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COMMENT

AMERICA CINCHES ITS PURSE STRINGS ON GOVERNMENT CONTRACTS: NAVIGATING SECTION 8(A) OF THE SMALL BUSINESS ACT THROUGH A RECESSION ECONOMY

*Nicholas M. Jones**

Introduction

Generally speaking, tribal economics and tribally owned business ventures in the United States have a rocky historical condition.¹ Only recently have certain tribes and tribal entities² seen much economic development. Unfortunately, great disparity exists between those tribes that have “hit the jackpot” and those that continue to sink deeper into poverty.³ Yet, for better or worse, since the inception of the nation, the United States federal government has taken an active role in tribal economics.⁴

In recent years, the active role taken by the federal government is providing economic opportunities to tribally owned businesses. Through the auspices of the Small Business Administration, Congress took a large step in providing economic incentives for tribes to create for-profit business entities separate from their tribal governments and to use those entities to procure lucrative contracts with the United States government. Specifically, the Department of Defense granted and continues to grant billions of dollars worth of contracts to tribal businesses through advantageous and often extremely truncated

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1. See John L. Williams, *Paving the Way for the Future: Potential Structures for Tribal Economic Development*, 2 UCLA INDIGENOUS PEOPLES' J. OF L., CULTURE & RESISTANCE 59 (2005), available at <http://www.law.ucla.edu/ipjlc/volume2/williams.pdf>. This article provides the definitive history of tribal economics in America.

2. Unless otherwise noted, throughout this comment references to “Indians,” “Natives,” “Indian tribe(s),” “tribes,” or “Native Americans” include federally recognized tribes and Alaska Native Corporations.

3. For an example of a tribe with economic success and legal maneuvering bordering on the ridiculous, see BRETT DUVAL FROMSON, *HITTING THE JACKPOT* (2003), and for recognition of many other tribes that continue to suffer economic hardships, see Williams, *supra* note 1, at 84 (noting that “Indian country still suffers from widespread poverty”).

4. Williams, *supra* note 1.

bidding processes. In response, protestors, through legal, political, and public fora, often express outrage at the success of certain Indian tribes and Alaska Native Corporations,⁵ citing abuse of the bidding and contracting processes and government corruption.⁶ The protestors claim that certain Indian tribes and Alaska Native Corporations procure government contracts unfairly, to the detriment of non-tribal competing businesses and the taxpayer at large.⁷

The most significant claims of alleged corruption concern funneling government contract work and proceeds to businesses that do not themselves procure the contracts and would not qualify for government contract awards. This concept is known in the government contracting community as a “pass-through.”⁸ In other words, the business entity qualifying for a government-awarded contract procures such contract and subcontracts some or all of the work (and thus the proceeds) to a non-qualifying entity. Hence, public outrage ensues, and legal, political, and public media ramifications reflect negatively on the business, the owning tribe, and the entire Native community.

This comment explains how such problems arise with respect to the government contracting process and provides approaches and advice for tribally owned businesses. Part I of this comment outlines the historical treatment of Indian-owned businesses and Alaskan Native Corporations in the United States, including the development of tribal economics and the enactment of the Section 8(a) Business Development Program (the 8(a) BD program). Part II discusses the problems, legally and in the court of public

5. “Alaska Natives, including Indians, Eskimos, and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07(3)(a) (Nell Jessup Newton et al. eds., Michie 2005); see also U.S. CONST. art. I, § 8, cl. 3. Thus, Alaska Native Corporations are treated substantially the same as Indian tribes under all of the provisions mentioned in this article. See 15 U.S.C. § 637(a)(4) (2006). One substantive difference is the ease with which Alaska Native Corporations can obtain status as a business that qualifies for government contracting advantages. 13 C.F.R. § 124.109(a)(2), (a)(4) (2006). However, tribally owned business concerns, governed by the same provision, can still qualify with relative ease compared to non-tribal entities. *Id.* § 124.109(b) (showing Indian tribes have more to prove insofar as “economic disadvantage” is concerned, but “social disadvantage” is presumed).

6. See e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT NO. GAO-06-399, CONTRACT MANAGEMENT INCREASED USE OF ALASKA NATIVE CORPORATIONS’ SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 22-23 (2006), available at <http://www.gao.gov/new.items/d06399.pdf> [hereinafter REPORT NO. GAO-06-399]; Jenny J. Yang, Note, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 ALASKA L. REV. 315, 337 (2006).

7. Yang, *supra* note 6, at 377.

8. See *supra* note 6.

opinion, that arise when tribal businesses take advantage of the 8(a) BD program. Part III provides strategies for avoiding the pitfalls of government contracting in the 8(a) BD program, including maintaining eligibility for contracts. Finally, Part IV reveals strategies to prepare for the future under the 8(a) BD program, as well as suggesting courses of action for developing tribally owned small businesses.

I. A Brief History of Indian Economics and Business in the United States

To understand the development of the Small Business Administration and federal programs offering aid to Native Americans, a brief look at the history of tribal economics and business in America is necessary. The context within which tribal economies developed is also necessary in understanding and forming opinions about the nature of government aid to tribal businesses today, and such context is useful in tempering the public perception about these government initiatives. This section outlines the historical advancement of Native American business enterprises in general.⁹ Then, this comment will focus on the more narrow issue of federal programs enacted to remedy the poverty and economic stagnancy of Indian tribes in America.

A. Federal Policy on Indian Business and Economics

Although post-Revolutionary America did not want to deal with the legal aspects of unilaterally assuming jurisdiction over its native peoples,¹⁰ it finally realized the tribes maintained *some* level of authority over their own kind. From 1823 to 1832, the Supreme Court recognized inherent tribal sovereignty with the Marshall Trilogy.¹¹ Tribal sovereignty recognizes the right of the tribes to control the internal aspects of self-governance.¹² Although the Supreme Court set forth this judicial mandate, recognizing the political autonomy of tribes, the executive and legislative branches of government still maintained control over tribal activity through relocation and creation of

9. Williams, *supra* note 1.

10. *Id.* at 67.

