United States Senate
Committee on Homeland Security & Governmental Affairs
SUBCOMMITTEE ON CONTRACTING OVERSIGHT

NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS (PART II)

Majority Staff Analysis
Prepared for Chairman Claire McCaskill

Executive Summary

In the 1980s and early 1990s, Congress passed a series of laws which made Alaska Native Corporations (ANCs) eligible for federal contracting opportunities for socially and economically disadvantaged minority-owned businesses, including the Small Business Administration's 8(a) program. These designations and several subsequent legislative and regulatory preferences now allow ANCs to enjoy competitive advantages and benefits not available to other 8(a) small business participants. The most far reaching of these preferences is the ANCs' ability to be awarded no-bid federal contracts of unlimited value. ANCs can also have multiple 8(a) subsidiaries and remain in the 8(a) program indefinitely.

At the request of Senator Claire McCaskill, this analysis examines the impact of the Alaska Native Corporations' contracting preferences. The report is based on nonpublic information provided to the Subcommittee by 19 Alaska regional and village corporations. For each corporation, the Subcommittee requested and received data on contract awards, major subcontractors, corporate structure and revenues, executive and board compensation, shareholder employment, and the dividends and other benefits provided to shareholders.

The analysis finds that Alaska Native Corporations are multi-million or billion dollar corporations that are now among the largest federal contractors. Although ANCs provide some benefits to their shareholders, those benefits may not be in proportion to the potential for waste, fraud, and abuse created by the ANCs' contracting preferences.

Key findings in the analysis include:

- **Alaska Native Corporations are now among the largest federal contractors.** In 2008, four ANCs – Arctic Slope Regional Corporation, Afognak Native Corporation, NANA Regional Corporation, and Chugach Alaska Corporation – were among the top 100 recipients of federal contract awards.

- **Alaska Native Corporations are big businesses.** The majority of the Alaska Native Corporations surveyed by the Subcommittee exceed the size requirements applicable to other 8(a) companies. 11 out of the 19 companies – Afognak, Ahtna, Arctic Slope, Bristol Bay, Chenega, Chugach, the Cook Inlet Region, Inc. (CIRI), Doyon, Koniag, NANA, and Sealaska – have had annual revenues higher than the Small Business Administration's limit since 2002.

- **Alaska Native Corporations have created multiple 8(a) subsidiaries.** The Alaska Native Corporations have taken advantage of the exemption from the size requirements to create multiple 8(a) subsidiaries. Over the last 9 years, the 19 companies surveyed by the Subcommittee have enrolled 248 subsidiaries, joint ventures, or partnerships in the 8(a) program.

- **Alaska Native Corporations have been awarded multiple large federal contracts on a sole-source basis.** Between 2000 and 2008, ANCs received $6.6 billion in 8(a) sole-source contracts valued at more than $3.5 million each. The single largest ANC 8(a) contract is the $1.13 billion Inter-Service Supply Support Operations Program (ISSOP) contract that was awarded by the Defense Department to FSS-Alutiiq, a joint venture of Arctic Slope Regional Corporation and Afognak Native Corporation, in 2002.

- **Alaska Native Corporations may be passing work through to subcontractors.** The Afognak Native Corporation can be viewed as a case study of how Alaska Native Corporations use subcontracts to pass work to large, non-Native companies. Nine subcontractors alone received more than 70% of all subcontract awards under Afognak contracts. For 91 individual contracts collectively worth more than $827 million, Afognak paid subcontractors more than 50% of the total prime contract revenue on each contract.

- **ANCs employ a relatively small percentage of shareholders.** The 19 Alaska Native Corporations which provided information to the Subcommittee employ more than 45,000 individuals throughout their corporations. Of these, approximately 2,400 employees – 5.2% - are shareholders (or relatives of shareholders) of the employing Corporation. On average, nearly 95% of ANC employees are not ANC shareholders.

- **Alaska Native Corporations have relied heavily on highly-paid, non-Native executives.** Of the 13 corporations which provided detailed information to the Subcommittee regarding executive compensation for non-Native executives, 69% of executive compensation was paid to individuals who were not shareholders in the Native Corporations. The information produced to the Subcommittee also shows that for one or more years between 2000 and 2008, eight Alaska Native Corporations paid their Chief Executive Officer, who was a shareholder, substantially less than a non-shareholder holding a lower-ranked position.

One of the primary rationales for the ANC contracting preferences is that they provide economic support and other benefits for Native shareholders and communities. The Subcommittee's investigation shows that the 19 ANCs have provided cash, scholarships, preservation of cultural heritage, or other benefits valued at approximately $720.1 million over the last nine years to members of the Alaska Native community as a result of federal contracts. On average, that amounts to a value of $615 per person per year.

