

STRENGTHENING THE 8(a) PROGRAM

The Agenda for Transparency, Accountability and Integrity

Prepared by Arctic Slope Regional Corporation, CIRI and Doyon, Limited
September 13, 2010



Summary:

As representatives of Arctic Slope Regional Corporation, Cook Inlet Region, Inc., and Doyon, Limited, three Alaska Native corporations representing more than 35,000 Alaska Native shareholders, we support reforming and improving the Small Business Administration's 8(a) program. The 8(a) program provides enhanced federal contracting opportunities for Alaska Native corporations and others designated as socially and economically disadvantaged minority-owned businesses. While Alaska Native corporations participate in the 8(a) program to varying degrees, we all recognize its importance in building sustainable businesses to improve the lives of Alaska Native people.

The 8(a) program can and should be improved. This can be accomplished by maintaining the integrity of the program and preserving the program's benefits to ensure it remains a valuable tool for the individuals and businesses it is intended to help.



Our Nine Point Program – *The Agenda for Transparency, Accountability and Integrity* – will improve the 8(a) program by increasing accountability, decreasing the potential for abuse while continuing to encourage the growth of sustainable businesses that raise the standard of living for Alaska Native people.

Our proposed reforms are intended to build on the successes of the 8(a) program by promoting more competition, strengthening enforcement against those who repeatedly violate the rules of the program and requiring Native 8(a) companies to track and report benefits derived from their 8(a) contracts.



The following pages detail the nine tenets of *The Agenda for Transparency, Accountability and Integrity* with eight specific proposed reform measures and one in support of other reforms already put forth.

THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY

1. *Tracking and Reporting of Benefits*

We propose to increase accountability and transparency by requiring Native-owned 8(a) companies to document annually how they have benefited their Tribal or Native communities. ANCs have a long history of building businesses for the benefit of their Alaska Native communities, and we are very proud of our record of accomplishment on behalf of our people. We look forward to working with the SBA to develop a standard format for reporting the benefits delivered to our communities, including our financial, social, economic, educational, and career-development programs.

2. *Limitation on Sole Source 8(a) Awards*

The National Defense Authorization Act for FY 2010 requires a written “best interest” justification by the contracting agency for sole-source 8(a) awards in excess of \$20 million. To bolster this safeguard, we propose to further provide that for any 8(a) sole source award exceeding \$100 million, only the justifications specified in Federal Acquisition Regulation section 6.302 can be asserted.

3. *Prohibition of Overlapping Work by Affiliated 8(a) Contractors*

We agree that work under 8(a) contracts should not be non-competitively “rolled over” from one 8(a) firm to an affiliated successor 8(a) firm and that these awards can be used to overcome the time limits on 8(a) participation. To address this concern, we propose to prohibit sole-source 8(a) contracts that are for the same scope of work as a prior contract awarded by the same government customer to an affiliated company that is an 8(a) participant, or that was an 8(a) participant within the two years preceding the new award. This would ensure that extensions of work within the scope of prior 8(a) contracts are not awarded to affiliated 8(a) firms without the benefit of competition by other sources. This approach would avoid overreliance on restrictions based on the companies’ “NAICS” codes, which are frequently overly broad or outdated. A NAICS-based prohibition could prevent an 8(a) firm from performing work that actually has little to do with its affiliate’s work, merely because they are operating within the same NAICS code. We believe our approach best reflects the principle that the government should not be constrained in its ability to competitively select an affiliated 8(a) contractor to perform follow-on work if it offers the best value to the government.

THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY

4. *Enforcement and Accountability*

We favor enforcement of program rules to ensure the integrity of the 8(a) program. We propose to strengthen existing SBA program enforcement tools by establishing a graduated system of remedial measures that could be taken against 8(a) firms that engage in repeated or systemic violations of 8(a) program requirements. Additional measures could include a menu of enforcement options other than suspension and termination of 8(a) eligibility. These might include, in a graduated manner, warning letters, probation, stop work on an impacted contract, disqualification from mentor-protégé program participation, disqualification from joint venture exclusion from affiliation rule, disqualification from sole source 8(a) awards, limitation on number or volume of 8(a) contract awards, or reduction of time to graduation/termination from 8(a) eligibility.

We also agree with the SBA that, when in evaluating an 8(a) applicant's "potential for success," SBA should be able to base its determination on an ANC's express written commitment to support the operations of its 8(a) subsidiary.