11. Through the Marshall Trilogy, the infamous Chief Justice John Marshall defined tribal sovereignty. The Trilogy: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

12. *Johnson*, 21 U.S. (8 Wheat.) 543; *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515; *see also* Williams, *supra* note 1.

reservations in the first hundred years of American interaction with its native peoples.¹³

Upon relocation and creation of tribal reservations, tribes became isolated from economic relations outside of the tribe.¹⁴ Most tribes resiliently maintained their culture and government, although many became necessarily dependent on the government for federal subsidies and cash handouts, which exposed their tribal economy to “interference from Washington.”¹⁵ In essence, the government created a dependency system whereby it could control the tribes’ economic fate.¹⁶ Yet, even in the face of this government policy, many tribes were able to develop successful economies.¹⁷ Such successful tribes based their success on their affirmed property rights in the reservation land and from their intact tribal governments protected by the Marshall Trilogy.¹⁸

Over the next hundred years, disagreement among the Supreme Court, Congress, and politicians in Washington created an incongruous and incomprehensible federal policy on tribes and tribal economic development.¹⁹ Commentators refer colloquially to this era as a “rollercoaster ride” in federal Indian policy.²⁰ Contradiction belied every decision imposed upon the tribes by a federal government in which they had no representation, because of course, tribal citizens could not vote for congressional representation.²¹ By 1871, Congress passed an act disallowing and making illegal negotiating treaties or contracting with Indian tribes or individual Indians.²² Moreover, by 1886, the Supreme Court had established Congress’s plenary power over tribal sovereignty,²³ which has been described as “absolute” authority over tribes.²⁴

13. Williams, *supra* note 1, at 73.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 570 (“That hereafter no contract or agreement of any kind shall be made by any person, with any tribe of Indians, or individual Indian not a citizen of the United States . . .”).

23. *United States v. Kagama*, 118 U.S. 375 (1886) (finding congressional authority based on dependency); *see also* *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating that tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance”); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding congressional authority to abrogate treaties).

24. Williams, *supra* note 1, at 73.

Without anyone with whom to contract, and being subject to nearly absolute congressional control, Indians depended upon the government for any economic interaction.²⁵ Thus, where the business world demands stability and predictability for success, Indian tribes were ostracized from external business opportunities by law and could not predict what move the federal government would make next in regard to their tribal sovereignty and contracting rights.²⁶ Indian tribes and privately owned Indian businesses could not thrive in a market that excluded them from participating.

Under Congress' established plenary power, the unpredictable exercise of control over tribes resulted in detrimental impacts to tribal governments in the late 1800s through the turn of the century. After indirectly removing tribes' ability to make contracts, Congress began whittling away at the last and greatest asset the tribes had, their land.²⁷ By privatizing communal tribal land holdings, Congress allotted some of the tribal lands back to individual tribal members and sold the rest to non-Indians.²⁸ The congressional allotment programs put two-thirds of Indian land into the possession of non-Indians, resulting in widespread poverty among the tribes.²⁹ Throughout the 1920s and early 1930s, the abysmal result of Congress's allotment scheme alongside "arrogant and undirected" federal Indian programs "could be seen on every reservation: landless Indians living in incredible poverty, an infant mortality rate more than twice that of the white population, widespread alcoholism and crime."³⁰

At least initially, legislation stemming from the Great Depression did not overlook the plight of Indian tribes.³¹ New Deal initiatives were extended to

25. Note the cyclical nature of the dependency: because Congress took away the contracting rights and controls tribal sovereignty, Congress also must act to protect the dependent tribes.

26. See generally Williams, *supra* note 1, at 73.

27. General Allotment Act of 1887, ch. 119, 24 Stat. 388. The tribes' land base remains the most lucrative asset available to a tribe, as "Indian nations still control 56 million acres of land—two percent of the land mass of the United States—and substantial natural resources. Some tribes rely on these resources to rebuild their economic base . . ." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01.

28. 24 Stat. at 388-90.

29. Williams, *supra* note 1, at 75; see also THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 28 (Vine Deloria, Jr. ed., 2002) (quoting the remarks of John Collier from the Minutes of the Plains Congress, Rapid City, South Dakota, March 2, 1934).

30. Williams, *supra* note 1, at 75; see also GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-35, at 9 (1980).

31. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.04(3)(a)(i) ("The

Indians in the Indian Reorganization Act (IRA),³² which was appropriately referred to as the “Indian New Deal.”³³ The IRA reversed some of the effects of the allotment policy, returning lands to tribal ownership.³⁴ From the passage of the IRA in 1934 until the coming of World War II, the federal government made a concerted effort to restore tribal autonomy by promoting the growth and rehabilitation of tribal governments and economies.³⁵ This effort included “Oklahoma tribes and Alaskan Native groups that were originally excluded from [the IRA].”³⁶ Most importantly, to chronicle the development of tribally owned businesses, the IRA was one of the first attempts by the federal government to “[fund] the organization of governments and *tribal corporations* for select tribes.”³⁷ By 1940, mixed sentiment toward the effects of the Indian New Deal emerged in Congress, as some members of Congress felt the IRA was not promoting its purpose of creating tribal autonomy but rather putting control over tribal resources into the hands of tribal corporations that would neither cooperate with nor benefit their local economies.³⁸ Although Congress made a temporary shift in favor of tribal autonomy and tribally owned businesses, the coming of World War II stifled the voices of Indian New Deal promoters and continued the incongruous federal policy toward tribes, to the detriment of tribally owned businesses.³⁹

Instead of absolute federal control over tribes through Congress’s plenary power and federal handouts, by the 1950s Congress was ready to terminate many tribes altogether.⁴⁰ Congress’s termination policy gave tribes the rights and duties of regular American citizens, allowing tribes to bring claims against

federal government’s efforts to transform governance in Indian country accelerated with publication in 1928 of the influential Meriam Report, which documented widespread poverty and extensive BIA mismanagement and administrative abuse throughout Indian country. As a new generation of reformers advocated increased respect for native life ways, the federal government passed legislation aimed at reestablishing tribal governance, reconstituting tribal land bases, and revitalizing tribal economies and cultures. The most prominent and comprehensive of these measures was the Indian Reorganization Act of 1934 (IRA).”

32. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

33. Williams, *supra* note 1, at 76; *see also* TAYLOR, *supra* note 30, at 121.

34. Williams, *supra* note 1, at 76.

35. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01.

36. Williams, *supra* note 1, at 76.

37. *Id.* (emphasis added); *see also* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (7th ed. 1984).