Introduction and Methodology

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) to distribute land and promote economic growth for Alaska Natives. ANCSA provided for the establishment of thirteen regional Alaska Native Corporations (ANCs) and what has now grown to over 200 village, urban, and group corporations. These regional and local corporations were tasked with dividing land, resources, and money among their shareholders, the Alaska Natives.[1]

In the 1980s and early 1990s, Congress passed a series of laws which made the ANCs uniquely eligible for federal contracting opportunities for socially and economically disadvantaged minority-owned businesses. The Small Business Administration's 8(a) program was created to help small businesses compete during the early stages of a business' development.[2] To be accepted into the 8(a) program, businesses must demonstrate their social disadvantage by providing evidence of "racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups."[3] Upon establishing their social disadvantage, businesses must then provide support for their claims of economic disadvantage.[4]

In 1986, Congress designated Indian tribes and ANCs as socially disadvantaged business enterprises.[5] In 1992, Congress amended ANCSA to deem all ANCs to be "economically disadvantaged."[6] These two designations enabled ANCs to participate in the Small Business Administration's 8(a) program by automatically deeming them to meet both social and economic disadvantage eligibility determinations.[7] According to the Senate Energy and Natural Resources Committee, the amendment to ANCSA was intended to:

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[1] Pub. L. 92-203, act of December 18, 1971, 85 Stat. 688, 691, 707, "Alaska Native Claims Settlement Act"; 43 U.S.C. § 1601, et seq.

[2] Pub. L. 83-163, § 207(c)-(d), 67 Stat. 230 (July 30, 1953). The program became permanent in 1958 and its mandate was expanded to focus on "socially and economically disadvantaged" small businesses in 1978. Pub. L. 85-536, § 8(a) (1)-(2), 72 Stat. 384 (July 18, 1958); Pub. L. 95-507, § 201-02, 92 Stat. 1757 (Oct. 24, 1978), codified in 15 U.S.C. § 637(a) and designated as the Business Development Program in 13 C.F.R. § 124.1.

[3] 13 CFR § 124.103(a).

[4] 13 CFR § 124.104.

[5] Pub. L. 99-272, § 18015, act of April 7, 1986, 100 Stat. 82, 370-371, "Consolidated Omnibus Budget Reconciliation Act of 1985;" 15 U.S.C. § 637(a)(4).

[6] Pub. L. 92-203, as amended by Pub. L. 100–241, § 15, act of February 3, 1988, 101 Stat. 1812, the "Alaska Native Claims Settlement Act Amendments of 1987"; 43 U.S.C. § 1626(e)(1)), and by Pub. L. 102-415, § 10, act of October 14, 1992, 106 Stat. 2115, the "Alaska Land Status Technical Corrections Act of 1992."

[7] Unlike the ANCs, Indian tribes must still establish economic disadvantage in order to be eligible for the 8(a) program. *See* Pub. L. 92-203, as amended by Pub. L. 100–241, § 15, act of

further clarify that Alaska Native corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for the purposes of qualifying for participation in Federal contracting and subcontracting programs … [which] were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement opportunities.[8]

Several subsequent legislative and regulatory preferences now allow ANCs to enjoy competitive advantages and benefits not available to other 8(a) small business participants. Most 8(a) participants may be awarded sole-source contracts not to exceed $3.5 million for services or $5.5 million for goods, if it is first determined that there is no reasonable expectation of small businesses' ability to compete for or receive such awards at a fair market value.[9] The Business Opportunity Development Reform Act of 1988 exempts all ANCs and economically disadvantaged Indian Tribes from these limits.[10] As a result, Alaska Native Corporations participating in the 8(a) program can receive sole-source contracts of unlimited value.

Another preference allows ANCs to take advantage of their small business designation indefinitely. Other 8(a) participants are limited to one-time eligibility for 8(a) participation, cannot own more than 10-20% interest in another 8(a) firm, and cannot participate in the program for longer than nine years.[11] ANCs, however, may own a majority interest in an unlimited number of 8(a) subsidiaries at any one time so long as no more than one 8(a) firm operates in the same primary area of work.[12] In other words, ANCs can form new subsidiaries to enroll in the program as the old ones graduate, effectively circumventing the nine-year graduation and ownership requirements.

Two other preferences created in the past nine years have been utilized by the Department of Defense to benefit ANCs, including subsidiaries which are not part of the 8(a)

February 3, 1988, 101 Stat. 1812, the "Alaska Native Claims Settlement Act Amendments of 1987"; 43 U.S.C. § 1626(e)(1)), and by Pub. L. 102-415, § 10, act of October 14, 1992, 106 Stat. 2115, the "Alaska Land Status Technical Corrections Act of 1992."

[8] S. Rept. 102-349, p. 14.

[9] 15 U.S.C. § 637(a)(1)(D)(i)(I) & (II); 48 C.F.R. § 19.805-1(a)-(b)(2).

[10] Pub. L. 100-656, § 602(a), act of November 15, 1988, 102 Stat. 3853, 3887, the "Business Opportunity Development Reform Act", 15 U.S.C. § 637 as amended; 13 CFR § 124.506(a)(iii); 13 CFR § 124.506(b); 48 C.F.R. § 19.805-1(a)-(b)(2). The original $3 and $5 million award limits were subsequently increased to $3.5 and $5.5 million. *Id*.

