specifically “authorizes a tribe to request a meeting with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires.”<sup>7</sup> At this one-on-one meeting with SBA, analysts may be able to provide more specific information about what may help or hinder a tribe’s economically disadvantaged status qualification.

### **Business Eligibility**

In addition to the Tribe establishing that it is economically disadvantaged, the Tribe must also establish that the tribally-owned business is eligible to participate in the 8(a)BD program. While the Tribe’s economically disadvantaged status need only be established once, the Tribe must establish the applicant business’s eligibility for each applicant business.<sup>8</sup> The business must be wholly owned by an eligible Indian Tribe or by the wholly owned business entities of an eligible Tribe.<sup>9</sup> In addition to this tribal ownership requirement, the business must meet six conditions.

1. Be a legal business entity organized for profit and susceptible to suit.<sup>10</sup>
2. Size: it must be a “small business concern.”<sup>11</sup>
3. Ownership: a Tribe must own at least 51% of the business.<sup>12</sup>

<sup>6</sup> 8(a) Business Development Program Compliance Guide: Small Business Size Regulations and 8(a) Business Development/Small Disadvantaged Business Status Determinations, p.22-23 (2010), available at [http://www.sba.gov/sites/default/files/8\(a\)%20Compliance%20Guide.pdf](http://www.sba.gov/sites/default/files/8(a)%20Compliance%20Guide.pdf).

<sup>7</sup> 8(a) Business Development Program Compliance Guide, p. 23. See 13 CFR 124.109(b).

<sup>8</sup> 13 CFR 124.109(c).

<sup>9</sup> 13 CFR 124.109(c).

<sup>10</sup> 13 CFR 124.109(c)(1): The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a “sue and be sued” clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

<sup>11</sup> 13 CFR 124.109(c)(2): (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern. (ii) A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded. (iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

<sup>12</sup> 13 CFR 124.109(c)(3): (i) For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest. (ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the

4. Control and management:<sup>13</sup>
  - a. Management and daily business operations must be controlled by the Tribe.<sup>14</sup>
  - b. Officers, directors, and members of the management team and business committees are precluded from engaging in any "outside employment or other business interests which conflict with the management" or business objectives of the tribally-owned business.<sup>15</sup>
5. Individual eligibility limitation: SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of §124.108(b).<sup>16</sup>
6. Potential for success: The tribally-owned applicant business must "possess reasonable prospects for success in competing in the private sector" by demonstrating at least one of the following three criteria:<sup>17</sup>
  - a. It has been in business for at least two years.

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same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard. (iii) The restrictions of §124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

<sup>13</sup> 13 CFR 124.109(c)(4): (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows: (A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or (B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future. (ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

<sup>14</sup> 13 CFR 124.109(c)(4)(i).

<sup>15</sup> 13 CFR 124.109(c)(4)(ii).

<sup>16</sup> 13 CFR 124.109(c)(5).

<sup>17</sup> 13 CFR 124.109(c)(6): A Tribally-owned applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. A Tribally-owned applicant may establish potential for success by demonstrating that: (i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or (ii) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or (iii) The Tribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

- b. The individuals who manage and control the daily business of the firm have “substantial technical and management experience,” *and* the applicant business has a record of “successful performance” on industry contracts, *and* the applicant business has adequate capital to sustain its operations and fulfill its business plan.<sup>18</sup>
- c. The Tribe has made a firm written commitment to support the operations of the applicant concern, and the Tribe has the financial ability to do so.<sup>19</sup>

SBA Regulations offer insight into the specific indicators and requirements for these conditions, but a face-to-face meeting with SBA could help a Tribe write a successful 8(a) BD application more efficiently.

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<sup>18</sup> 13 CFR 124.109(c)(6)(ii).

<sup>19</sup> 13 CFR 124.109(c)(6)(iii).