38. *See* TAYLOR, *supra* note 30.

39. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.04(3)(a)(i); Williams, *supra* note 1, at 76.

40. Williams, *supra* note 1, at 77-78.

the United States as they arose in the termination process.⁴¹ Yet, termination policy was short-lived as state and local governments were unwilling to take on the burden of policing and maintaining jurisdiction over the newly disbanded tribes.⁴² After the outrage expressed by state and local governments and prompting from the Executive, Congress made its final attempt to enact a comprehensive federal policy toward tribes. The official policy would be “self-determination.”⁴³

President Nixon did not officially endorse self-determination policy until 1970, and by that time, tribes were in dire need of economic rehabilitation to overcome the “economic and cultural disaster” of the government’s termination policy.⁴⁴ Self-determination remains the modern federal policy toward tribes, allowing tribal autonomy in intratribal affairs, including sovereign governments and court systems, alongside some economic stimulation from the federal government.⁴⁵

In furtherance of self-determination policy, Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971, which established the current corporate model under which Alaska Natives continue to operate today.⁴⁶ Although Alaska Natives have the “same legal status as members of Indian tribes” in the lower forty-eight states, their specific claims to hunting and fishing rights on Alaskan land brought about their unique status as members of “native corporations.”⁴⁷ That is, the ANCSA settled and extinguished all of the Alaska Native’s claims to ancestral land rights and vested the proceeds of the settlement in “state-chartered native corporations.”⁴⁸ The ANCSA gave native Alaskan citizens stock in their respective regional native corporation.⁴⁹ Through the corporation, the shareholders own their ancestral land, congressional appropriations, and oil royalties.⁵⁰ Although the Alaska Natives’ rights are governed by this unique corporate scheme, for purposes of this article they are treated as any other Indian tribe, unless otherwise noted.

41. *Id.* at 78.

42. *Id.*

43. H.R. DOC. NO. 91-363, at 1-3 (1970).

44. *Id.*

45. Williams, *supra* note 1, at 79.

46. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29 (2000)).

47. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.07(3)(a).

48. *Id.*; 43 U.S.C. § 1606, 1607, 1613.

49. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.07(3)(b)(ii)(B); 43 U.S.C. §§ 1605, 1613.

50. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 4.07(3)(b)(ii)(B).

Since the commencement of self-determination policy and the enactment of ANSCA, many tribes “continue to confront serious issues of poverty and its social consequences.”⁵¹ With unemployment rates as high as 85% on some of the poorest reservations, and averaging 43% for all Indians living on or near a reservation in 1999, the economic situation remains rather stark.⁵² In fact, in that same year, the “per capita income for reservation Indians was \$8816” for Indians living on reservations with gambling and \$8466 for those reservations without gambling.⁵³ Unfortunately, the “[h]ealth and social welfare indicators are equally troubling,” which provides Indian Country with not only economic, but also survivalist incentives to prioritize the development of their economies.⁵⁴

Concerns about current federal programs and oversight should be considered within this context. After more than 200 years of disastrous federal policy, many tribes still struggle to maintain any economic growth.⁵⁵ Yet, the chips have fallen in favor of some Indian tribes after such a long and drastic folly of federal policies. The tribes, themselves, “may . . . be [the] facilitators of the economic development efforts” so urgently needed in Indian Country today.⁵⁶ In fact, “[o]ne of the fastest growing sectors in the economy is the private Native-owned business sector,” providing self-sustaining support to other tribal members.⁵⁷ Native “small businesses may meet important socioeconomic needs of individual members,” and “[t]hey may also generate tax revenue for the tribe,”⁵⁸ while continuing to provide jobs and economic stimulus to their surrounding communities as well.⁵⁹

Today, many federal programs promote Indian business ventures. As explained above, growth of tribal economies has been slow or nonexistent in most instances.⁶⁰ In response, the federal government initiated many programs to remedy the poverty and economic stagnancy of Indian tribes in America. According to a study performed by the Government Accountability Office

51. *Id.* § 21.01.

52. *Id.*

53. *Id.*

54. *Id.*

55. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01.

56. *Id.*

57. *Id.*

58. *Id.*

59. See *Weekend Edition Sunday: How the Recession is Affecting American Indians* (NPR radio broadcast, Feb. 8, 2009) (interview with Jacqueline Johnson Pata, Executive Director, National Congress of American Indians) [hereinafter *Weekend Edition*].

60. See Williams, *supra* note 1.

(GAO) in December 2001, about 100 federal programs are available to tribes and tribal members for economic development.⁶¹ Some of the programs are used widely, while others remain virtually untouched by Indians, either individually or as tribal entities.⁶² This comment focuses on one such program, codified in Section 8(a) of the Small Business Act, which focuses on small businesses in general but tailors its provisions to allow Native American businesses a leg up in government contracting.

B. History, Enactment, and Purpose of the Small Business Act, Section 8(a)

During World War II, the United States recognized the desirability of a strong industrial production base and enacted the Small Business Assistance Act of 1942.⁶³ Thereafter, in continuation of such progress, Congress created the Small Business Administration (SBA) in 1953 “to contract with government procurement agencies to provide services and supplies, to subcontract with small businesses, and to encourage subcontracting by prime contractors with small businesses.”⁶⁴ The Small Business Act of 1958 (the Act) made permanent the SBA and codified the scope of its contracting powers.⁶⁵

Specifically, Congress empowered the SBA to grant government contracts to qualifying small business entities.⁶⁶ To qualify, an entity must be a “socially and economically disadvantaged small business concern” as defined by the Act.⁶⁷ In ordinary use, the Act defines a “small-business concern” as a business that is “independently owned and operated” and “not dominant in its field of operation.”⁶⁸ The Act relaxes the “socially and economically

61. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-02-193, ECONOMIC DEVELOPMENT: FEDERAL ASSISTANCE PROGRAMS FOR AMERICAN INDIANS AND ALASKA NATIVES (2001), available at <http://www.gao.gov/new.items/d02193.pdf>.

62. For an in-depth discussion of both individual and tribal use of federal programs available to Indians, see the U.S. Government Accountability Office report on federal assistance programs. *Id.*

63. Pub. L. No. 77-603, 56 Stat. 351 (“An act [t]o mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes”); Yang, *supra* note 6, at 319; see also JOHN C. MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS: CYCLOPEDIA GUIDE TO LAW, ADMINISTRATION, PROCEDURE § 48.10 (2005).