[11] 13 C.F.R. § 124.108(b); 13 C.F.R. § 124.2; 13 C.F.R. § 124.105(g).

[12] 13 C.F.R. § 124.109(c)(3)(ii).

program. First, so long as funds are appropriated, all contractors (including ANC prime contractors) can be paid up to a 5% bonus to subcontract to an Alaska Native Corporation.[13]

Second, ANCs have a unique ability to obtain work performed by federal employees. Generally, when a federal agency decides to contract out federal civilian jobs to the private sector, it must conduct a competition known as an "A-76", named after the Office of Management and Budget Circular which established the competitive procedures.[14] In 2000, Congress inserted a provision in the Department of Defense Appropriations Act which allows the Department to outsource federal jobs without following the A-76 procedures if the contract was awarded to a Native American-owned business.[15] In 2004, Congress clarified that the language in the 2000 exception included Alaska Native Corporations, and added a provision which allows the Department of Defense to count these conversions towards the agency's competition goals.[16]

Little information has been made available to the public about the impact of the contracting preferences for Alaska Native corporations. The Federal Procurement Data System, the electronic database of federal government contract awards, has only recently allowed users to track the awards to Alaska Native Corporations as a unique category. And as private companies, the ANCs are not regulated by the Securities & Exchange Commission and do not have to comply with disclosure rules applicable to publicly-traded corporations. Although the State of Alaska requires ANCs to file disclosure statements, these statements are available only to those members of the public who travel to Alaska to access the paper documents.

To assess the impact of the contracting preferences for the Alaska Native Corporations, Senator Claire McCaskill requested nonpublic information from the 13 Alaska regional corporations and seven of the largest village corporations: Ahtna, Incorporated; The Aleut Corporation; Arctic Slope Regional Corporation; Bering Straits Native Corporation; Bristol Bay Native Corporation; Calista Corporation; Chugach Alaska Corporation; Cook Inlet Region, Inc. (CIRI); Doyon, Limited; Koniag, Incorporated; NANA Regional Corporation; Sealaska Corporation; The 13th Regional Corporation; Afognak Native Corporation; Tyonek Native Corporation; Cape Fox Corporation; Chenega Corporation; Eyak Corporation; Goldbelt, Inc.; and Olgoonik Corporation.

For each corporation, the Subcommittee requested data on contract awards from 2000 to 2008. The corporations were asked to provide information relating to their revenue from federal contracts and subcontracts, major subcontractors, and the dividends and other benefits provided to shareholders. The corporations were also asked to provide information relating to their

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[13] 25 U.S.C. § 1544. In 2009, Congress appropriated $15 million for this purpose. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. 110-329, Sec. 8021.

[14] Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities (August 4, 1983), revised 1999.

[15] Pub. L. 106-79, Sec. 8014(3).

[16] Pub. L. 108-87, Sec. 8014(b)((1)(C), incorporating 25 U.S.C. § 450b(e).

corporate structure and revenues, executive and board compensation, and shareholder employment. Nineteen companies provided complete or substantially complete responses to the Subcommittee.[17]

Findings

In recent years, federal auditors and academics have raised concerns that the preferences granted to Alaska Native Corporations create the potential for waste, fraud, and abuse in government contracting.

In 2006, the U.S. Government Accountability Office (GAO) concluded that the Alaska Native Corporation contracting preferences were an "open checkbook" for government agencies. According to GAO, federal agencies used Alaska Native Corporation preferences to quickly award large contracts without going through the lengthy competitive process and to help meet their small business contracting goals. GAO also found an "increased risk that an inappropriate degree of the work" on the contracts was being performed by large, non-Native subcontractors, rather than by the ANCs themselves.[18]

Steven Schooner, a government contracts professor at the George Washington University Law School, recently stated:

> The ANC program, as currently implemented, is a blunt instrument that distorts the procurement system, injects well-founded cynicism into the process, and reinforces the belief that government procurement is more about allocating political spoils than ensuring that the government receives value for taxpayer money.[19]

One rationale for the Alaska Native Corporations' contracting preferences is to further the federal government's policy of supporting small, disadvantaged businesses. Supporters have also suggested that the ANCs' contracting preferences provide economic and other benefits to ANC shareholders and Alaska Native communities. The Native American Contractors Association (NACA) has stated that the 8(a) provisions applicable to ANCs have enabled the Native Corporations "to generate revenues and create jobs that benefit entire Native

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[17] One company, the 13th Regional Corporation, failed to provide any response to the Subcommittee's request. The Subcommittee has since learned that the 13th Regional Corporation's financial distress may prevent it from providing a response at this time. For additional information regarding the 13th Regional Corporation, *see 13th Regional Corp. Lays Out Its Difficulties*, Anchorage Daily News (Dec. 3, 2008).

