MEMORANDUM

May 15, 2009

To: Senate Committee on Homeland Security and Governmental Affairs
   Attention: Molly Wilkinson

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Subject: The Small Business Administration's 8(a) Program and Alaska Native Corporations

This memorandum responds to your request for information regarding the Small Business Administration's (SBA) 8(a) program, and, in particular, Alaska Native Corporations (ANC). Information regarding the 8(a) program and ANCs may be found in the first two sections; the third and final section examines selected issues related to ANC contracting.

8(a) Program

Legislative History

The current 8(a) set-aside program for small businesses owned and controlled by socially and economically disadvantaged individuals resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist minorities. This merger of small business and minority programs first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978. A legislative history of 8(a) thus encompasses executive branch policy and regulations, as well as statutes. An abridged legislative history of 8(a) follows. A more detailed version of this history can be found as an appendix to the memorandum.

1 An Alaska Native Corporation is "any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. § 1601, et seq.)" (13 CFR § 124.3.)
Federal Programs for Small Businesses: The Origins of the SBA's Subcontracting Authority

Congress first authorized a federal agency to enter into prime contracts with other agencies and subcontract with small businesses for the performance of these contracts in 1942. The agency was the Smaller War Plants Corporation (SWPC), which was partly created for this purpose; and Congress gave it these powers in order to ameliorate small businesses' financial difficulties while also "mobilizing the productive facilities of small business in the interest of successful prosecution of the war." The SWPC's contracting/subcontracting authorities expired along with the SWPC at the end of the World War II, but Congress created the Small Defense Plants Administration (SDPA), which was given the same powers, in 1951 at the start of the Korean War. Two years later, in 1953, Congress transferred these powers, among others, to the newly created Small Business Administration, with the intent that the SBA would exercise these powers in peacetime, as well as in wartime. When the Small Business Act of 1958 ("Act") transformed the SBA into a permanent independent agency, the contracting/subcontracting authorities were included in Section 8(a) of the Act, giving rise to the practice of calling the program the "8(a) program." However, the present 8(a) set-aside program did not yet exist for several reasons. First, the SBA's contracting/subcontracting authorities were not limited to small businesses owned and controlled by socially and economically disadvantaged individuals. Rather, the SBA could contract with any "small-business concerns or others" under Section 8(a). Second, the SBA seldom, if ever, employed its contracting/subcontracting authorities under Section 8(a).

Federal Programs for Minorities Merge with the SBA's Subcontracting Authority: Executive Branch Policy and Administrative Regulations

Federal programs for minorities began developing at approximately the same time as those for small businesses, although there was no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt's order on June 25, 1941 requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of race, creed, color or national origin. Subsequent Presidents followed Roosevelt's example, issuing a number of executive orders seeking to improve the employment
opportunities of “Negroes, Spanish-Americans, Orientals, Indians, Jews, Puerto Ricans, etc.” These executive branch initiatives took on new importance after the Kerner Commission’s report on the causes of the urban riots of 1966 concluded that African Americans would need “special encouragement” to enter the economic mainstream. Presidents Lyndon Johnson and Richard Nixon laid the foundations for the present 8(a) program in the hope of providing such “encouragement.” Johnson created the President’s Test Cities Program (PTCP), which involved a small-scale use of the SBA’s authority under 8(a) to award contracts to firms willing to locate in urban areas and hire unemployed individuals, largely African Americans, or to sponsor minority-owned businesses by providing capital or management assistance. Under the PTCP, however, small businesses did not have to be minority-owned to receive subcontracts under 8(a). Nixon’s program was larger and focused more specifically on minority-owned small businesses. Under Nixon, the SBA promulgated its earliest regulations for the 8(a) set-aside program. In 1970, the first of these regulations articulated the SBA’s policy of using 8(a) to “assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place.” A later regulation, promulgated in 1973, defined “disadvantaged persons” as including, but not limited to, “black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts.” Although the SBA was implementing its 8(a) program as a program for minority-owned small businesses by 1973, it was doing so without explicit statutory authority.

The 1978 Amendments to the Small Business Act

In 1978, Congress amended the Small Business Act of 1958 to give the SBA statutory authority for its 8(a) program for minority-owned businesses. The 1978 amendments re-wrote Section 8(a) so that SBA could only subcontract federal contracts with “socially and economically disadvantaged small business concerns,” as they were initially called. The 1978 act defined “socially disadvantaged individuals,” as well as “economically disadvantaged individuals,” as socially disadvantaged. These findings are noteworthy because (1) the listing of groups that Congress found socially disadvantaged did not include all the groups that the SBA had included in its 1973 regulation (e.g., “Oriental Americans”) and (2) Native Americans were added by the conference committee, not having

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12 President’s Comm. on Gov’t Contracts, Compliance Guide: Recommendations for Obtaining Compliance with the Nondiscrimination Provisions in Government Contracts 21 (1958).

13 See, e.g., Minority Business Enterprise Development, supra note 9, at 11-12.


17 13 C.F.R. § 124.8(c) (1973).

18 S. Rep. No. 95-1070, 95th Cong., 2d Sess., at 14 (1978) (“One of the underlying reasons for the failure of this effort is that the program has no legislative basis.”); H.R. Rep. No. 95-949, 95th Cong., 2d Sess., at 4 (1978) (“Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations. ... [The program is not as successful as it could be.”).


20 Id. at § 202.

21 Id.

22 Id. at § 201.
been present in either the House or Senate bills. The 1978 act also granted the SBA discretion to recognize groups or individuals not referenced in its findings as socially disadvantaged.

Regulatory and Statutory Developments After 1978

Most of the developments in the 8(a) program since the 1978 act have been made by the SBA as matters of administrative law. The SBA has, for example, developed a three-part test for determining whether other minority groups are disadvantaged; established standards of evidence to be met by individuals seeking to demonstrate personal disadvantage; and created a mechanism to allow third parties to rebut the presumption of social disadvantage accorded to members of recognized minority groups. Presently, sixty-four racial or ethnic groups are recognized as socially disadvantaged for purposes of the 8(a) program.

Few of the statutory amendments to Section 8(a) since 1978 have altered the 8(a) program, as opposed to making technical changes. The Small Business Export Expansion Act of 1980 required the SBA to negotiate “graduation” dates with 8(a) firms, providing for their ultimate exit from the 8(a) program, while the Business Opportunity Development Reform Act of 1988 sought to improve management of the 8(a) program and required government-wide goals for contracting with small businesses owned and controlled by socially and economically disadvantaged individuals.

Alaska Native Corporations (ANCs) were not added to Section 8(a) or made eligible for set-asides under it until comparatively late in the process of regulatory and statutory developments after enactment of the 1978 act, as discussed later in this memorandum.

Description of the 8(a) Program

The Small Business Administration’s 8(a) program authorized the SBA to enter into procurement contracts with Federal agencies and to subcontract with eligible small businesses. The 8(a) business development program seeks to help small businesses owned and controlled by “socially and economically disadvantaged” individuals by fostering participation in the federal procurement process of these businesses.

To qualify for SBA 8(a) certification, a firm must be a small business that is “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character

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24 P.L. 95-507, at § 202 (granting the SBA’s Associate Administrator for Minority Small Business and Capital Ownership Development the authority to make determinations regarding which other groups are socially disadvantaged).
28 13 C.F.R. § 124.103(b)(1).
and citizens of the United States," and must demonstrate potential for success. Definitions of these eligibility requirements follow.

Socially Disadvantaged

"Socially disadvantaged" individuals are defined by the SBA as individuals who "have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities." The SBA has presumed the following groups are socially disadvantaged: African-Americans, Hispanic-Americans, Asian-Americans, and Subcontinent Asian-Americans (including persons with origins from India, Pakistan, Bangladesh, Sri Lanka). Other groups designated from time to time by the SBA can also be considered socially disadvantaged. In addition, social disadvantage may include race, ethnic origin, gender, physical handicap, and "long-term residence in an environment isolated from the mainstream of American society." In every case the SBA will also consider education, employment and business history in determining social disadvantage. Individuals who are not members of a designated group can claim social disadvantage but must establish social disadvantage on the basis of a "preponderance of evidence."

Economically Disadvantaged

"Economically disadvantaged" individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business." The section 8(a) applicant must, in addition, show that "economic disadvantage" has diminished capital and credit opportunities, thereby limiting ability to compete with other firms in the open market.

Ownership and Control by Disadvantaged Individual

To qualify for 8(a) SBA certification, the business must be at least 51 percent unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs).

Ownership by one or more disadvantaged individuals must be direct ownership; a business owned principally by another business entity does not meet this requirement. When a small business is owned by a married couple, the socially or economically disadvantaged individual must prove that he or she controls 51% of the firm. The Code of Federal Regulations outlines specific majority-ownership requirements for disadvantaged individuals with respect to businesses incorporated as partnerships.