64. Yang, *supra* note 6, at 319 (citing Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232).

65. 15 U.S.C. § 637 (2006).

66. *Id.*

67. *Id.* § 637(a)(1)(B).

68. *Id.* § 632(a)(1).

disadvantaged” requirement for tribally owned small businesses.⁶⁹ The Act defines such a disadvantaged tribal entity as a small business with at least 51% ownership by an “economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe).”⁷⁰ This section of the Act has particular ramifications for business entity planning because it requires that “the management and daily business operations of [a] small business concern [be] controlled by one or more . . . members of an economically disadvantaged Indian tribe”⁷¹ That is, the Indian tribe or ANC must not merely own the business, but must also control the daily business operations to qualify for government contracts under the Act.⁷² As discussed in detail below, the regulations set forth by the SBA provide the real substance of the Act’s requirements for Indian tribes.⁷³

As stated in the first section of the SBA regulations, Section 8(a) of the Act authorized the SBA to create a “Minority Small Business and Capital Ownership Development program,” also known as the “8(a) Business Development or ‘8(a) BD’ program.”⁷⁴ “The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns to compete in the American economy through business development.”⁷⁵ The regulations parse no words in codifying the congressional aspiration to give certain minority businesses a competitive advantage. The realization of this advantage is through contracting rules that the regulations deem “Contractual Assistance.”⁷⁶

The contractual assistance provisions authorize the SBA to disregard the usual competitive government bidding process to favor Indian tribes and ANCs.⁷⁷ The Act specifically provides that “[i]t shall be the duty of the

69. *Id.* § 637(a)(4).

70. *Id.* § 637(a)(4)(A)(i)(II) (for privately owned entities); *see also Id.* § 637(a)(4)(A)(ii)(II) (for publicly owned entities, requiring 51% stock ownership).

71. *Id.* § 637(a)(4)(B)(ii).

72. Though not litigated or discussed in other sources, this provision clearly impacts the analysis of whether work done on government contracts awarded to a tribe can be subcontracted to non-tribally-owned businesses. That is, the “pass-through” concept discussed in Part II.A.

73. *See* 13 C.F.R. pt. 124 (2006).

74. *Id.* § 124.1.

75. *Id.*

76. *Id.* § 124.501 (heading appearing just above this section).

77. For the usual process requiring competition in government bidding, *see* 41 U.S.C. § 253(a) (2000) (stating that a procurement agency must obtain “full and open competition through the use of competitive procedures”). *But see id.* § 253(c)(5) (stating that a procurement agency may dispense with competitive procedures when a statute “expressly authorizes or requires that the procurement be made . . . from a specified source”). For the specific contracting favoritism given to Indian tribes and ANCs, *see* 13 C.F.R. §§ 124.501-124.520.

Administration and it is hereby empowered” to enter into contracts with any government department or agency to provide goods, services, or perform construction work.⁷⁸ Then, after the SBA procures the contract it shall “arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns”⁷⁹ Thus, this is a non-competitive process whereby a government agency, the SBA, procures contracts from other government agencies and passes them along to qualifying small business concerns, such as Indian tribes.

This lack of competition has raised some eyebrows, but at least one court upheld this preferential treatment in the face of the typical government policy requiring competition among bidders.⁸⁰ Furthermore, the Supreme Court refused to enter the debate on government contracting preferences for tribes, allowing the reasoning to stand, at least in the Fifth Circuit, that Indian tribes are among a unique political or indigenous classification, not an impermissible race-based classification.⁸¹ The procedure for awarding the contracts to a qualifying small business concern, also set forth in the SBA regulations, explains how the SBA engages in contracting assistance.⁸²

In some shape or form, the SBA truncates a typical competitive bidding process to award contracts to qualifying small business concerns.⁸³ The Act empowers the SBA “to make an award” to the qualifying small business concerns,⁸⁴ but it does not require a truly competitive process, even among the eligible small business concerns.⁸⁵ Instead, the regulations give the SBA a choice concerning how it wants to conduct the contract award process.⁸⁶ Essentially, “8(a) contracts may either be sole source awards”, that is, awards

78. 15 U.S.C. § 637(a)(1)(A) (2006).

79. *Id.* § 637(a)(1)(B).

80. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 708-09 (5th Cir. 1973) (holding that “section 8(a) . . . clearly constitutes specific statutory authority to dispense with competition” and thus, “subcontracts under the section 8(a) program may be awarded on a noncompetitive basis”); see 41 U.S.C. § 253(c)(5).

81. See Am. Fed’n of Gov’t Employees v. United States, 330 F.3d 513, 516-17, 520-21 (D.C. Cir. 2003), cert. denied 540 U.S. 1088 (2003). But see Roth Dev. Corp. v. Dep’t of Def., 545 F.3d 1023, 1035 (Fed. Cir. 2008) (holding the SBA statute allowing Indian tribes—and other minority groups—the automatic presumption of socially disadvantaged business status, and thus the benefits of such status, is subject to strict scrutiny).

82. See 13 C.F.R. § 124.501.520 (2007).

83. *Id.*

84. 15 U.S.C. § 637(a)(1)(C) (2006).

85. *Id.* § 637(a)(1)(D).

86. See 13 C.F.R. § 124.501(b).

given directly to the qualifying small business, or “awards won through competition with other Participants.”⁸⁷

To “increase their prospects of receiving sole source [or noncompetitive] 8(a) contracts,” the regulations encourage the tribes to “market their capabilities to appropriate procuring activities.”⁸⁸ Once the business markets itself in accordance with the regulations, the SBA can award the contracts in three ways: (1) it may open up competition among all 8(a) qualifying businesses to submit bids; (2) it may allow the 8(a) business to contract directly with the government agency or department offering the contract for procurement; or (3) it may procure the contract from a government agency on behalf of the 8(a) Program and award it to a single 8(a) business on a “sole source,” noncompetitive basis, as described above.⁸⁹ To reduce inefficiency within the SBA, most government agencies enact a memorandum of understanding (MOU) with the SBA, allowing them authority to contract directly with the 8(a) business.⁹⁰

Moreover, Indian-owned businesses are not subject to the general rule that limits the amount of a contract that may be given via a sole-source award.⁹¹ This means the SBA can procure a contract specifically for a single tribal business and award that contract without competition or agreement among the other 8(a) businesses. Yet, qualifying tribally owned 8(a) businesses have even more incentive to contract with the federal government. Unlike other 8(a) businesses, tribally owned businesses are not limited on the total amount of contract dollars available.⁹² That is, the ceiling capping the amount of 8(a) contract money available is lifted for tribally owned businesses. This is colloquially termed “Super 8(a)” status.⁹³ In short, this is a powerful and lucrative scheme whereby tribes can obtain enormous government contracts.