[18] U.S. Government Accountability Office, *Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* (Apr. 27, 2006) (GAO-06-399).

[19] *Business is Booming for Alaska Native Corporations*, Government Executive (March 6, 2009).

communities," including incentives for economic development, educational scholarships and training.[20]

The Subcommittee's investigation shows that the Alaska Native Corporations are multi-million or billion dollar corporations that are now among the largest federal contractors. Although ANCs provide some benefits to their shareholders, ANCs' contracting preferences also create the potential for waste, fraud, and abuse.

Growth in Alaska Native Contracting

Contract awards to Alaska Native Corporations have increased dramatically. Over the last nine years, ANC contract awards increased by $4.7 billion, from $508.4 million in 2000 to $5.2 billion in 2008.[21] In total, ANCs received $23.7 billion in federal contracts between 2000 and 2008. In percentage terms, ANC contract awards increased 916% from 2000 to 2008, approximately six times faster than overall federal contract spending.[22]

Alaska Native Corporations are now among the largest federal contractors. In 2008, four ANCs – Arctic Slope Regional Corporation, Afognak Native Corporation, NANA Regional Corporation, and Chugach Alaska Corporation – were among the top 100 recipients of federal contract awards.[23] In 2009, six ANCs – NANA Regional Corporation, Arctic Slope Regional Corporation, Chenega Corporation, Eyak Corporation, Afognak Native Corporation, and Chugach Alaska Corporation – made Washington Technology's list of the top 100 federal technology contractors.[24]

ANC contract spending has been concentrated among a few corporations. The five largest ANC contractors received more than $15.2 billion from 2000 to 2008. Almost 20% of this – more than $4.6 billion – was awarded to Chugach Alaska Corporation. The top 5 ANC contractors received 64% of the contract dollars awarded to ANCs between 2000 and 2008.[25]

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[20] Native American Contractors Association, *The Native American Communities 8(a) Program Works* (online at http://www.nativecontractors.org/media/pdf/NACA-Advocacy-Packet-2009.pdf) (accessed July 14, 2009).

[21] Data are based on information compiled by Eagle Eye, Inc., from the Federal Procurement Data System, the federal contract tracking system established by the General Services Administration, and are current through February 2009. Unless otherwise noted, years cited denote fiscal years.

[22] *Id.*

[23] *Top 100 Recipients of Federal Contract Awards for FY 2008* (online at http://www.usaspending.gov) (accessed July 7, 2009).

[24] *2009 Top 100* (online at http://washingtontechnology.com/toplists/top-100-lists/2009.aspx) (accessed July 14, 2009).

[25] Eagle Eye, *supra* Note 21.

The major ANC contractors are now large national corporations. Over the last 9 years, the 19 corporations surveyed by the Subcommittee have created or participated in 723 subsidiaries, joint ventures, or partnerships based in Alaska and across the United States.[26] For example, subsidiaries of the Chenega Corporation are located in Las Vegas, Nevada; Lorton, Chesapeake, Ashburn, Alexandria, Vienna, and Norfolk, Virginia; Sioux Falls, South Dakota; and Jacksonville, Florida.[27] Alutiiq, a subsidiary of the Afognak Native Corporation, maintains offices in Chesapeake, Virginia; Washington, DC; Charleston, South Carolina; Huntsville, Alabama; San Diego, California; Dallas, Texas; Denver, Colorado; and Honolulu, Hawaii, in addition to an office in Anchorage.[28] Between 2000 and 2008, approximately 40% of all ANC contract dollars was awarded to ANC subsidiary companies located outside of Alaska.

Last year, the single largest ANC contractor was Arctic Slope Regional Corporation. According to information produced to the Subcommittee, Arctic Slope received $868.9 million in prime contracts and an additional $98.7 million in subcontracts in 2008. From 2000 to 2008, Arctic Slope received approximately $3.1 billion in federal contracts, of which more than $1.4 billion (46%) was awarded through the 8(a) program.[29]

Since April 2009, Alaska Native Corporations have received nearly $30 million dollars in federal stimulus contracts. These contracts were awarded as new task orders under existing noncompetitive contracts to Chugach Alaska Corporation, Alutiiq (a subsidiary of Afognak Native Corporation) and Arctic Pipe & Materials (a subsidiary of Cape Fox Corporation). Between April and July 2009, these companies were awarded 73 task orders to perform construction and maintenance for the Department of Defense, including the repair of roadways and rail crossings, plumbing, barracks renovation, and upgrades of dining facilities. The work will be performed at Fort Drum in New York, Kirtland Air Force Base in New Mexico, Eielson Air Force Base in Alaska, Offutt Air Force Base in Nebraska, and Scott Air Force Base in Illinois.[30]

Alaska Native Corporations and the 8(a) Program

The Alaska Native Corporations now receive a disproportionate number of 8(a) contracts. Between 2000 and 2008, ANCs received $15.1 billion in federal contracts through the 8(a) program.

