

Special Status of 8(a) Subsidiaries Owned by ANC's:

- **Absence of Sole Source Dollar Threshold – 13 CFR 124.506 (b)**
- **Socially & Economically Disadvantaged – 13 CFR 124.109 (a)(2)**
- **Non Challenged 8(a) Sole Source Award – 13 CFR 124.517(a)**
- **Waiver of Two Year in Business Rule – 13 CFR 124.109(c)(6)**
- **Special Rights Under the A-76 Program – OMB Circular**
- **The 5% Subcontracting Bonus – DFAR 252.226-7001, FAR 52.226-1**
- **ANC Prime Contractor Performance Requirements – 13 CFR 125.6**
- **Limitations on Subcontracting – FAR 52.219-14**

Absence of a Sole Source Dollar Threshold - 13 C.F.R. 124.506(b): SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC- owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

Economically Disadvantaged - 13 C.F.R. 124.109(a)(2): An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.

Non Challenged 8(a) Sole Source Award -13 C.F.R. 124.517(a): The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

Waiver of Two Year in Business Rule - 13 C.F.R. 124.109(c)(6): (i) A tribally-owned applicant concern must be in business for at least two years, as evidenced by income tax returns 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 demonstrate potential for success as set forth in paragraph (c)(6)(ii) of this section.

Special Rights Under the A-76 Program: The A-76 program ("A-76" refers to the number of the implementing Office of Management and Budget (OMB) Circular) imposes a long and cumbersome procedure for any government facility that wishes to contract out (i.e., outsource) an activity that employs ten or more civilian government employees. (Average A-76 study takes 23 months.) One of the few options open to a DOD command, service or agency that wants to contract out a function but avoid the cumbersome A-76 process is to award the contract to a tribal or ANC 8(a) firm.

Language in the Defense Appropriations Act provides that a command does not have to go through the A-76 process but may do a direct conversion of that function to a private contractor, regardless of the number of civilian employees, if the command contracts with a firm that is 51% or more Native American owned, so long as the conversion is cost effective. While this opportunity is available to any 51% or more Native American owned firm, in practice it is only available to tribal and ANC 8(a)s on the larger conversions, because the Appropriations language does not create a new procurement vehicle. As a result, the only way the command may contract with a Native American firm is to do it through the 8(a) sole source authority. As indicated above, the only entities that may receive an 8(a) contract in excess of \$3 million for services are tribal and ANC-owned 8(a) firms and the bulk of the A-76 contracts are far in excess of \$3 million.

The 5% Subcontracting Bonus – DFAR 252.226-7001: A DOD contractor that subcontracts with a firm that is 51% or more Native American owned is entitled to receive a bonus equal to 5% of the amount of the subcontract award. While theoretically available to all agencies, Congress provided appropriations to implement it only to DOD, which, after some initial resistance, has initiated it fully out of the DOD SADB Office. Defense Appropriations Acts provided \$11 million to this program in FY 2005. DFAR states: (f)

(1) The Contractor, on its own behalf or on behalf of a subcontractor at any tier, may request an incentive payment in accordance with this clause.

(2) The **incentive amount** requested is **5 percent of the estimated cost, target cost, or fixed price included in the subcontract at the time of award** to an “Indian tribe” which includes native villages and native groups as defined in the Alaska Native Claims Settlement Act.

(3) The Contractor has the burden of proving the amount claimed and shall assert its **request for an incentive payment prior to completion of contract performance.**

The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the estimated cost, target cost, or fixed price included in the subcontract awarded to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

NC Prime Contractor Performance Requirements - 13 C.F.R. 125.6:

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent **small disadvantaged business (SDB) price evaluation preference**, a small business concern must agree that contracts for:

(1) **Services** (except construction), perform at least **50% of the cost** of the contract **incurred for personnel** with its own employees.

(2) **Supplies or products** (other than procurement from a non-manufacturer in such supplies or products), perform at least **50% of the cost of manufacturing the supplies or products** (not including the costs of materials).

(3) **General construction**, perform at least **15% of the cost** of the contract **with its own employees** (not including the costs of materials).

(4) **Construction by special trade contractors**, perform at least 25% of the cost of the contract with its own employees (not including the cost of materials).

Limitations on Subcontracting (Dec 1996) FAR 52.219-14, Limitations on Subcontracting:

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for --

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) *Supplies (other than procurement from a non-manufacturer of such supplies)*. The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) *General construction*. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) *Construction by special trade contractors*. The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.