Furthermore, federal agencies have a mandate to contract with 8(a) Program participants, as discussed in Part IV.A below, and an agency’s “total value of

87. *Id.* § 124.501(b).

88. *Id.* § 124.501(e).

89. 13 C.F.R. § 124.502 to 503; *see Yang, supra* note 6, at 320-21.

90. REPORT NO. GAO-06-399, *supra* note 6, at 1-2; *see, e.g.*, Memorandum from the Office of the Under Sec’y of Def. on Class Deviation—New 8(a) Partnership Agreement Between the U.S. Small Business Administration and the Dep’t of Def. to the Dirs. of Def. Agencies (Feb. 28, 2007) (effective through Sept. 30, 2009), *available at* [http://www.acq.osd.mil/osbp/policy/8\(a\)%20Partnership%20Agreement%20Extension%20thru%2009302009.pdf](http://www.acq.osd.mil/osbp/policy/8(a)%20Partnership%20Agreement%20Extension%20thru%2009302009.pdf).

91. 13 C.F.R. § 124.506(a)(1)(iii), (b) (2006).

92. *Id.* § 124.519(a).

93. For an example, *see* Small Business Association (SBA) “Super 8(a)” Organizations, <http://super8a.com/Super8a/> (last visited July 10, 2009).

contracts and subcontracts issued” to 8(a) participants cannot “drop below an annual minimum of five percent.”⁹⁴ By using the MOUs and “Super 8(a)” status, government contracting officers can meet their SBA contracting quotas with a few large awards. As a result, ANCs and tribal 8(a) companies are targeted by larger companies to use them as a pass-through entity and ultimately capture the proceeds of a federal contract. Thus, the contracting procedure is advantageous for businesses, if they can qualify.

C. Qualifying for and Maintaining Section 8(a) Status

As described above, the federal government directly awards enormous lucrative contracts to tribally owned businesses under the 8(a) BD program, including construction projects and military services contracts.⁹⁵ Accordingly, these projects gain the most attention from competing bidders, government oversight committees, the media, and taxpayers at large. Under such scrutiny, tribes must ensure they continue to qualify for 8(a) status, and tribes must diligently maintain such qualification.

One underlying problem concerns the level of control the qualifying tribal entity must have over the work performed on a contract. Providing guidance for qualification and maintenance of 8(a) status, the Code of Federal Regulations (CFR) sets forth a vast resource of information organized in question-and-answer format to determine if a given entity qualifies for 8(a) status.⁹⁶ For tribes and ANCs, the crux of these requirements is set forth in Section 124.109.⁹⁷

1. General Eligibility Requirements

To qualify, tribally owned businesses must meet certain conditions to participate in the 8(a) BD program.⁹⁸ Initially, the tribe must own at least 51% of the business entity.⁹⁹ Secondly, the tribe must organize the business “for profit” as a “separate and distinct legal entity” with “articles of organization [containing] express sovereign immunity waiver language.”¹⁰⁰ Moreover, the

94. Yang, *supra* note 6, at 321 (citing 15 U.S.C. § 644(g) (2006)).

95. See discussion *supra* Part I.B.

96. See 13 C.F.R. § 124.1-124.704 (2006).

97. *Id.* § 124.109.

98. *Id.* § 124.109(c).

99. *Id.* § 124.109(c)(3)(i) (noting that “a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock,” and “[f]or non-corporate entities, a tribe must own at least a 51 percent interest.”).

100. *Id.* § 124.109(c)(1). Note that the waiver of sovereign immunity also requires the business to subject itself to the jurisdiction of U.S. federal courts. *Id.* However, ANCs are not

tribe must meet the “size” requirements relative to their particular industry classifications.¹⁰¹ Yet, the regulations require more than simply organizing the business. The tribe must also show a “[p]otential for success . . . as evidenced by income tax returns for each of the two previous years showing operating revenues in the primary industry in which the applicant is seeking 8(a) . . . certification.”¹⁰² Then, the tribe must meet “[c]ontrol and management”¹⁰³ requirements, which are closely analyzed below, as control and management of the daily business activities is a primary concern when scrutinizing potential pass-through subcontracts.¹⁰⁴ But first, the Native business must hurdle the most intrinsic eligibility requirement, meeting socially and economically disadvantaged status.

2. *Qualifying as “Socially and Economically Disadvantaged”*

As stated above, Congress granted the Small Business Administration the power to determine what entities qualify as “disadvantaged small business concerns” for purposes of favorable government contracting.¹⁰⁵ The regulations promulgated by the SBA make qualifying for “socially and economically disadvantaged small business” status much easier for Indian tribes and ANCs than for other small business concerns.¹⁰⁶ ANCs need not prove social or economic disadvantage at all,¹⁰⁷ and tribes need only prove economic disadvantage, as social disadvantage is assumed.¹⁰⁸ Moreover, tribes

required to include any of this language. *Id.* § 124.109(a)(6).

101. *Id.* § 124.109(c)(2). Since the focus of this paper is on control requirements and performance obligations, especially concerning subcontracting, a detailed discussion of the SBA size requirements is not appropriate. But see 13 C.F.R. § 121 for the details of size requirements, and consult the SBA website at OHA Size Cases, <http://www.sba.gov/aboutsba/sbaprograms/oha/allcases/sizcases> (last visited July 15, 2009) for specific cases concerning the proper size of a qualifying company.

102. 13 C.F.R. § 124.109(c)(6). The SBA will also look to factors including “technical and managerial experience”, “financial capacity”, and the business’ prior “record of performance” on contracts within its designated industry. *Id.* § 124.109(c)(6)(ii).