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[26] All data not otherwise cited herein are based on information received by the Subcommittee in response to Chairman McCaskill's May 12, 2009 requests for information (online at http://mccaskill.senate.gov/issues/soco/docs.cfm).

[27] Chenega Corporation Website (http://www.chenega.com) (accessed July 8, 2009).

[28] Alutiiq Website (http://www.alutiiq.com) (accessed July 8, 2009).

[29] Eagle Eye, *supra* Note 21.

[30] This information was received from data publicly available through a recovery awards search of FedBizOpps.Gov, an electronic database maintained by the U.S. government; www.fbo.gov (accessed July 7, 2009).

Alaska Native Corporations receive the majority of their contract dollars through 8(a) contracts. In 2008, awards to ANCs constituted 19% of all the federal contract dollars awarded to 8(a) firms. In 2008, 65% of contract dollars awarded to ANCs were awarded through the 8(a) program.[31]

The ANCs' share of the 8(a) contracting program has raised significant concerns among other small business groups. Harry Alford, President of the Black Chamber of Commerce, has called for an end to the ANCs' 8(a) preferences. In 2006, Mr. Alford stated:

> Bundling and a "runaway freight train" known as the ANCs are wreaking havoc on 8(a) firms and the African American, Hispanic, Asian and, yes, the Native American communities. We are losing jobs, destroying businesses and negatively affecting communities who need progress the most. ANC's [sic], in effect, have become predators on the minority business community.[32]

Some experts have concluded that the ANCs' 8(a) preferences ultimately may be detrimental to the ANCs themselves. Jenny Yang, the author of a recent law review article about the ANCs, suggests that the ANCs' contracting preferences may lead to their dependence on those advantages.[33] According to Ms. Yang:

> The practices of creating subsidiaries to take on follow-on contracts and of creating holding companies 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.[34]

The Subcommittee's investigation shows that the ANCs have taken advantage of their 8(a) contracting preferences. Unlike other 8(a) contractors, which must comply with the SBA's size and economic disadvantage eligibility requirements, ANCs are now large, wealthy corporations which receive billions in sole-source contracts not available to other 8(a) contractors. ANCs have also used the subcontracting rules to pass a significant portion of the work on their contracts through to other businesses, to the extent that some corporations appear to have abused the SBA's subcontracting limitations.

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[31] Eagle Eye, *supra* Note 21.

[32] House Committee on Government Reform and House Committee on Small Business, Written Testimony of Harry Alford, President of the National Black Chamber of Commerce, *Joint Hearings on Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporations* (June 21, 2006).

[33] Jenny J. Yang, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, Alaska Law Review (Dec. 2006).

[34] *Id.*

ANCs Exceed Size Limitations for Small Businesses

Unless a business is certified as "small," it is not eligible to participate in the 8(a) program.[35] A business's size is based on evaluation of annual receipts (and in select cases, assets), or number of employees.[36] The size determination limits vary by industry to reflect differences within each field. The Small Business Administration has set the highest allowable annual receipts threshold at $35.5 million.[37]

The business size restrictions for 8(a) participation do not apply to ANCs in the same way as other 8(a) participants. While individual companies owned by ANCs are subject to the same size determination requirements as other 8(a) participants, the total size of the ANC and its other subsidiaries and affiliates are not included in those size determinations.[38] And because each individual ANC subsidiary, joint venture, or partnership is assessed independently, the ANC can have a potentially unlimited number of employees and revenues as long as each individual 8(a) subsidiary meets the size requirements.[39]

The majority of the Alaska Native Corporations surveyed by the Subcommittee exceed the size requirements applicable to other 8(a) companies. 11 out of the 19 companies – Afognak, Ahtna, Arctic Slope, Bristol Bay, Chenega, Chugach, CIRI, Doyon, Koniag, NANA, and Sealaska – report annual revenues higher than $35.5 million every year since 2002.[40] In 2007 and 2008, not one of the companies which provided information to the Subcommittee had annual revenues below $35.5 million. In 2008 alone, 17 companies had total revenues in excess of $100 million.

The Alaska Native Corporations have also taken advantage of the exemption from the size requirements to create multiple 8(a) companies. Over the last 9 years, the 19 companies surveyed by the Subcommittee have enrolled 248 subsidiaries, joint ventures, or partnerships in the 8(a) program. On average, each company has operated 13 8(a) subsidiaries since 2000.

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[35] 13 CFR § 121.101(a).

[36] 13 CFR § 121.201; 13 C.F.R. § 121.106(b); 13 C.F.R. § 121.104(a).

[37] 13 CFR § 121.201. Select industries such as commercial banking and credit card issuers have maximums set at $175 million in assets, instead of annual receipts. *Id.* The Subcommittee is not aware of any ANCs which participate in these industries.

[38] 13 C.F.R. § 124.109; *See also* 13 C.F.R. § 121.103.