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33 13 C.F.R. § 124.103.
34 13 C.F.R. § 124.104. Generally, preponderance is evidence of quality and quantity which leads the decision maker to conclude, objectively, that the existence or truth of the fact(s) asserted is more probable than not.
35 13 C.F.R. § 124.104.
37 13 C.F.R. § 124.105. See § 124.3 for definition of unconditional ownership; and §§124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.
limited liability companies, and corporations; in addition, the CFR outlines the effect of stock options and dividends on ownership.

A firm must also be at least 51% unconditionally controlled by one or more socially or economically disadvantaged individuals. Control is not the same as ownership, although both may reside in the same person. SBA regards control as “including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.”

**Must Be a Small Business**

In addition to being a member of a socially or economically disadvantaged group, the business must be a small business as defined by the SBA. The Small Business Act states that a small business concern is “one that is independently owned and operated and which is not dominant in its field of operation.” The law also states that in determining what constitutes a small business, the definition will vary from industry to industry to reflect industry differences accurately. The SBA has developed a 40-page manual outlining the definition of a small business based on the North American Industry Classification System (NAICS) industries; this table may be consulted to determine small business size eligibility.

**Demonstrate Potential for Success**

The small business seeking SBA 8(a) certification must provide evidence that it has the potential to succeed in a business environment by providing income tax returns for two previous tax years, which must show operating revenues in the primary industry in which the applicant is seeking 8(a) certification. In addition, the owner must provide evidence that he or she possesses substantial business management experience, technical experience to carry out its business plan, and adequate capital to sustain its operations and carry out its business plans.

**Net Worth**

The net worth of an individual claiming disadvantage must be less than $250,000 when initially applying for 8(a) certification. For continued 8(a) eligibility after admission to the program, net worth must be less than $750,000. In this calculation SBA will exclude the ownership interest and the equity in the primary personal residence.

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38 13 C.F.R. § 124.106.
43 13 C.F.R. § 124.104.2.
Good Character

The owner of a small disadvantaged business cannot be certified as an 8(a) firm if the owner "lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity" or violates SBA regulations.  

Program Limited to Nine Years

A disadvantaged small business is limited to a nine-year participation period in the 8(a) program from the date of SBA’s approval letter certifying admission to the program. The certified 8(a) firm must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine-year program term may be shortened only by termination or early graduation and voluntary graduation. Early or voluntary completion of the 8(a) program may occur if the disadvantaged small business substantially achieves the targets, objectives, and goals set forth in its business plan prior to the expiration of its program term, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) program.

Data on 8(a) Federal Contracting

The Federal government maintains a database known as the Federal Procurement Data System (FPDS), managed by the General Services Administration (GSA), with information on federal contracting and procurement for small disadvantaged businesses. According to the FPDS, the largest contractors for small disadvantaged businesses are the Department of Defense ($15.5 billion contracted out to small disadvantaged businesses), the Department of Homeland Security ($1.5 billion), the Department of Veterans Affairs ($1.0 billion), and the Department of Health and Human Services ($0.9 billion). Out of a total of $378.5 billion in federal contracts eligible for small business contracting, 6.6%, or $25.0 billion, was awarded to small disadvantaged businesses.

In addition to the FPDS information provided by the GSA, the Small Business Administration generates data on the number of businesses in the 8(a) program. As of March 4, 2008, there were 8,632 firms in the 8(a) program.

For additional information on the 8(a) program, please refer to the pertinent excerpt from the Code of Federal Regulations attached to this memorandum.

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44 13 C.F.R. § 124.108.
45 13 C.F.R. § 124.2.
46 The Federal Procurement Data System is available at https://www.fpds.gov/.
Alaska Native Corporations

Demonstration of Social and Economic Disadvantage

Currently, Alaska Native regional and village corporations are deemed to be both economically disadvantaged and socially disadvantaged. Indian tribes are deemed to be socially disadvantaged, but they must prove they are economically disadvantaged.\(^{47}\) The Consolidated Omnibus Budget Reconciliation Act of 1985\(^{48}\) (enacted in 1986) added Indian tribes, including Alaska Native regional and village corporations (ANCs), to the list of groups presumed to be socially disadvantaged for purposes of the 8(a) program\(^{49}\) and defined "Indian tribe" to include federally- and state-recognized tribes and Alaska Native regional and village corporations.\(^{50}\) The effect of this 1986 act was that businesses owned and operated by tribes and ANCs no longer had to prove they were socially disadvantaged to be eligible for Section 8(a), but they still had to prove they were economically disadvantaged. Some ANCs, such as the larger regional and village corporations, may have had difficulty meeting the criteria to show they were economically disadvantaged, although many smaller ANCs may not have had this difficulty. (See discussions of ANCs below.) In 1992 the Alaska Native Claims Settlement Act (ANCSA) was amended to deem all ANCs economically disadvantaged for the purposes of federal programs, including Section 8(a), thereby ensuring that all ANCs were equally eligible.

Management by a Disadvantaged Individual

Unlike most Section 8(a) entities, including tribes, ANCs need not be controlled and managed by a disadvantaged individual to be deemed a socially and economically disadvantaged business.\(^{51}\) This exception for ANCs is based on 1988 and 1992 amendments to ANCSA that deemed ANCs to be socially and economically disadvantaged.\(^{52}\)

Competition and Dollar Threshold for Sole-Source Contracts

The Small Business Act requires Section 8(a) contracts to be competed among participating small businesses whenever possible, but it allows sole-source contracting if the contract is for $3 million or less (for manufacturing, $5 million or less) and if there is not a reasonable expectation that two or more participating small businesses will compete for the contract.\(^{53}\) A 1988 provision exempts ANCs and economically disadvantaged Indian tribes from these requirements.\(^{54}\) Hence tribes and ANCs are eligible to receive sole-source 8(a) contracts for any value without competition.

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\(^{47}\) Small businesses owned by economically disadvantaged Native Hawaiian organizations are also deemed to be socially disadvantaged (see 15 U.S.C. § 637(a)(4)(A)(i)(III)).


\(^{51}\) 13 CFR § 124.109(a)(4).


Number of Firms a Section 8(a) Participant May Own

The Small Business Act limits an individual or business concern asserting social and economical disadvantage for purposes of the Section 8(a) program to only one small business (that is, a subsidiary).55 A 1989 amendment to the Act exempted ANCs and economically disadvantaged Indian tribes from this limitation, as long as each tribal or ANC participating business is in a different primary industry.56

Potential for Success: Exception to Minimum Time in Business

Under a 1990 provision, the SBA may require a minimum time in which an applicant has been in business in order to be eligible for the Section 8(a) program, as long as the Administration allows a waiver of the minimum time period if the applicant has demonstrated a "potential for success."57 In its regulations for this provision, the Small Business Administration has set the required minimum time in business at two years, with a waiver for most Section 8(a) applicants if they meet all of five specified criteria.58 However, the SBA has conditioned the waiver for firms of ANCs and economically disadvantaged tribes on an unspecified "number of factors" (such as, the regulations suggest, a firm's "technical and managerial experience and competency," financial capacity, and previous record of performance on contracts in the relevant industry).59

Effect of Affiliates on Size Determination

To determine whether the size of a business qualifies it as a small business (within its primary industry) for the purposes of the Section 8(a) program, most applicants' affiliates are taken into account.60 For small businesses owned by economically disadvantaged Indian tribes and ANCs, however, a 1990 amendment to the Small Business Act excluded certain affiliates from being taken into account in determining size; the excluded affiliates include the tribe or ANC itself, its entities, or any other business enterprise owned by the tribe or ANC.61 An exception may be made if the SBA "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."62

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58 13 CFR § 124.107(b)(1).
59 13 CFR § 124.109(c)(6). Small businesses owned by economically disadvantaged Native Hawaiian organizations and community development corporations are also eligible for this exception (see 13 § CFR 124.110(c), § 124.111(f)).
60 13 CFR § 121.103.
62 13 CFR § 124.109(c)(2)(iii). Small businesses owned by economically disadvantaged Native Hawaiian organizations and community development corporations are also eligible for this exception (see 13 CFR § 124.110(b), § 124.111(c)).
Alaska Native Claims Settlement Act and Alaska Native Corporations

Background

ANCs were created under the authority of ANCSA, enacted in 1971 to settle Alaska Natives' aboriginal land claims to most or all of Alaska. ANCSA created four types of ANCs, all to be incorporated under state law:

- 12 regional corporations, based on the regions of 12 specified Alaska Native associations, covering the entire state (plus a 13th regional corporation for Alaska Natives permanently resident outside Alaska);
- village corporations, for the approximately 220 Alaska Native communities listed in ANCSA with populations of 25 or more Natives;
- group corporations, for Alaska Native communities with populations of fewer than 25 Natives in which Natives constituted a majority; and
- urban corporations, for urban Alaska Native communities.

Village, group, and urban corporations are scattered unevenly across the 12 regions. Each Alaska Native became a voting shareholder in both the local regional corporation and the local village, group, or urban corporation.