5. *Joint Ventures/Subcontracts*

We agree with the SBA that rules governing joint ventures and subcontracting by 8(a) companies should be improved. We support the SBA's proposal to require joint ventures to distribute profits in proportion with the work performed by each participant, rather than the current rule, which guarantees the 8(a) partner at least 51% of the profits of the joint venture. At the same time, non-8(a) participants in joint ventures should not be able to benefit from sole source 8(a) awards in which the 8(a) firm performs only a small portion of the work. We favor one of the options suggested by the SBA, to allow sole source joint venture contracts above the competitive threshold amounts only where the 8(a) partner directly performs at least 40% of the entire contract.

We support clarifying that the Indian Incentive Program subcontracting credit (see DFARS 252.226-7001) does not apply to subcontracts for supplies or services between affiliated companies. We do not believe this program was intended to provide credits for subcontracts awarded by a company to an affiliated company.

THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY

6. *Mentor/Protégé*

We support SBA's proposals to improve the mentor-protégé program, including a limit of three protégés per mentor, allowing non-profit entities to be mentors, allowing SBA to authorize a protégé to have a second mentor where appropriate, requiring a firm to end its protégé status if it becomes a mentor to another entity, and prohibiting new mentor-protégé agreements in the last year of the protégé's 8(a) eligibility.

We welcome SBA's clarification that a protégé and mentor may be deemed to be affiliated for reasons other than the mentor/protégé agreement.

We agree with SBA's proposal for joint venture partners to be considered affiliated if awarded more than three contracts over a two-year period, and to clarify that the exemption from affiliation provided to mentors and protégés applies only to 8(a) contracts.

We support SBA's proposal for enforcement – including stop work orders or suspension or debarment proceedings – against mentors that fail to provide proper development assistance to their protégés as contractually required in the entities' mentor/protégé agreement.

We support SBA's proposed protégé eligibility standards, under which a firm can qualify as a protégé if (1) it is in the developmental stage of 8(a) participation, (2) it has never received an 8(a) award, or (3) its size is less than half the size standard for its primary NAICS code.

7. *Equality Among Tribal/Native American Participants*

We believe that 8(a) program eligibility is an important and appropriate means for promoting the economic growth of America's Native and Tribal communities, not just the ANCs. Accordingly, we favor expanding the "economic disadvantage" designation to include all Native American Tribe-owned entities and Native Hawaiian Organizations, just as it currently does for ANCs.

We agree with the SBA's proposal to treat Native Hawaiian Organizations like Tribes and ANCs for purposes of applying the 8(a) sole source ceiling rules.

THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY

To ensure that Native-owned 8(a) companies can attract top quality management, we favor SBA's proposal to permit any Tribal member to manage a Tribally-owned 8(a) firm without requiring that person's separate qualification as "economically disadvantaged" and that these individuals not be members of the specific Tribe that owns the 8(a) entity in order to manage it.

8. *Audits*

To ensure that SBA maintains appropriate oversight over the 8(a) program, we favor requirements for 8(a) companies to provide financial data that is sufficient for program oversight, while considering the costs of audits on 8(a) participants. ANC parents of affiliated 8(a) participants should provide complete consolidated financial statements that include schedules for their individual 8(a) subsidiaries, and these schedules would be certified by an officer of the ANC or by an independent accounting firm. We further welcome the SBA's plan to balance its requirements for financial data by increasing the revenue thresholds above which audited financial statements must be submitted.

9. *Other 8(a) Reform Measures*

We support other proposals by the SBA to improve the 8(a) program. Among these:

We do not believe that any 8(a) participant should be forced out of the program due to a large contract received during its developmental period. Accordingly, we support early graduation or termination 8(a) status upon (1) exceeding the SBA size threshold for its primary NAICS code for 3 years and (2) concurrently failing to meet the business mix requirements during transition years (i.e., years 5-9). We propose a 3-year period to reflect that under current size standards, revenues are measured on a 3-year basis.

We accept a rule that 8(a) applicants bear the burden to prove their 8(a) eligibility and that missing information will be considered adverse to the applicant.

We agree with the SBA that agencies' set-asides for 8(a) competition should be required to follow normal 8(a) processes and that to ensure consistent administration of the program, SBA should decide whether to authorize follow-on requirements without 8(a) competition.

THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY

We agree with SBA's clarification that after early graduation or termination, a program participant will no longer be eligible for new awards and that the participant must still complete ongoing contracts and exercised options.

We agree with the SBA's clarification that program participants can exit the 8(a) program via expiration, graduation, voluntary withdrawal, or termination; and that work performed under subcontracts or non-8(a) prime contracts should be counted toward an 8(a) participant's "business mix" requirement.

We support SBA's efforts to make internal changes to improve the administration of the 8(a) program, including SBA's internal delegation of responsibility for reviewing 8(a) applications.