[39] *Id*. In addition, the Small Business Administration should determine that no "substantial unfair competitive disadvantage" exists when excluding these entities from size determinations. 13 C.F.R. § 124.109.

[40] To determine annual receipts, SBA averages total income plus cost of goods sold averaged over the three preceding years. *See* 121 CFR 121.104. Because the Subcommittee's calculations are based on total revenues averaged over the three preceding years, a company's annual receipts as determined by the SBA may be even higher.

Award of Large No-Bid Contracts

The most far reaching of the legal and regulatory preferences is ANCs' ability to be awarded federal contracts of unlimited size and amount on a sole-source basis as 8(a) small and disadvantaged businesses.[41] Between 2000 and 2008, ANCs received $6.6 billion in 8(a) sole-source contracts valued at more than $3.5 million each.[42] These include a $480 million Army Corps technology support contract awarded to Eyak Corporation[43]; a 10-year, $500 million Air Force contract awarded to Chugach Corporation to provide base operations support at MacDill Air Force Base[44]; and a 10-year, $475 million Customs & Border Patrol contract awarded to Chenega to maintain metal detectors, x-ray machines, and other equipment at airports and along the U.S. border.[45]

The single largest Alaska Native 8(a) contract is the Inter-Service Supply Support Operations Program (ISSOP) which was awarded in 2002 by the Defense Department to FSS-Alutiiq, a joint venture of Arctic Slope Regional Corporation and Afognak Native Corporation.[46] This contract, which is used in the United States, Puerto Rico, Guam, the Middle East, and elsewhere to provide logistics and supply support services to the Navy, is valued at $1.13 billion.[47] To date, FSS-Alutiiq has received over $570 million through the ISSOP contract.[48]

ANCs' Use of Subcontracts

One criticism of the Alaska Native Corporations' contracting preferences is that the corporations have been used as pass-throughs to large, non-Native companies. Under the 8(a) rules, ANCs may subcontract service or supply contracts to non-8(a) participants so long as at

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[41] Pub. L. 100-656, § 602(a), act of November 15, 1988, 102 Stat. 3853, 3887, the "Business Opportunity Development Reform Act", 15 U.S.C. § 637 as amended; 13 CFR § 124.506(a)(iii); 13 CFR § 124.506(b); 48 C.F.R. § 19.805-1(a)-(b)(2).

[42] Eagle Eye, *supra* Note 21.

[43] FedBizOpps.Gov, *Notice: 70--Technology for Infrastructure, Geospatial, and Environmental Requirements (TIGER)* (Sept. 30, 2005) (online at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=28d95a48d30d8f393627dcdd19f7dc29&cck=1&au=&ck=).

[44] Eagle Eye, *supra* Note 21; *MacDill Air Force Base: 'Minority' Contractor Bumps Dozens of Enlisted and Civilian Personnel*, Tampa Tribune (Sept. 20, 1999).

[45] Department of Homeland Security Office of Inspector General, *Customs and Border Protection Award Fees for Enforcement Equipment Maintenance and Field Operations Support Contract* (Feb. 11, 2009).

[46] Department of Defense, *Press Release: Navy Contracts* (Sept. 12, 2002).

[47] *Id.*

[48] Eagle Eye, *supra* Note 21.

least half of these contracts are performed by ANCs.[49] ANCs may also subcontract to non-8(a) participants for construction and specialty trade-related contracts so long as ANCs perform at least 15 percent of the cost of construction contracts and at least 25 percent of the cost of specialty trade contracts.[50] ANCs' ability to subcontract large portions of no-limit sole-source 8(a) contracts, sometimes worth several hundreds of millions of dollars, to non-8(a) participants means large, non-Native corporations may ultimately have access to much of the work.

In 2006, the U.S Government Accountability Office found "almost no evidence" that federal agencies were enforcing the provisions designed to prevent the ANCs from passing the work and the benefits of their federal contracts along to subcontractors.[51] In one example reported by the Washington Post in 2008, the Food and Drug Administration intentionally awarded a sole-source contract to an Alaska Native Company in order to direct the work to Quorvis Communications, a major non-Native public relations firm, as a subcontractor.[52]

The Afognak Native Corporation can be viewed as a case study of how Alaska Native Corporations use subcontracts to pass work to large, non-Native companies. From 2000 to 2008, Afognak was awarded 294 unique contracts, of which 150 (51%) had subcontracts valued at 10% or more of the contract value. Afognak paid its subcontractors more than 50% of the total revenue it received for 91 of those contracts, and 56 of these 91 were awarded through the 8(a) program. For 15 8(a) contracts totaling $206 million, including 11 construction contracts, Afognak paid subcontractors more than 85% of the total revenue received from the prime contract.[53]

Examples of high subcontracting activity within Afognak's 8(a) sole-source awards include: 93.0% of a one-year, $48 million Army contract for advertising; 88.2% of a four-year,

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[49] 13 C.F.R. § 125.6(a)(1)(2). "(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. (2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials)." *Id. See also* FAR 52.219-14(b)(1)(2).