As compensation for settling the land claims, ANCSA provided for the conveyance of more than 40 million acres (including subsurface rights) and $962.5 million to the ANCs, chiefly to the 12 regional corporations and the village corporations. The settlement lands were to be divided among the 12 regional corporations (excluding the 13th corporation) based on the acreage of their regions, and among the village corporations based chiefly on their populations. Group and urban corporations were to receive a set number of acres apiece. (Conveyance of final title to ANCs was not yet complete as of mid-2008.) The settlement funds were to be paid out over a number of years and divided among the regional corporations (including the 13th corporation) based on their populations; each regional corporation was to distribute at least half of its share of these funds to the village corporations in its region.

The ANCs were to hold their ANCSA lands in private title, not in the trust title usual for Indian lands, and subject to federal, state, and local taxation in specified circumstances. The regional corporations were to operate as for-profit entities, and the village corporations as either for-profit or non-profit entities. Their revenues from investment of their settlement funds were to be subject to taxation. The ANCs are not governments—that is, they are not "federally recognized tribes" in the sense used in federal policy (although in a large number of federal Indian programs they are defined as tribes for purposes of eligibility).

Congress' intent, in passing ANCSA in 1971, was to create ANCs as vehicles for Alaska Native economic development. The variation among regions and villages in acreage and population size meant that ANCs initially differed widely in their shares of the settlement fund and of the 40 million acres. Since then the

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64 This summary is based on archived CRS Report 81-127 GOV, Alaska Native Claims Settlement Act of 1971 (Public Law 92-203): History and Analysis Together with Subsequent Amendments, by Richard S. Jones (June 1, 1981).
ANCs have differed equally widely in their business success, growth, income, and losses. According to one analyst,

the consolidated financial performance of the Alaska Native corporations over their first two decades was surprisingly poor. The twelve regional corporations lost about $380 million—more than three quarters of their original cash endowment—in business operations between 1973 and 1993. Only the one-time sale of old growth timber and other natural assets and a one-time tax windfall allowed them to report positive accounting income. Behind this poor average performance, however, is a surprising amount of variation across corporations. Cumulative per capita dividends varied from zero to $17,000. The average annual accounting return on book equity was 3.9% for the consolidated group, but the range runs from -71% to +13%.65

While all 13 regional corporations still exist, a large number of village corporations have merged with each other or with their regional corporation.66

Congress has taken several steps to assist ANCs. For instance, it has included ANCs (or regional nonprofit corporations founded by the original regional corporations) in the definition of Indian tribes in several significant Indian laws, making them eligible for contracts with and grants from the Bureau of Indian Affairs and the Indian Health Service.67 Further, as referred to in the quote above, Congress for a short time in the 1980s allowed ANCs to create profits by selling their losses to other companies to use to offset their income and taxes.68 The amendments to the Small Business Act and ANCRA made by Congress from 1986 to 1992, discussed above, also assisted ANCs to find additional sources of revenue.

Eligibility to participate in the 8(a) program enhances, as the Association of ANCSA Regional Corporation Presidents/CEOs notes, the ANCs’ ability to compete in the marketplace: “Alaska Native Corporations increasingly use the Small Business Administration 8(a) program to develop strong companies to compete in the U.S. Economy and provide Benefits to shareholders, the Alaska Native community, and Alaska’s economy.”69 As the Government Accountability Office (GAO) found, however, reliance on the 8(a) program varies among the corporations, with “some ANCs ... heavily reliant on the 8(a) program for revenues, while others approach the program as one of many revenue-generating opportunities, such as investments in stock or real estate.”70 Koniag, Inc. is an example of the latter.

69 Alexandra J. McCalhanah et al., Native Corporations: We Share It, Association of ANCSA Regional Corporation Presidents/CEOs, p. 11.
maintaining a diversified business portfolio, as demonstrated by the following excerpt from its annual report.

[Konig] continues to pursue a business strategy that is focused on diversification of risk. In implementing this strategy, the Company [Konig] has made significant investments in commercial real estate, investment securities and in a number of subsidiary companies. The Company's non-ANCSA real estate holdings include properties in Alaska, Washington, Idaho, California, Nevada, Texas and Arizona. The discussed real estate assets do not include any lands conveyed to the Company under ANCSA. The investment securities portfolio is invested in a variety of domestic and international equity securities (stocks) and debt securities (bonds) with the goal of maximizing the portfolio's rate of return, while mitigating potential risk. The subsidiary companies in which the Company has invested perform work in a variety of sectors including software development, information technology services, manufacturing parts for the aerospace industry, fluid reprocessing, logistics, facilities maintenance, and security services.  

In FY2000, the amount of federal dollars obligated to ANCs was $265 million; the amount was $1.1 billion in FY2004. During this period, the government obligated a total of $4.6 billion to ANC firms; 63% ($2.9 billion) of this amount went through the 8(a) program. In examining six agencies' contracts with ANCs, GAO found that, for FY2000-FY2004, "sole-source awards accounted for 77 percent of [their] ANC 8(a) contracts..." In FY2008, ANC firms earned $5 billion in federal contracts. This figure might include both contracts with 8(a) firms and contracts with non-8(a) firms.

ANC Business Model

Alaska Native Corporations differ from traditional tribal organizations in that they are patterned after a corporate model. Shareholders, who are Alaska Natives, elect a board of directors which, in turn, governs the corporation. Corporate officers manage the company day-to-day. At Chugach Alaska Corporation, a "nine member Board of Directors, elected from more than 2,200 shareholders, directs CAC's management team. The Board, all of whom are Alaska Natives, selects the President and is assisted by an experienced and qualified managerial staff with responsibilities for the day-to-day operations of CAC and its subsidiaries and joint ventures." A copy of the NANA Regional Corporation organization chart, which shows the organization's corporate officers and offices, accompanies this memorandum. An ANC may be either a for-profit or non-profit entity, but "a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program."

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73 Ibid, p. 11.
74 Ibid. One firm, Konig Inc., earned $90 million from contracts in 2008; 74% was the result of prime or subcontracts with federal government. (Konig, Inc. "Faces from Our Past, A Gift of Heritage Returns, 2008 Annual Report," p. 14.)
76 This departure from tribal organizations and reservations is considered, by some, to be "a bold experiment intended to provide economic autonomy [and] self-reliance...." (E. Budd Simpson, Doing Business with Alaska Native Corporations: A New Model for Native American Business Entities, Business Law Today, vol. 16, no. 6 (July/August 2007), p. 2.) Although ANCs "are considered tribes for certain ... statutory purposes," they are not "designated as Indian tribes for purpose of sovereign immunity." (Ibid., p. 3.)
78 13 CFR § 124.109(a)(3). The SBA defines a "business concern" as follows: It "is a business entity organized for profit, with a (continued...)
An eligible Alaska Native generally is entitled to membership in two corporations: her village’s corporation and the regional corporation in which her village is located. “As shareholders, Alaska Natives are entitled to a voice in the management of and a share in the lands, assets, and income as decided by the board of directors of the corporations, which own and manage the land and money.”

Although benefits for shareholders vary among the ANCs, they may include “payments, scholarships, internships, burial assistance, land gifting or leasing, shareholder hire, cultural programs, and support of the subsistence lifestyle.”

Data collected by the Association of the ANCSA Presidents and CEOs shows that, for 2004, 42 ANCs donated $5.4 million in scholarships for 3,040 Alaska Native students, contributed $8.5 million in charitable donations, and paid $117.5 million in dividends to shareholders. Some ANCs also provide employment opportunities for their own shareholders. NANA Regional Corporation, for example, paid $27.8 million in wages and salaries to its shareholders in 2005. Speaking about the Arctic Slope Regional Corporation, a company spokeswoman reportedly emphasized the educational benefits it provides to its shareholders as follows:

The 8(a) program contributes to ASRC’s overall mission to enhance the cultural and economic freedom of our 10,000 Iñupiat Eskimo members, our shareholders.... Forty percent of our shareholder population is under the age of 18. The revenues generated from our 8(a) operations are applied to shareholder training and education programs; they contribute to building our education foundation and meaningful partnerships with education institutions.

The portion of shareholders’ dividends attributable to federal government contracts involving ANC 8(a) firms is unknown. The Government Accountability Office commented in its 2006 report that the ANCs it “reviewed do not track the benefits provided to their shareholders specifically generated from 8(a) activity. Thus, an explicit link between the revenues generated from the 8(a) program and benefits provided to shareholders is not documented.”

Although, as noted above, ANCs are similar in several respects to other publicly-owned corporations, they are dissimilar in the following ways:

- Regional ANCs are required to “share 70 percent of the net revenues from their natural resource development—timber, minerals, oil—among all of the regions. This is mandated on a per-capita basis, such that the larger corporations receive more, the smaller [corporations receive] less.”

- The ANCSA “also requires that half of the money shared [among the regions] be paid out to individual shareholders and village corporations.”

(...continued)

place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” (13 CFR § 121.105(a)(1).) Agricultural cooperatives are excluded from this definition. (Ibid.)