103. *See id.* § 124.109(c)(4).

104. *See discussion infra* Parts I.C.3, II.A.

105. 15 U.S.C. § 637(a) (2006) (giving the Small Business Administration additional powers to determine rules for “[p]rocurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; . . . construction subcontracts; . . . Indian tribes”).

106. *Id.* § 637(a)(1)(B); *see* 13 C.F.R. § 124.109.

107. 13 C.F.R. § 124.109(a).

108. *Id.* § 124.109(b). The regulations specifically list the data that non-ANC tribally-owned businesses must submit to prove economic disadvantage. *Id.* § 124.109(b)(2)(i)-(vii).

need only prove economic disadvantage once, as tribes are not required to comply with this aspect of the SBA's annual reviews,¹⁰⁹ and the economically disadvantaged status applies as to all subsidiaries of the tribally owned business.¹¹⁰ However, qualifying for 8(a) status remains a difficult task, and, according to one commentator, many entities lack information about adhering to the strict 8(a) requirements for maintaining qualification once the SBA approves their 8(a) application, due to no fault of their own.¹¹¹

3. *Maintaining 8(a) Status and "Control" of the Business*

A tribally owned business must comply with the often cumbersome requirements to "remain eligible to participate in the 8(a) BD Program."¹¹² That is, tribes must follow certain housekeeping requirements, including annual submissions "[a]s part of an annual review."¹¹³ One such pertinent submission is a "certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility."¹¹⁴ For instance, if the tribe changed its corporate ownership since the last annual review, the tribe "must inform SBA of any changes and provide relevant supporting documentation" for such changes.¹¹⁵ Moreover, the SBA may subject the tribe to "eligibility reviews" if it receives "specific and credible information alleging a Participant no longer meets the eligibility requirements"¹¹⁶ Thus, the tribe and its counsel must consider SBA eligibility and reporting requirements when making most daily business decisions.

Another important business consideration concerns the requirement that tribal entities have control over the daily business activity of their businesses.¹¹⁷ The CFR provides some flexibility about the way a tribally

109. See 13 C.F.R. § 124.112(a) (2006).

110. 13 C.F.R. § 124.109(b).

111. Sharon McLoone, *Report: SBA Should Better Educate 8(a) Applicants*, WASH. POST, Nov. 24, 2008, available at http://voices.washingtonpost.com/small-business/2008/11/report_sba_should_better_educa.html; REPORT NO. GAO-06-399, *supra* note 6, at 22-23.

112. 13 C.F.R. § 124.112(a).

113. *Id.* § 124.112(b).

114. *Id.* § 124.112(b)(2).

115. *Id.*

116. *Id.* § 124.112(c)(1).

117. See 13 C.F.R. § 124.101 (2006) (requiring a small business be "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals"). *But see* 13 C.F.R. § 124.106 (2006) (noting that the "Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs").

owned small business can maintain control so as to allow growth for an inexperienced business. The tribe may have complete control over the daily business operations “through one or more disadvantaged individual members [of the tribe] who possess sufficient management experience of an extent and complexity needed to run the concern” or through management teams made up of tribal members.¹¹⁸ For inexperienced businesses, the SBA provides a third option whereby the concern can team with non-tribal members as a path to future control of the business, however, the SBA must approve a written plan to qualify a management team having non-tribal members.¹¹⁹ Yet, the crux of the control requirements, as they relate to pass-through considerations, is summed up in the pertinent CFR section titled, “What percentage of work must a Participant perform on an 8(a) contract?”¹²⁰ These specific requirements provide the guidance for 8(a) contractors and are explained in detail in Part II.A below.

Navigating the CFR is a difficult task for any tribal business. Discerning what constitutes an acceptable level of control is an important question for the Native business to answer in order to maintain compliance with the federal contracting rules. Unfortunately, neither court nor administrative decisions provide reliable guidance on pass-through subcontracting,¹²¹ although, it is clear that public outrage arises over such subcontracting.¹²² The normal business practices of a general contractor bidding on a government contract blur where the tribe is merely a shell entity, formed with the sole purpose of obtaining a lucrative contract under little or no competitive scrutiny. Protestors allege that non-tribal entities, and tribal entities alike, profit to the detriment of competitors in the market and the taxpayer at large.¹²³ The process seems to reek of corruption, but statutorily the procedures set forth by the SBA and the Act are followed in most instances. So two questions remain, what are the pitfalls of government contracting and how do tribes avoid these problems?

118. 13 C.F.R. § 124.109(c)(4)(i),(i)(A) (2006).

119. *Id.* § 124.109(c)(4)(i)(B).

120. 13 C.F.R. § 124.510 (2006).

121. *See generally* Chapman Law Firm v. United States, 63 Fed. Cl. 519, 528 (2005); Appeal of Floorpro, Inc., 7-2 B.C.A. (CCH) 33,615, 2007 WL 1978045, at *13 (Armed Servs. Bd. of Contract Appeals June 27, 2007); *In re* Operational Support & Servs., No. B-299660.2, 2007 WL 3146270, at *3 (Comptroller Gen. Decisions Sept. 24, 2007); Myers Investigative & Sec. Servs., Inc., Nos. B-286971.2, B-286971.3, 2001 WL 322776, at *4 (Comptroller Gen. Decisions Apr. 2, 2001).

122. McLoone, *supra* note 111; REPORT NO. GAO-06-399, *supra* note 6.

123. *See generally* Yang, *supra* note 6, at 319.

II. The Pitfalls of Section 8(a) Contracting

Part II sets forth key problems that arise for tribes participating in the 8(a) BD program. Although some problems concern facial issues, or the public image, others, such as “pass-through” subcontracting, can have adverse pecuniary, as well as legal, ramifications. All Native businesses should consider these issues when contracting with the federal government.