[50] 13 C.F.R. § 125.6(a)(3)(4). "(3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). (4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials)." *Id., See also* FAR 52.219-14(b)(3)(4).

[51] U.S. Government Accountability Office, *Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* (Apr. 27, 2006) (GAO-06-399).

[52] *FDA Takes End Run to Award Contract to PR Firm*, Washington Post (Oct. 2, 2008).

[53] As noted above, federal regulations require an 8(a) company to perform 15% or more of the cost of the contract for construction contracts with its own employees. 13 CFR 125.6(a)(3,4). Cost of the contract excludes cost of materials. *Id.*

$116 million Army contract for prefabricated metal buildings and component manufacturing; and 87.8% of a four-year, $22 million Army contract for specialty trade construction.

Afognak's largest 8(a) sole-source award was given to Alutiiq Security & Technology LLC, on or around July 30, 2003, to guard Fort Bragg. Between 2003 and 2008, Afognak reports prime contract revenue of $296 million; at least $135 million (45.5%) was subcontracted to Wackenhut Services, Inc.

Relationship Between Federal Contracts and Benefits to Shareholders

One of the primary rationales for the ANC contracting preferences is that they provide economic development and other benefits to the Native shareholders and communities.[54] The Subcommittee's review of information produced by 19 Alaska Native Corporations shows that the ANCs have provided $1.6 billion in cash dividends and benefits from 2000 to 2008. On average, each member of the Native community received approximately $615 per year from 2000 to 2008 as a result of Alaska Native Corporations' federal contracts.

In addition, the corporations paid $106.7 million in compensation for shareholders serving as board members and senior executives from 2000 to 2008 and currently employ almost 2,400 of their own shareholders.

Benefits to Shareholders and Communities

The Alaska Native Corporations have provided substantial benefits to their shareholders and communities. In total, the 19 corporations which produced benefit information to the Subcommittee distributed $1.3 billion in cash dividends and $303.7 million in scholarships, community development, and other social and cultural contributions.

The information received by the Subcommittee does not address how much of these benefits were directly connected to the Corporations' 8(a) contracts. The ANCs derive income from multiple sources beyond federal contracts. On average, the 19 ANCs which produced information to the Subcommittee received only 44% of their total yearly revenues from federal prime contracts.

The Subcommittee conducted an extensive analysis of information received from 19 companies to quantify the benefits provided to the Alaska Native Community as a result of federal contracts. The Subcommittee estimates that federal contracts have provided cash, scholarships, preservation of cultural heritage, or other benefits valued at approximately $720.1 million over the last nine years to members of the Alaska Native community as a result of the ANCs' federal contracts. On average, this amounts to a value of $615 per person per year.[55]

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[54] Native American Contractors Association, *About Us* (online at http://www.nativecontractors.org/pages/about-us.php) (accessed July 14, 2009).

[55] To arrive at this figure, the Subcommittee multiplied the 2000-2008 total benefits provided by the 19 Corporations ($1.6 billion) by 0.44 (the percentage of total revenue attributable to federal prime contracts) to arrive at a dollar value of benefits attributable to

The information provided to the Subcommittee also includes detailed accounts of various contributions to the community, the value of which is not purely monetary. For example, Sealaska Corporation has helped secure funding for municipal drinking water improvement systems and management of the Hubbard Glacier overflow in order to prevent catastrophic flooding on the Situk River. Several corporations have funded programs to renew cultural awareness and preserve native languages.

Jobs for Shareholders

The 19 Alaska Native Corporations which provided information to the Subcommittee employ more than 45,000 individuals within their corporations. Of these, approximately 2,400 employees – 5.2% – are shareholders (or relatives of shareholders) of the employing Corporation. On average, nearly 95% of ANC employees are not ANC shareholders.

The employment of shareholders increases substantially at companies based in Alaska. For example, approximately 20% of the employees at the corporate office of Chugach Alaska Corporation are shareholders. Over 70% of the employees at Bristol Bay's corporate offices and 66% of the employees at Ahtna's corporate offices are shareholders.

Afognak Native Corporation, a village corporation with only 728 total shareholders, has the lowest percentage of shareholders employed by the ANCs. Afognak, which recognized nearly $763 million in federal contract revenue in 2008, currently employs over 6,400 individuals, of which only 59 – less than 1% – are shareholders.

Management and Executive Compensation

One major benefit provided to Alaska Native corporation shareholders is the compensation earned by corporation executives and board members. Over the last 9 years, the 16 Alaska Native Corporations which provided top-level compensation information by shareholder to the Subcommittee have paid $215.8 million to their boards of directors and executive officers.[56] Alaska Native shareholders serving on the Corporations' boards of directors and as executives received $106.7 million, or 49%, of that total sum between 2000 and 2008.[57]

Unlike other 8(a) companies, which must be managed by socially and economically disadvantaged executives, Alaska Native Corporations can be managed by non-Native

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federal prime contracts, then divided that number by 130,000, the estimated number of individuals in the Alaska Native Community who have derived benefits from the Alaska Native Corporations' contracting preferences over the last nine years. *See, e.g.*, *Increase in Native Contracts Brings Senate Scrutiny*, Anchorage Daily News (June 23, 2009).