80 Ibid., p. 24.

81 McClanahan et al., Native Corporations: We Share It, p. 6.


The land distributed to ANCs is “exempt from property tax” until it is developed. “Most of Alaska is undeveloped anyway, and unlike other places, most areas of Alaska are not even within a taxing jurisdiction. There are no counties in Alaska, but some municipalities are organized as boroughs that can levy property taxes.”

In its 2006 report, GAO described the ANCs’ use of several business strategies, including the forming of subsidiaries, holding companies, and partnerships. The ANCs’ use of subsidiaries has grown since 1988, when only one subsidiary existed. As of December 2005, 49 ANCs owned 154 subsidiaries, all of which were 8(a) firms. As an example of the extent of one corporation’s subsidiaries, the following list of Ahtna, Inc.’s subsidiaries indicates whether each firm participates in the 8(a) program and identifies the types of services it provides:

- Ahtna Construction & Primary Products Corporation (8(a)): “oil spill response, general highway construction, electrical and mechanical services, rock crushing, sale of processed materials.”
- Ahtna Development Corporation (8(a)): “operations and maintenance, specializing in facilities management, information technology, records management, and simulation and training.”
- Ahtna Enterprises Corporation (8(a)): “governmental contracting and demolition.”
- Ahtna Government Services Corporation (8(a)): “environmental engineering and demolition, general contracting, and professional services.”
- Ahtna Technical Services Incorporated: “facility operations and maintenance, shared services.”
- Koht’aene Enterprises Company, LLC (8(a)): “vertical construction.”
- Ahtna Support and Training Services, LLC (8(a)): “simulations operations and maintenance; management of training aids, devices, and associated facilities; training range operations; instrumentation and maintenance; training data collection and processing; facilities operations and maintenance.”

The following list of services provided by Bering Straits Native Corporation’s subsidiaries further illustrates the variety and extent of services ANCs perform for their customers: “Engineering and Project Management, General and Electrical Construction Services, Commercial Facility Renovation and Remodel, Security and Automated Building Systems, Fiber Optic Installation, Base Operations Support Services, Facilities Maintenance and Management, Information Technology Services, Logistics Services, Security Services, Administrative Support Services, Financial Analysis, Aerospace Services, Air Field Operations.”

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85 Ahtna, Inc., “Subsidiaries,” at http://www.ahtna-inc.com/subsidiaries.html. It is unclear whether all of the subsidiaries identified as having received 8(a) certification are still certified. For example, the Ahtna Development Corporation received its certification in 1994.
86 Bering Straits Native Corporation, “Subsidiaries,” at http://www.beringstraits.com/companyprofile/subsidiaries/subsidmain.html. Serving as a contractor, whether for the federal government or some other entity, may be only one facet of an ANC’s portfolio. For example, “[CIRI] is aggressively pursuing real estate development opportunities including office, retail, residential and mixed use developments on it properties in Alaska, California, Hawaii, Texas and other states. CIRI and (continued...)}
Another business strategy some ANCs may use is to form a holding company, which is a “non-8(a) subsidiary[...] that provide[s] share administrative services to other subsidiaries, for a fee...\textsuperscript{89}

Establishing partnerships, which are used by ANCs “to gain access to capital, experience, or expertise,” is the third business strategy identified by GAO.\textsuperscript{90} A corporation new to the 8(a) program may benefit from shared subsidiary ownership, particularly when its partner is an ANC that has experience with the 8(a) program.\textsuperscript{91} Another type of partnership is the joint venture agreement, which is “an agreement between an 8(a) participant and one or more businesses to work together on a specific 8(a) contract.”\textsuperscript{92} Finally, an ANC subsidiary may participate in a mentor-protégé program, such as the one established by the Small Business Administration. GAO found that, of the ANCs they examined, “19 owned a total of 24 subsidiaries participating in mentor-protégé agreements.”\textsuperscript{93}

As noted above, Alaska Native Corporations and other native-owned businesses enjoy certain advantages not available to other 8(a) program participants. These include the following:

- An agency may award a sole source contract to an 8(a) ANC firm regardless of the value of the contract. For all other 8(a) program participants, an agency can award a sole source contract only if the value of the contract is less than $5 million (manufacturing) or $3 million (all other contracts).\textsuperscript{94}
- ANCs (and Indian tribes) participating in the 8(a) program are permitted to form multiple subsidiaries while non-ANC 8(a) firms are limited to one subsidiary each.
- A federal government contractor may be paid compensation equal to 5% of the value of a subcontractor’s or supplier’s contract if the subcontractor or supplier is “an Indian

(...continued)

Browman Development Co. are currently developing what will become Alaska’s largest shopping and entertainment center on a 95-acre parcel of CIRI land in northeast Anchorage. The company is also developing or exploring oil, gas, coal, gravel and wind power projects on its lands in Alaska. CIRI and Nabors Industries Ltd., the world’s largest land-based oil drilling company, are 50-50 owners of Alaska Interstate Construction LLC and Peak Oilfield Service Co. These Anchorage-based companies provide a variety of civil construction, oilfield and mining project services and equipment maintenance services in Alaska and far-east Russia. The company’s Alaska tourism division owns and operates several of the state’s leading marine day cruise companies and lodges.... CIRI is a long-time minority broadcast, wireless and wireline telecommunications investor....” (Cook Inlet Regional, Inc., “CIRI Company Overview,” at http://www.ciri.com/content/company/business.aspx.) Another example comes from Koniag, Inc.’s annual report, where the company notes that it “continues to pursue a business strategy that is focused on diversification of risk. In implementing this strategy, the Company [Koniag] has made significant investments in commercial real estate, investment securities and in a number of subsidiary companies. The Company’s non-ANCSA real estate holdings include properties in Alaska, Washington, Idaho, California, Nevada, Texas and Arizona. The discussed real estate assets do not include any lands conveyed to the Company under ANCSA. The investment securities portfolio is invested in a variety of domestic and international equity securities (stocks) and debt securities (bonds) with the goal of maximizing the portfolio’s rate of return, while mitigating potential risk. The subsidiary companies in which the Company has invested perform work in a variety of sectors including software development, information technology services, manufacturing parts for the aerospace industry, fluid reprocessing, logistics, facilities maintenance, and security services.” (Koniag, Inc. “Faces from Our Past, A Gift of Heritage Returns, 2008 Annual Report,” p. 9.)

\textsuperscript{90} Ibid., p. 29.
\textsuperscript{91} Ibid., p. 14.
\textsuperscript{92} Ibid., p. 30.
\textsuperscript{93} Ibid.
\textsuperscript{94} 13 CFR § 124.406(a) and (b).
organization or Indian-owned economic enterprise as defined” in Chapter 17 of Title 25 of the U.S. Code.\(^95\)

Selected Issues Related to Alaska Native Corporations

Advantages of Using 8(a) ANC Firms

Using 8(a) ANC firms is an attractive option for contracting officers, because it is “a quick, easy, and legal method of awarding contracts for any value.”\(^96\) Specifically, awarding a sole source contract to an 8(a) ANC firm “is an easy and expedient method of meeting time-sensitive requirements.”\(^97\) As Kimberly Palmer wrote in Government Executive, the Department of Defense “spent less than $1 billion a year on contracts with tribally owned companies [prior to 2000.] In fiscal 2005, it spent $2.6 billion. Frank M. Ramos, director of [the] Pentagon’s Office of Small and Disadvantaged Business Utilization, attributes the shift to the wars in Iraq and Afghanistan. ‘Contracting officers had to ramp up [spending] and they grabbed whatever legitimate authority they had,’ he says.”\(^98\)

Another advantage of 8(a) ANC firms for agencies is that contracting with these firms helps them to meet their small business contracting goals, which GAO confirmed in its 2006 report on ANCs.\(^99\) Furthermore, agencies may receive credit for contract awards in more than one small business category. An agency that awards a contract to an 8(a) ANC firm can get credit for the overall small business goal (which is 23%) and the small, disadvantaged business goal (which is 5%).\(^100\)

For the reasons stated above, an unmanned and undertrained government acquisition workforce most likely is receptive to using 8(a) ANC firms, as demonstrated by the following example:

An Army contracting official told [GAO] that his agency’s limited contracting staff was the primary reason his office awarded an 8(a) sole-source contract to an ANC firm for base operations support. The official added that this contract had been competitively awarded three times previously to large businesses, but in 1999 his office decide it did not have the staff to administer another full and open competition.\(^101\)

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\(^95\) 25 U.S.C. § 1544. Apparently, the implementation of this provision requires the appropriation of funds necessary to pay eligible contractors this additional compensation. For example, Sec. 8022 of P.L. 107-117 (Department of Defense Appropriations Act, FY2002) appropriates $8 million “for incentive payments authorized by section 504 of the Indian Financing Act of 1074 (25 U.S.C. § 1544).”


\(^97\) Ibid., p. 16.


\(^100\) Ibid., pp. 18-19.