A. “Pass-Throughs” and Their Effect on 8(a) Determinations

A “pass-through”, as the tribal business and legal communities have coined the term, occurs when a tribal entity obtains a government contract and, in turn, subcontracts all or part of the work to entities that do not qualify as socially and economically disadvantaged.¹²⁴ Strictly speaking, pass-throughs are illegal in 8(a) contracting, and Congress and the Executive continue to closely scrutinize pass-throughs.¹²⁵

The CFR requires the 8(a) participant to perform the contract awarded.¹²⁶ This calls into question the legality of subcontracting some and certainly all of the work under an 8(a) contract award. Specifically, “[i]n the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees,” and in the case of general contracting on construction projects, “the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).”¹²⁷ Thus, this general rule on the amount of work to be performed by the 8(a) qualifying business entity provides the first level of guidance for the 8(a) contractor. However, Native business concerns should be aware that recent changes to the government’s contracting guidelines have been enacted and stricter scrutiny of government contracts is on the horizon.

124. REPORT NO. GAO-06-399, *supra* note 6, at 22-23; Yang, *supra* note 6, at 337.

125. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT NO. GAO-08-269, DEFENSE CONTRACTING, CONTRACT RISK A KEY FACTOR IN ASSESSING EXCESSIVE PASS-THROUGH CHARGES (2008) available at <http://www.gao.gov/new.items/d08269.pdf>. [hereinafter REPORT NO. GAO-08-269]; Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting, 2009 WL 534378 (White House) (Mar. 4, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/ [hereinafter Memorandum].

126. 13 C.F.R. §§ 124.510, 125.6 (2006).

127. 13 C.F.R. § 125.6(a)(1),(a)(3) (2006).

1. Recent Administrative Rules Specifically Addressing Pass-Throughs

As described above, the SBA already has general procedures in place to regulate companies that elect to subcontract work obtained through 8(a) contract awards, but recent changes in the Federal Acquisition Regulations (FARs) are impacting government treatment of pass-through subcontracting as well.¹²⁸ The FARs provide government contracting officers with uniform language to use in all government contracts.¹²⁹ As its stated purpose indicates, the system is designed to provide “uniform policies and procedures for acquisition” to promote fairness and continuity in government contracts.¹³⁰ Unfortunately, the FARs cannot provide language for every contracting situation, and the clauses provided by the FARs often lag behind changes in the contracting environment.¹³¹ Thus, the FARs drafters must continuously make changes to the system to keep up with demands from Congress and from GAO reports, which point the finger at inadequate acquisitions regulations as one culprit in excessive government contracting expenditures.¹³²

One such GAO report, titled *Contract Risk a Key Factor in Assessing Excessive Pass-Through Charges*,¹³³ details the need for better oversight of pass-through subcontracting in a wide range of government contracts, including contracts awarded through the 8(a) BD program. In an effort to curtail the unexpected costs of paying subcontractors, the federal government answered the GAO report with new additions to the FARs directed at “excessive pass-through charges” in government contracts.¹³⁴ In fact, the Department of Defense (DOD), the government agency most accused of spending unwisely on tribes and ANCs, issued its own regulations specifically addressing excessive pass-through charges.¹³⁵

As one of the biggest spenders among government agencies, and in turn among the biggest spenders on 8(a) contracts, the DOD has its own set of regulations to supplement the FARs.¹³⁶ The Defense Federal Acquisition Regulations (DFARs) guide DOD contract officers on the specific

128. Codified at Title 48 of the Code of Federal Regulations.

129. See generally 48 C.F.R. § 1.101-9905.506 (2006).

130. *Id.* § 1.101.

131. See generally REPORT NO. GAO-08-269, *supra* note 125.

132. *Id.*

133. *Id.*

134. *Id.* at 14.

135. 48 C.F.R. § 252.215-7003-252.215-7004 (2008), available at <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252215.htm>.

136. *Id.*

requirements of DOD contracts.¹³⁷ In May 2008, the DOD issued its new DFARs addressing the pass-through charges the GAO accused it of paying.¹³⁸ Specifically, the new DFARs eliminate any pass-through charges not previously agreed to by the DOD:

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.¹³⁹

The DOD drafted these form clauses to eliminate any overpayment by the general contractor to the subcontractors for failure to do the work itself.¹⁴⁰ Yet, tribes should take notice that the contracting officer still has the unique authority to determine if a contract contains “excessive pass-through charges.”¹⁴¹

As discussed at Part II.A above, the regulations already require general contractors to perform a minimum percentage of the work on a given project.¹⁴² However, confusion among government contracting officials about the proper language for pass-through subcontracting still causes Native firms and government agencies problems both legally and in the public eye. Although Native firms received negative associations with such problems in the media, GAO reports consistently blamed government contracting officials.¹⁴³ One GAO auditor stated that “for one contract we reviewed that was awarded to an ANC firm, contracting officials had failed to include the required FAR clause in the contract”¹⁴⁴ When the GAO auditors asked contracting officials what caused their failure to include the FAR clauses, they expressed their confusion, stating they “were unsure who should be monitoring compliance” with the pass-through subcontracting limitations contained in the FARs and CFR.¹⁴⁵ As the GAO report on pass-throughs observed:

137. *Id.*

138. *Id.*

139. *Id.* § 252.215-7004 & Alternate I(b) (allowing clause to be substituted).

140. *Id.*

141. *Id.* § 252.215-7004(b) & Alternate I(b) (allowing clause to be substituted).

142. 13 C.F.R. § 125.6(a)(1) & (a)(3) (2006).

143. *See, e.g.*, REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6, at 22-23.

144. REPORT NO. GAO-08-269, *supra* note 125, at 14.

145. *Id.* at 14-15.

Several other contracting officials we spoke to said they were unsure of whose responsibility it is to monitor compliance with the subcontracting limitations under these 8(a) contracts. They recognized that they should be doing more to monitor compliance. By not ensuring compliance with the limits on subcontracting requirement, there is an increased risk that an inappropriate degree of the work is being done by large businesses, raising questions about the value added by the [tribally owned] firm.¹⁴⁶

Thus, tribally owned businesses must be versed in all of the government's contracting rules. Essentially, the tribal contractor must be able to oversee the work of the government contracting official to ensure all appropriate FAR and DFAR clauses are included in their contract. Otherwise, the government reserves the right to reexamine the contract and take back profits deemed in excess of what the government desired to pay.¹⁴⁷

This lack of comprehension among the very officials charged with determining whether a pass-through situation exists denotes the danger for Native businesses. Tribal contractors must stay apprised of changes in government contracting rules.