[56] Bristol Bay and CIRI did not provide data which permitted the Subcommittee to calculate this information with certainty. The Chenega Corporation failed to provide an adequate response to the Subcommittee's request.

[57] *Id.*

executives.[58] The Alaska Native Corporations have taken advantage of this exception. Of the 13 corporations which provided detailed information to the Subcommittee regarding executive compensation for non-Native executives, 69% of executive compensation was paid to individuals who were not shareholders in the Native Corporations. One Corporation, Afognak, paid more than 99% of the executive compensation reported to the Subcommittee to individuals who were not shareholders in Afognak Native Corporation.

In most publicly-traded corporations, e.g. Coca-Cola or Exxon Mobil**,** the chief executive officer is the most highly-paid employee. The information produced to the Subcommittee shows that for one or more years between 2000 and 2008, eight Alaska Native Corporations paid their Chief Executive Officer, a shareholder, substantially less than a non-shareholder holding a lower-ranked position. In 2008, for example, NANA's non-shareholder General Counsel earned 114% more than the shareholder Chief Executive Officer. Also in 2008, Bering Straits' Vice President of Government Services and Vice President of Business Development, both non-shareholders, were paid 88% and 91% more than the Chief Executive Officer, respectively. Bristol Bay's non-shareholder Senior Vice President/Chief Operating Officer was paid nearly 107% more than the Chief Executive Officer. And in 2000, 2001, and 2002, Bristol Bay's Chief Financial Officer was paid an average of 204% more than the Chief Executive Officer. Bering Straits' Bay's Vice President of 8(a) Operations made 29% more than the Chief Executive Officer in 2005, the only full year for which the position existed.

Case Study: Chenega Corporation

Between 2000 and 2008, Chenega Corporation's federal contract awards increased 4,190%, from $9.6 million in 2000 to $412.9 million in 2008. Over the last nine years, Chenega was awarded federal prime contracts totaling more than $1.9 billion.[59]

Over the last nine years, Chenega received approximately 84% of its prime contract dollars through the 8(a) program. In 2008 alone, approximately 90% of the prime contract dollars Chenega received were awarded through the 8(a) program. For example, Chenega-Blackwater Solutions, a joint venture of Chenega and the private security company Blackwater, received an 8(a) contract in 2006 to provide security at a U.S. military facility in Japan. Over the last three years, Chenega-Blackwater Solutions has received more than $30.6 million for this contract.[60]

Between 2000 and 2008, Chenega's total revenues exceeded $5.8 billion. Federal prime contracting comprised approximately 34% of this sum. Chenega distributed benefits of more than $16.8 million to its shareholders and the community between 2000 and 2008, an average of $1.8 million per year. As of April 2009, Chenega employed 5,356 employees, of which 52 (0.97%) were shareholders.

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[58] 43 U.S.C. § 1626(e)(1) ; 13 C.F.R. § 124.109(a)(4).

[59] Eagle Eye, *supra* Note 21.

[60] Eagle Eye, *supra* Note 21.

Case Study: Cook Inlet Region, Inc. (CIRI)

Over the last 9 years, CIRI has built a business that is not dependent on federal contracting. Instead, CIRI has focused on real estate development, tourism, energy and resource development, construction and oilfield services, telecommunications, and private equity and investment securities.

According to CIRI, "the Company's strategy is to increasingly pursue contracting opportunities which are not dependent upon the sole sourcing provisions of 8(a)."[61] Between 2000 and 2008, CIRI relied on federal contracting for only 2.7% of its cumulative total revenue. Of the $48.8 million that CIRI has received through federal prime and subcontracts, only one prime contract for $3.7 million was awarded through the 8(a) program.

Between 2000 and 2008, CIRI's revenues totaled nearly $1.8 billion. As of December 31, 2008, CIRI had $422 million in retained earnings available. CIRI also distributed benefits of more than $735 million to its shareholders and the community between 2000 and 2008. In addition, 35% of CIRI's employees are shareholders – one of the highest percentages of any of the 19 corporations surveyed by the Subcommittee.

Conclusion

In recent years, federal auditors and academics have raised concerns that the preferences granted to Alaska Native Corporations create the potential for waste, fraud, and abuse in government contracting. The record before the Subcommittee shows that the Alaska Native Corporations are multi-million or billion dollar corporations that rank among the largest federal contractors. The Subcommittee's investigation shows that the ANCs have taken advantage of their 8(a) contracting preferences, receiving large no-bid contracts and passing through much of the work to other contractors. The record also shows that ANCs provide some benefits to their shareholders.

[61] Cook Inlet Region, Inc., *Annual Report 2008*.