\(^101\) Ibid., p. 16.
Sole Source Awards

Although the ability to award a sole source contract in any amount to an 8(a) ANC firm is an attractive option for contracting officers, others have expressed concerns about the use of this option in some cases. In a letter addressed to the Secretaries of Defense, Homeland Security, and State, the Chairman and the Ranking Member of the House Committee on Government Reform noted that the “growth in sole-source contracts with Alaska Native Corporations raises important questions about whether the interests of the taxpayer are being protected.” Small businesses generally also are concerned about the advantages surrounding contracting with ANCs, as demonstrated by the following excerpt from an article on ANCs:

But for small businesses that believe they’ve been left out in the cold, the ANC program is anything but popular. Paul Miller represents a number of companies that have attempted to crack into the federal marketplace, only to lose out to ANCs on key awards, often without a formal competition. Many of his clients have moved on to other ventures. “When you bid over and over and don’t get the contract, you start to say, ‘why bother?’” says Miller, a partner and lobbyist with Miller/Wenhold Capitol Strategies of Fairfax, Va. “We have clients who have said, ‘We won’t do business with government anymore because it’s a waste of time and it’s going to ANCs or somebody else.’”

Examples of sole source contracts awarded to ANC 8(a) firms include an award by the Coalition Provisional Authority (CPA), in 2004, to NANA Pacific, LLC, which is an 8(a) subsidiary of NANA Regional Corporation. The CPA awarded a $70 million contract for the provision of services related to improving Iraqi seaports.

In recent years, at least two government agencies, the Department of Homeland Security (DHS) and the Air Force’s Air Combat Command (ACC), issued guidance related to the use of ANC 8(a) firms for sole source contracts. DHS issued an acquisition alert, effective June 15, 2007, which reminded the heads of DHS’s contracting activities of the following:

The guidance and training requirements outlined in this alert are a combined result of Government Accountability Office (GAO) recommendations from an audit on ANCs, the objectives of the DHS/SBA PA, and OCPO’s [Office of the Chief Procurement Officer’s] recent analysis of several contracts utilizing the Federal Acquisition Regulation (FAR) 19.805-1(b) sole source award authority for Indian Tribes/ANCS. Specifically, use of the FAR 19.805-1(b) authority must be judicious with appropriate safeguards to ensure that the cost/price is fair and reasonable, that the Indian Tribe/ANC has the technical ability to perform the work, that the Indian Tribe/ANC will be per forming the required percentage of the work, and that the award is in the best interests of the Government.

The Air Combat Command issued an acquisition alert for all of its contracting activities regarding sole source actions that exceed $550,000. This memorandum reads, in part:

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102 Letter from Tom Davis, Chairman, House Committee on Oversight and Government Reform, and Henry A. Waxman, Ranking Minority Member, House Committee on Oversight and Government Reform, to Donald H. Rumsfeld, Secretary of Defense, Michael Chertoff, Secretary of Homeland Security, and Condoleezza Rice, Secretary of State, March 4, 2005.


105 Apparently, this is a reference to the partnership agreement between DHS and SBA.

There is currently a great deal of scrutiny involved with using sole source contracts simply as a means to reach particular subcontractors. In these situations the sole source prime vendor performs little to none of the actual requirement but merely adds their own mark up pricing to the total costs paid by the government. Therefore, effective immediately ALL sole source actions over $550K ($550,000) must be approved by the Command Competition Advocate at ACC/A7K. The rationale for using sole source must be fully justified in writing. This new requirement applies to all sole source actions to include, but not limited to actions with Small Business, 8(a), HubZone, Service Disabled Veteran, and Alaskan Native Corporations.107

Subcontractors

FAR clause 52.219-14 imposes limitations on subcontracting under 8(a) contracts. The clause reads as follows:

(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 nonmanufacturer 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.108

The purpose of this clause “is to insure that small businesses do not pass along the benefits of their contracts to contractors.”109 Nevertheless, GAO found, in reviewing 16 files involving ANC 8(a) firms, “almost no evidence that the agencies are effectively monitoring compliance with this requirement, particularly where 8(a) ANC firms have partnered with large firms. As a result, there is an increased risk that an inappropriate degree of the work is being done by large business rather than by the ANC firms.”110 Both the agency and the firm are responsible for compliance with this clause: a company certifies in its offer “that [it] will meet the applicable percentage of work requirement for each contract when subcontracting” and the agencies is to monitor the firm.111

Reportedly, it is difficult to know to what extent ANCs comply with FAR 52.219-14 because “[t]here’s little comprehensive data available to prove or disprove [the assertion that ANCs perform their own contracts.] [The] SBA doesn’t collect the names of subcontractors or what portion of contracts they perform. Awarding agencies aren’t required to track subcontractors or even ask their names. Contracting officers have leeway to decide when a contract warrants further investigation.”112 For example, two New York Times reporters noted that Chenega Technology Services Corp., which had been awarded a sole source contract by the U.S. Customs Service in 2003, “had little experience maintaining high-tech

107 Memorandum from Raymond Carpenter, Acting Chief, Contracting Division, Headquarters Air Combat Command, Department of the Air Force, to ACC Contracting Activities, April 11, 2008.
108 Italics in original.
110 Ibid.
111 Ibid.
112 Palmer, “The Alaskan Edge.”
scanning machines. So it ended up subcontracting much of the work to some of the big companies that had originally expressed interest in the contract, including San Diego-based Science Applications International Corp., and Massachusetts-based American Science and Engineering Inc. However, the article did not mention the percentage of work performed by Chenega or its two subcontractors.

Subsidiaries

The ways in which certain ANCs manage their subsidiaries might be viewed by some as another type of business strategy. As already discussed, ANCs are permitted to form multiple subsidiaries, although each subsidiary has to have a different primary NAICS code. When an existing subsidiary graduates from the 8(a) program after reaching the nine-year limit on participation in the program, the ANC may form another subsidiary with the same primary NAICS code. A variation on this strategy is to create a new subsidiary when the incumbent subsidiary exceeds the small business threshold. GAO describes this process as follows: “ANCs sometimes leverage expertise and management by sharing staff and expertise among subsidiaries to win new contracts and create a subsidiary to win a follow-on contract when the original subsidiary outgrows its designation as ‘small.’” Other practices related to owning multiple subsidiaries include the following:

Own multiple subsidiaries with overlapping NAICS codes, either as a primary or secondary line of business. Leverage the expertise and management from existing subsidiaries to aid with the development of newer subsidiaries.... Some ANCs wholly own their 8(a) subsidiaries, while others invest in partially-owned subsidiaries. Some ANCs own subsidiaries that specialize in a niche market with the goal of developing an independently sustainable business. Other ANCs diversify their subsidiaries’ capabilities to increase opportunities to win government contracts in various industries.

On the other hand, some “ANCs have purposely limited their 8(a) involvement to a targeted industry with the goal of becoming independently sustainable—a strategy that, in their view, is consistent with the business development intent of the 8(a) program.”

Additional Resources

Additional information regarding ANCs may be found in the following documents (copies accompany this memorandum):


115 Ibid., p. 28.
116 Ibid., p. 7.


We trust that this memorandum will be of assistance. For questions regarding Alaska Native Corporations, contact Roger Walke at 707-8641 or Elaine Halchin at 707-0646; for questions regarding the legislative history of the 8(a) program, contact Kate Manuel at 707-4477; and for other questions regarding the 8(a) program, contact Oscar R. Gonzales at 707-0764.
Appendix. Legislative History of the 8(a) Program

The current 8(a) set-aside program for small businesses owned and controlled by socially and economically disadvantaged individuals resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses and those seeking to assist minorities. This merger of small business and minority programs first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978. A legislative history of 8(a) thus encompasses executive branch policy and regulations, as well as statutes.

Federal Programs for Small Businesses

The federal government has long been cognizant of the role that small businesses play in the U.S. economy and sought to strengthen this role. Government concerns about small businesses escalated during World War II, when 100 large corporations received 67% of all procurement contracts awarded by the federal government, and one in six small businesses failed due to lack of access to materials, labor or markets. Congress created the Smaller War Plants Corporation (SWPC) in 1942 in order to ameliorate small businesses’ financial difficulties while also “mobiliz[ing] the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes.” Among other things, the SWPC had the authority to enter into contracts with federal agencies and subcontract with small businesses or other entities for the performance of these contracts. The SWPC was dissolved at the end of World War II. Although the SWPC subcontracted few federal contracts with small businesses, Congress created the Small Defense Plants Administration (SDPA) in 1951 at the start of the Korean War to fill the same role that the SWPC played during World War II. The SDPA was granted the same authority to subcontract agency contracts with small businesses that the SWPC had during World War II. This authority to contract with federal agencies and then subcontract with small businesses for the performance of these contracts, which Congress granted to both the SWPC and SDPA, underlies the present 8(a) set-aside program.

The authority to subcontract agencies’ prime contracts with small businesses moved closer to its current form in 1953, when Congress created the Small Business Administration (SBA). Congress intended that the SBA would, in part, fulfill the roles of two other federal agencies. One was the Reconstruction

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120 Id.
121 P.L. 603 at § 4(f)(4) (authority to contract); id. at § 4(f)(5) (authority to subcontract).
122 See, e.g., 97 Cong. Rec. 412 (1951) (remarks by Rep. Patman) (noting that the SWPC let only 260 contracts pursuant to its statutory authority during World War II).
123 Act of July 31, 1951, P.L. 96, 65 Stat. 131. See also H.R. Rep. No. 639, 82d Cong., 1st Sess., at 31 (1951) (noting that the SDPA was created, in part, to ensure that the war “mobilization program ... extended down into the small plants” and small businesses received a fair proportion of federal prime contracts).
124 Id. at § 714(B)(2).
125 P.L. 83-163, § 207(c)-(d), 67 Stat. 230 (July 30, 1953).
126 Congress also intended the SBA to serve a peacetime role in assisting small businesses, unlike the SWPC and the SDPA. See, e.g., H.R. Rep. No. 494, supra note 117, at 2 (1953) (stating that the SBA would “continue many of the functions of the [SDPA] in the present mobilization period and in addition would be given powers and duties to encourage and assist small-business (continued...)
Finance Corporation, which had made loans to small businesses, among others, between 1932 and 1953 and whose existence was terminated by the Small Business Act of 1953. The other was the SDPA, whose authority was due to expire on June 30, 1953. In Sections 207(c) and (d) of the Small Business Act of 1953, Congress granted the SDPA's contracting/subcontracting authorities to the SBA:

It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary—

(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government; and

(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

However, the SBA's contracting/subcontracting authorities were of comparatively less concern to the Members who enacted the 1953 act than the SBA's loan authority, and they were not limited to small businesses owned and controlled by socially and economically disadvantaged individuals.

The Small Business Act of 1958, which made the SBA a permanent independent agency, retained the language of Sections 207(c) and (d) while making minor additions to it.

It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary—

(...continued)

enterprises in peacetime as well as in any future war or mobilization period”); S. Rep. No. 1714, 85th Cong., 2d Sess., at 9-10 (1958) (stating that the act would “put[] the procurement assistance program on a peacetime basis.”). The SDPA was arguably no more successful than the SWPC in subcontracting agency prime contracts with small businesses. See, e.g., H.R. Rep. No. 494, at 8 (noting that the SDPA's contracting/subcontracting authorities had “not been extensively used to date,” resulting in only $436 million worth of procurements through March 27, 1953).


128 Under Section 714 of the Defense Production Act of 1950, the SDPA was to expire as of June 30, 1953. P.L. 81-774, 64 Stat. 798 (Sept. 8, 1950).


130 See, e.g., S. Rep. No. 604, supra note 127, at 3 (8(a) subcontracting not listed as a major authority of the SBA, unlike loan authority); 99 Cong. Rec. 6126-56 (June 5, 1953) (loan authority dominating House debate on the 1953 act).


132 While the version of the Small Business Act of 1953 passed by the House would have created a permanent SBA, the version passed by the Senate provided for only a temporary SBA. The Senate's version prevailed in the conference committee, but the House's intent was later realized by the Small Business Act of 1958. See, e.g., H.R. 943, 83d Cong., 1st Sess., at 18 (1953).

133 See S. Rep. No. 1714, supra note 126, at 9-10 (noting, for example, that the 1958 act added the phrase “upon such terms and conditions as may be agreed upon between the Administration and the procurement officer” at the end of the subsection discussing SBA contracts with federal agencies in the 1953 act).
(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and

(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management, services as may be necessary to enable the Administration to perform such contracts.134

This language was codified in Section 8(a) of the 1958 act, thereby giving the future set-aside program its common name: the “8(a) program.” Section 8(a) in its earliest form allowed the SBA to subcontract with any small business or other concern, just like Sections 207(c)-(d) of the Small Business Act of 1953 did.

The SBA did not immediately create a viable subcontracting program under the authority of Section 8(a), however. To the contrary, despite the existence of the contracting/subcontracting authorities in Section 8(a), the SBA did little to subcontract agencies’ prime contracts with small businesses in the fifteen years between 1953 and 1967. It was not until 1967, when federal programs for minorities effectively merged with those for small businesses, that Section 8(a) served as the basis for an active federal subcontracting program for small businesses.135

Federal Programs for Minorities and the Economically Disadvantaged

Federal programs for minorities began developing at approximately the same time as those for small businesses, although there was initially no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt’s order on June 25, 1941 requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of race, creed, color or national origin.136 Presidents Harry Truman and Dwight Eisenhower later issued similar orders prohibiting racial discrimination by federal contractors.137 Eisenhower also issued a separate executive order, establishing a Government Contract Committee (GCC) and giving it explicit directions for encouraging and enforcing contractors’ compliance with the federal nondiscrimination policy.138 Among other things, the GCC required contractors to furnish employment statistics indicating the number of “Negro” employees, as well as employees belonging to other minority groups, including “Spanish-American, Orientals, Indians, Jews, Puerto Ricans, etc.”139 President John F.

135 See Minority Business Enterprise Development, supra note 118, at 11 (“Because the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA’s power to contract with other government agencies essentially went unused. The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA’s 8(a) authority from its dormant state.”).
139 President’s Comm. on Gov’t Con., Compliance Guide: Recommendations for Obtaining Compliance with the Nondiscrimination Provisions in Government Contracts 21 (1958).
Kennedy later abolished the GCC and replaced it with the President’s Committee on Equal Employment Opportunity (PCEEO),\textsuperscript{140} which similarly required federal contractors to report on the number of minority employees, including “Negroes,” “Orientals,” “American Indians,” and “Spanish Americans.”\textsuperscript{141}

Most of the preexisting programs for minorities established under executive orders were effectively repealed in 1964, when Congress passed the Civil Rights Act.\textsuperscript{142} This act prohibited racial discrimination by employers, including federal contractors. Congress also enacted the first statute designed to assist economically disadvantaged individuals in 1964. The Economic Opportunity Act of 1964, in part, directed the SBA to assist small businesses owned by low-income individuals.\textsuperscript{143} However, executive orders continued to be issued even after these early statutory programs were created. For example, Executive Order 11458, issued on March 7, 1969, created the Minority Business Enterprise (MBE) program within the Department of Commerce.\textsuperscript{144} A later executive order charged the MBE program with strengthening businesses owned or controlled by one or more socially or economically disadvantaged individuals.\textsuperscript{145} This MBE program is kin to the current 8(a) program, but was not its direct predecessor for several reasons. First, all businesses were eligible for the MBE program regardless of their size (large or small). Second, businesses were not required to show both social and economic disadvantage in order to be eligible for the MBE program; either social disadvantage or economic disadvantage sufficed.

Early Uses of 8(a) to Benefit Minority-Owned Small Businesses

In short, by 1967, the federal government had a history of programs benefiting small businesses and a history of programs benefiting minorities. All that remained was to merge these two types of programs into one, benefiting minority-owned small businesses. The Kerner Commission’s report on the causes of the urban riots of 1966 provided the impetus for this merger by concluding that African Americans would need “special encouragement” to enter the economic mainstream.\textsuperscript{146} Presidents Lyndon Johnson and Richard Nixon developed the foundations for the present 8(a) program in the hope of providing such “encouragement.”\textsuperscript{147}

Johnson’s program—the President’s Test Cities Program (PTCP)—used 8(a) to subcontract with small businesses for the benefit of minorities,\textsuperscript{148} but its reliance on 8(a) was minimal and the program did not limit eligibility to minority-owned businesses. Established in 1967, the PTCP sought to bring jobs to unemployed individuals, who were largely minorities, in five major urban areas.\textsuperscript{149} The SBA’s contracting/subcontracting authorities played some role in this, as the SBA awarded eight subcontracts under its 8(a) authority in 1968.\textsuperscript{150} However, the Departments of Commerce and Labor played a much


\textsuperscript{141} See, e.g., Michael I. Sovrni, Legal Restraints on Racial Discrimination in Employment 123 (1966) (reproducing “Form 40,” which companies used to record employment statistics for the PCEEO).


\textsuperscript{143} P.L. 90-222, § 106(a), 81 Stat. 672 (1967). The act was repealed in 1974.


\textsuperscript{146} Report of the National Advisory Commission on Civil Disorders 424 (1968).

\textsuperscript{147} S. Rep. No. 95-1070, 95th Cong., 2d Sess., at 14 (1978) (“The 8(a) program simply evolved as a result of Executive orders issued ... in response to the 1967 Report of the Commission on Civil Disorders.”).

\textsuperscript{148} See, e.g., Minority Business Enterprise Development, supra note 118, at 11-12.

\textsuperscript{149} Id.

greater role in the PTCP, largely by making grants to companies that agreed to hire and train the unemployed.\textsuperscript{151} Under the PTCP, the SBA subcontracted with any small business willing to locate in designated urban areas and hire unemployed individuals, or to sponsor minority-owned businesses by providing capital or management assistance.\textsuperscript{152} The SBA’s use of non-minority firms here proved to be of great concern to the drafters of the 1978 amendments to the Small Business Act and was one of the reasons for their enactment.\textsuperscript{153} Although the PTCP program was phased out in 1968, it established a precedent for SBA’s use of its contracting/subcontracting authorities under Section 8(a) to benefit racial and ethnic minorities.

The Nixon Administration relied upon the precedent of the PTCP in implementing its “Black Capitalism” program in 1969, although it expressly limited eligibility for subcontracts under Section 8(a) to minority-owned small businesses. It was also the first to characterize minorities as “disadvantaged” for purposes of small business programs. Nixon called for federal agencies to award a greater percentage of federal contracts to minority-owned small businesses,\textsuperscript{154} and for the newly established Office of Minority Business Enterprise (OMBE) to develop programs to encourage federal contractors to subcontract with minority-owned small businesses.\textsuperscript{155} Nixon’s Executive Order 11518, in particular, called directly upon the SBA to “aid, counsel, assist and protect ... the interests of small business concerns,” including minority-owned small businesses.\textsuperscript{156}

The SBA responded to Executive Order 11518 by establishing its earliest regulations for the 8(a) set-aside program. In 1970, the first of these regulations articulated the SBA’s policy regarding 8(a): “It is the policy of the SBA to use [this] authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place.”\textsuperscript{157} However, although the SBA’s regulations limited eligibility for its 8(a) program to small businesses owned by “disadvantaged persons,” they did not initially articulate which persons were “disadvantaged” with a high degree of specificity. At first, the regulations said only that the category of “disadvantaged persons” “often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos, and Aleuts.”\textsuperscript{158} In 1973, however, the SBA finally defined “disadvantaged persons” as:

Persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar causes. Such persons include, but are not limited to, black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts.\textsuperscript{159}

Despite the fact that the Small Business Act of 1958 did not limit the SBA’s contracting/subcontracting authorities under Section 8(a) to small businesses owned by disadvantaged persons, the U.S. Court of

\textsuperscript{151} Minority Business Enterprise, supra note 119, at 11-12.
\textsuperscript{152} See, e.g., Big Government and Affirmative Action, supra note 150, at 66.
\textsuperscript{156} Exec. Order No. 11518, supra note 154.
\textsuperscript{157} 13 C.F.R. § 124.8-1(b) (1970).
\textsuperscript{158} 13 C.F.R. § 124.8-1(c) (1970).
\textsuperscript{159} 13 C.F.R. § 124.8(c) (1973).
Appeals for the Fifth Circuit upheld these regulations against a challenge alleging, among other things, that the SBA abused its discretion and acted in excess of its authority in promulgating them.\textsuperscript{160}

The 1978 Amendments to the Small Business Act

In 1978, Congress finally established a statutory basis for the SBA’s 8(a) subcontracting program for “socially and economically disadvantaged small business concerns,” as they were initially called.\textsuperscript{161} Congress did so, in part, because it believed that the effectiveness of the 8(a) program had been hampered by its lack of a statutory basis.\textsuperscript{162} Section 202 of the 1978 amendments to the Small Business Act created such a statutory basis by revising Section 8(a) of the Small Business Act of 1958 so that it explicitly required the SBA to subcontract agencies’ prime contracts with “socially and economically disadvantaged small business concerns”:

It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and the procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator;

(B) to enter into contracts with such agency, as shall be designated by the President within 60 days after the effective date of this paragraph, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such officer shall promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration, and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such written communication, the Administration shall decide whether to perform such procurement contract or

\textsuperscript{160} Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973). The Fifth Circuit also found that the SBA’s regulations did not violate federal laws requiring competition in contracting, nor did they abridge plaintiff’s rights to due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution.


\textsuperscript{162} S. Rep. No. 95-1070, supra note 147, at 14 (“One of the underlying reasons for the failure of this effort is that the program has no legislative basis.”); H.R. Rep. No. 95-949, supra note 153, at 4 (“Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations ... [The] program is not as successful as it could be.”).
withdraw its prior certification that the Administration is competent and responsible to perform such contract; and

(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.\(^{163}\)

Congress defined “economically disadvantaged individuals,” for purposes of the 8(a) program, as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired ... as compared to others in the same business area who are not socially disadvantaged.”\(^{164}\)

There was relatively little discussion about the meaning of this phrase in Congress at the time when the 1978 amendments were enacted, and the phrase has seldom been central to public debates concerning the 8(a) program. This is perhaps because 80-90% of Americans reportedly qualify as “economically disadvantaged” under the regulations that the SBA promulgated to implement the requirement for economic disadvantage.\(^{165}\)

The meaning of “socially disadvantaged individuals,” however, was the subject of much debate at the time when the 1978 amendments were enacted—and remained so thereafter. Some Members of Congress, perhaps focusing on the SBA’s use of its 8(a) contracting/subcontracting authorities in 1968-1970, viewed the 8(a) program as a program for African Americans and would have defined “social disadvantage” accordingly.\(^{166}\) Others favored a somewhat broader view, including both African Americans and Native Americans on the theory that only those who did not come to the United States seeking the “American dream” (i.e., African Americans and Native Americans) should be seen as socially disadvantaged.\(^{167}\) Yet others suggested that groups that are not racial or ethnic minorities should be able to qualify as “socially disadvantaged,”\(^{168}\) or that individuals ought to be able to prove they are personally socially disadvantaged even if they are not members of racial or ethnic minorities.\(^{169}\) Ultimately, the bill that passed the House defined this term, in part, by establishing a rebuttable presumption that African Americans and Hispanic Americans were socially disadvantaged,\(^{170}\) while the bill that passed the Senate did not reference any racial or ethnic groups in defining “social disadvantage.”\(^{171}\)

\(^{163}\) P.L. 95-507, at § 202. Agencies’ authority under Section 8(B) of the 1978 act was originally set to expire September 30, 1980, but was later extended.

\(^{164}\) Id.


\(^{167}\) Mitchell was a Member of the U.S. House of Representatives and leader of the Black Caucus when the 1978 amendments were enacted.

\(^{168}\) See, e.g., Testimony Before the House Committee on Small Business, Subcommittee on General Oversight and Minority Enterprise, Task Force on Minority Enterprise, 96th Cong. 21 (1979).

\(^{169}\) See, e.g., H.R. Rep. No. 95-949, supra note 153, at 9 (“[T]he committee intends that the SBA give most serious consideration to, among others, women business owners” when determining which groups are socially disadvantaged); H.R. Rep. No. 95-1714, 95th Cong., 2d Sess., at 22 (1978) (“A poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged.”).

\(^{170}\) See, e.g., H.R. Rep. No. 95-949, supra note 153, at 9 (“[T]he bill does recognize that persons falling outside of the racial and ethnic groups presumed to be disadvantaged, may nevertheless be disadvantaged.”).

\(^{171}\) See, e.g., H.R. Conf. Rep. No. 95-1714, supra note 168, at 20 (noting that the House bill, H.R. 11318, 95th Cong., as reported from the House Permanent Select Committee on Small Business, created a rebuttable presumption that African Americans and Hispanic Americans are socially disadvantaged in absence of substantial evidence demonstrating that specific individuals have (continued...
The conference committee reconciling the House and Senate versions of the 1978 amendments to the Small Business Act ultimately arrived at a definition of “socially disadvantaged individuals” that was broader than the definition used in the SBA's 1973 regulation and included “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” This definition did not incorporate the rebuttable presumption that members of certain groups are socially disadvantaged that was included in the House bill. However, the conference bill included congressional findings that “Black Americans, Hispanic Americans, Native Americans, and other minorities” were socially disadvantaged, thereby arguably achieving a similar effect. Two things are particularly noteworthy about the findings in the 1978 amendments. First, the listing of groups that Congress found to be socially disadvantaged did not include all the groups that the SBA had included in its 1973 regulation. “Oriental Americans,” in particular, were not mentioned in the findings, nor were “Eskimos” or “Aleuts.” Second, Native Americans were a comparatively late addition to the listing in the findings. They were not included in either the House or Senate bills. Rather, Native Americans were added by the conference committee, which further provided that the category of “Native Americans” includes “American Indians, Eskimos, Aleuts and Native Hawaiians.” The conference bill further granted the SBA discretion to recognize groups or individuals not referenced in the findings as socially disadvantaged. Its doing so was in keeping with the apparent intent of the House and Senate, whose debates often mentioned that the 1978 amendments to the Small Business Act would grant the SBA “sufficient discretion” to recognize other minority groups or individuals as socially disadvantaged.

Executive Branch Implementation of the 1978 Amendments

After the 1978 amendments to the Small Business Act were enacted, the SBA began the lengthy process of promulgating regulations to implement the 8(a) subcontracting program for “socially and economically disadvantaged small business concerns.” The SBA ultimately addressed all aspects of the 8(a) program, from entry into the program to exit from it. As during the House and Senate debates over the 1978 act, however, the definition of “social disadvantage” occupied a central place in the SBA’s rule-making process. While the drafters of the 1978 act had expressly found that “Black Americans, Hispanic Americans, and Native Americans” were socially disadvantaged, they granted the SBA discretion to recognize other groups and individuals as socially disadvantaged. The formulation and application of the regulations governing such recognition played a substantial role in the SBA’s implementation of the 8(a) program—and in public discussions thereof. Recognition of a group as socially disadvantaged is significant because group members are presumed to be socially disadvantaged when applying to the 8(a)

(...continued)

not experienced business difficulties due to race or ethnicity).
171 See, e.g., S. Rep. 95-1070, supra note 147, at 13-16.
173 Id. at § 201.
175 P.L. 95-507, at § 202 (granting the SBA’s Associate Administrator for Minority Small Business and Capital Ownership Development the authority to make determinations regarding which other groups are socially disadvantaged).
176 H.R. Rep. No. 95-949, supra note 153, at 9 (expressing the view that Sections 201 and 202 of the bill provided “sufficient discretion ... to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social ... disadvantage.”).
program.\textsuperscript{177} They do not need to prove social disadvantage as must be done by individual applicants who are not members of recognized groups.\textsuperscript{178}

When it came to recognizing other minority groups as socially disadvantaged, the SBA initially signaled its intent to take an apparently broad approach, including factors that had not been publicly considered in the congressional debates on the 1978 act, such as “Vietnam-era service in the Armed Forces.”\textsuperscript{179} By 1980, however, the SBA had arrived at an arguably narrower three-part “test” for social disadvantage that it proceeded to apply to the petitions of numerous groups over the next decade.\textsuperscript{180} The criteria comprising this test were largely based upon the Economic Opportunity Act of 1964, which had indicated that the SBA should attempt to assist small businesses in ways that furthered the purposes of the act,\textsuperscript{181} and included:

1. whether the group had suffered from prejudice, bias, or discriminatory practices;
2. whether the prejudice, bias, or discriminatory practices confronting the group resulted in economic deprivation for group members; and
3. whether the economic deprivation of group members had produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.\textsuperscript{182}

Using these criteria, the SBA recognized numerous groups as socially disadvantaged, while rejecting others, as Table 1 illustrates.\textsuperscript{183}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Group & Places of origin included in group & Date of determination & Outcome of petition \\
\hline
Native Americans & Hawaii & May 29, 1979 & Granted \\
\hline
\end{tabular}
\caption{Groups Petitioning for Recognition as Socially Disadvantaged}
\end{table}

\textsuperscript{177} See 13 C.F.R. § 124.103(b)(1) (2009).
\textsuperscript{178} See 13 C.F.R. § 124.103(c) (2009).
\textsuperscript{179} Small Bus. Admin., Meaning of Socially or Economically Disadvantaged, quoted in Gross Presumptions, supra note 165, at 123-24 (noting that the SBA initially intended to consider income, location, education, physical or other disabilities, prevailing or restrictive practices, and prior military service in making its determinations).
\textsuperscript{180} See 13 C.F.R. § 124.103(d)(1) (1980) (allowing “representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias” to petition SBA for recognition as socially disadvantaged).
\textsuperscript{181} Minority Business Enterprise Development, supra note 118, at 58.
\textsuperscript{182} 13 C.F.R. § 124.103(d)(2)(i)-(iii) (1980).
\textsuperscript{183} The end result of the SBA’s determinations on these petitions is the current Subsection 124.103(b)(1) of Title 13 of the Code of Federal Regulations, which recognizes more than thirty groups as socially disadvantaged for purposes of the SBA’s 8(a) program. These groups include:

Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau, Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).
<table>
<thead>
<tr>
<th>Group</th>
<th>Places of origin included in group</th>
<th>Date of determination</th>
<th>Outcome of petition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asian Americans</td>
<td>Japan, China, The Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan</td>
<td>July 6, 1979</td>
<td>Granted</td>
</tr>
<tr>
<td>Hasidic Jews</td>
<td>n/a</td>
<td>April 9, 1980</td>
<td>Denied a</td>
</tr>
<tr>
<td>Women</td>
<td>n/a</td>
<td>May 11, 1982</td>
<td>Denied</td>
</tr>
<tr>
<td>Asian Indian Americans</td>
<td>India, Pakistan, or Bangladesh</td>
<td>Aug. 23, 1982</td>
<td>Granted</td>
</tr>
<tr>
<td>Disabled veterans</td>
<td>n/a</td>
<td>Dec. 16, 1987</td>
<td>Denied</td>
</tr>
<tr>
<td>Asian Pacific Americans</td>
<td>Sri Lanka</td>
<td>Mar. 15, 1988</td>
<td>Granted</td>
</tr>
<tr>
<td>Asian Pacific Americans</td>
<td>Indonesia</td>
<td>July 25, 1988</td>
<td>Granted</td>
</tr>
<tr>
<td>n/a</td>
<td>Iran</td>
<td>Jan. 1, 1989</td>
<td>Denied</td>
</tr>
<tr>
<td>Asian Pacific Americans</td>
<td>Burma, Thailand, Malaysia, Singapore, Brunei, Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Marianas Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Nauru</td>
<td>Aug. 21, 1989</td>
<td>Granted</td>
</tr>
<tr>
<td>Subcontinent Asian-Americans</td>
<td>The Maldives</td>
<td>Aug. 21, 1989</td>
<td>Granted</td>
</tr>
<tr>
<td>Subcontinent Asians</td>
<td>Bhutan, Nepal</td>
<td>Aug. 21, 1989</td>
<td>Granted</td>
</tr>
</tbody>
</table>


a. Hasidic Jews are, however, among the minority groups recognized as socially disadvantaged for purposes of the Commerce Department's MBE program, now known as the Minority Business Development Agency. See 15 C.F.R. § 1400.1(c)(1972).

Individuals who are not members of racial or ethnic groups that are recognized as socially disadvantaged can show personal disadvantage under the SBA regulations, in keeping with the apparent intent of the drafters of the 1978 act. Initially, the SBA required that individuals seeking to show personal disadvantage provide "clear and convincing evidence" of the following:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

184 See supra note 169.
(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.\(^1\)

In 1998, however, the SBA lowered the evidentiary standard for showing personal disadvantage to a "preponderance of the evidence."\(^2\)

Similarly, the SBA provided that the presumption of social disadvantage accorded to members of recognized minority groups "may be overcome with credible evidence to the contrary."\(^3\)

**Statutory Amendments to the 1978 Act**

There have been relatively few statutory amendments to the 1978 act, and only two of these amendments have arguably been substantive. Much of the development of the 8(a) program after enactment of the 1978 act has thus been determined by administrative law.

In terms of substantive changes, the Business Opportunity Development Reform Act (BODRA) of 1988\(^4\) made what some commentators characterize as the "first major revision of the 8(a) program in ten years."\(^5\) Congress enacted BODRA, in part, because of concerns that the 8(a) program had been "unable to achieve its goal of developing disadvantaged firms into viable businesses."\(^6\) BODRA did not, however, address the criteria for eligibility or the definitions of "social disadvantage" and "economic disadvantage" at the core of the 8(a) subcontracting program. Rather, BODRA focused on business development activities for 8(a) participants and overall management of the 8(a) program.\(^7\) BODRA also amended Section 644(g) of the Small Business Act to require that the President establish government-wide goals for contracting with small businesses owned and controlled by socially and economically disadvantaged individuals.\(^8\) This government-wide goal is to be no less than five percent of the value of all federal procurement contracts awarded per fiscal year.\(^9\) Another substantive change was, however, arguably effected prior to BODRA by the Small Business Export Expansion Act of 1980, which required the SBA to negotiate "graduation" dates with 8(a) firms, providing for firms' ultimate exit from the 8(a) program.\(^10\)

Other amendments have been comparatively minor, such as those made by:

- P.L. 102-366, which changed the lettering and numbering of subsections;
- P.L. 101-574, which removed the language stating that agencies' authority to award contracts under Subsection 8(B) of the 1978 act ended on September 30, 1988; struck

\(^1\) 13 C.F.R. § 124.103(c)(2) (1997).
\(^3\) See 13 C.F.R. § 124.103(b)(3) (2009).
\(^5\) Id.
\(^6\) Id.
\(^7\) P.L. 100-656, at § 502(3) (codified at 15 U.S.C. § 644(g)(1)).
\(^8\) Id.
Subsection 8(B) and replaced it with the text of Subsection 8(C); and created a new Subsection (C);

- P.L. 100-656, which inserted provisions authorizing administrative appeals from procurement officers’ adverse decisions and providing for decisions by the Secretary or agency head on the appeal, as well as added the language presently contained in Subparagraph 8(a)(1)(D);

- P.L. 99-567, which substituted a provision that no contract may be entered into under Subsection 8(B) of the 1978 Act after September 30, 1988, for the provision that no such contract could be entered into prior to October 1, 1983, nor after September 30, 1985;

- P.L. 99-500, which added language to the present Subparagraph 8(a)(1)(A) prohibiting contracts from being awarded if the award would result in a cost to the awarding agency that exceeds the fair market price; and