B. The Public Image

Just as the intricacies of government contracting create potential pitfalls, the public perception of such contracting procedures creates another realm of concerns for the tribal business. Even if Indian tribes exercise their congressionally approved advantages in a perfectly legal manner, tribal success often receives negative sentiment among industry competitors and the media.¹⁴⁸ When Indian businesses thrive to the disadvantage of their competitors, receiving bids in anti-competitive processes, competing contractors become potential whistle-blowers. This negative attention affects the public outlook on the entire Indian business community. Thus, the following presents the political, public relations, and media fallout from engaging in the SBA Section 8(a) bidding process without a tested business plan for public relations.

146. *Id.*

147. *Id.* § 252.215-7004(b) & Alternate I(b) (allowing clause to be substituted); *see also supra* text accompanying notes 134-39.

148. *See discussion infra* Part II.B.

1. ANCs and Congress

A media frenzy erupted in 2005 over the alleged corruption of government contracting provided to Alaska Native Corporations¹⁴⁹, or ANCs, to which the Act provides the same status as tribally owned businesses under Section 8(a).¹⁵⁰ Newspaper columns touting the anti-competitive nature of the no-bid contracts given to these few corporations prompted unrest in Alaska,¹⁵¹ resulting in a GAO report specifically addressing pass-through subcontracting.¹⁵² The GAO released this report in 2006.¹⁵³ The report criticized the use of Section 8(a) to procure government contracts for huge ANCs, noting lack of oversight concerning where the proceeds of the contract were going and who was actually performing the work done on the contracts.¹⁵⁴ The media associated this problem with ANCs and Senator Ted Stevens of Alaska, who lobbied hard in Congress to create the ANC firms and allow them access to 8(a) contracting.¹⁵⁵ However, the report actually blamed government contracting officials from various departments for failing to abide by contracting rules.¹⁵⁶

2. The Mississippi Choctaws, Jack Abramoff, and Katrina

Similar to the negative media attention experienced by ANCs, the Mississippi Choctaws and many other tribes were connected with the lobbying scandal with Jack Abramoff and received damaging negative media attention.¹⁵⁷ For instance, reporters at the *Seattle Weekly* cited the Mississippi

149. Paula Dobbyn, *Some Say No-bid, No-limit Government Commissions for Natives are Unfair*, ANCHORAGE DAILY NEWS, Mar. 19, 2006, at H1, available at 2006 WLNR 4685448; see also Yang, *supra* note 6.

150. 13 C.F.R. § 124.109 (2006). Note that ANCs actually qualify for 8(a) status even easier than Indian tribes because they do not have to prove economic hardship, but the same subsection of the regulations otherwise governs them. *Id.*

151. See e.g., Dobbyn, *supra* note 149.

152. REPORT NO. GAO-06-399, *supra* note 6.

153. *Id.*

154. *Id.* at 22-23.

155. Weld Royal, *Facing a Loss in Alaska*, N.Y. TIMES, Oct. 30, 2008, at B12.

156. REPORT NO. GAO-06-399, *supra* note 6, at 20-23.

157. Rick Anderson, *Choctaw Cash: A U.S. Senate Investigation Reveals New Details on Jack Abramoff's Seattle Ties*, SEATTLE WEEKLY, July 6, 2005, <http://www.seattleweekly.com/2005-07-06/news/choctaw-cash/>. See generally SEN. COMM. ON INDIAN AFFAIRS, 109TH CONG., FINAL REPORT: "GIMME FIVE"—INVESTIGATION OF TRIBAL LOBBYING MATTERS (Comm. Print 2006), available at http://www.indian.senate.gov/public/_files/Report.pdf. [hereinafter GIMME FIVE].

Choctaws as being one of Abramoff's "biggest clients, paying the Republican lobbyist and his business partners more than \$27.6 million to sway lawmakers on gaming issues."¹⁵⁸ Compounding their media woes, the Choctaws were chastised in the media for procuring a \$300 million post-Katrina cleanup project on a sole-source, noncompetitive basis.¹⁵⁹ After accusations surfaced of spending large sums of money lobbying Congress for this and other projects and favorable treatment, the Choctaws looked far less appealing as a future business partner, despite the tribe's continuing positive impact on rural Mississippi.¹⁶⁰

3. *Just the Facts*

Despite the negative media attention given ANCs and the Mississippi Choctaws, government officials admit that bad contracting practices on behalf of the United States caused overspending on these contracts.¹⁶¹ In the face of national emergencies such as Hurricane Katrina and the war in Iraq, many U.S. agencies were in dire need of supplies and services, often failing to comply with the FARs in the process.¹⁶² After the DOD hastily awarded contracts, their audits found "multiple layers of subcontractors, questionable value added by contractors, increased costs, and lax oversight."¹⁶³ In response to such accusations, the media associated tribally owned businesses with contracting scandals,¹⁶⁴ although the GAO reports never directly implicated any wrongdoing by the Native firms.¹⁶⁵ Instead, the reports consistently cited failure to adhere to proper contracting practices on the part of government contracting officials.¹⁶⁶

Following the GAO investigation into ANCs and pass-through subcontracts, the GAO reports never spoke of underhandedness on behalf of ANC management either.¹⁶⁷ In fact, the section of the report focusing on pass-

158. Dawn Kopecki, *Cashing In on the Katrina Cleanup: Why the Army Is About to Hand an Indian Tribe an Enormous No-Bid Contract*, BUSINESS WEEK, Apr. 10, 2006, available at http://www.businessweek.com/print/magazine/content/06_15/b3979071.htm?chan=gl.

159. *Id.*

160. *Weekend Edition*, *supra* note 59.

161. REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

162. REPORT NO. GAO-08-269, *supra* note 125, at 14.

163. *Id.*

164. *See* discussion *supra* Part II.B.2.

165. *See, e.g.*, REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

166. REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

167. REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

through subcontracting is specifically titled “Contracting Officials Not Consistently Monitoring Subcontracting.”¹⁶⁸ Moreover, with respect to the Choctaws and Jack Abramoff, the final report issued for the Senate Committee on Indian Affairs’ investigation of tribal lobbying revealed that Jack Abramoff and his associates, not the tribes, committed vast lobbying violations.¹⁶⁹ The tribes were the victims of a high-level lobbying scandal,¹⁷⁰ and yet, the report containing these conclusions was only printed for the Senate Committee on Indian Affairs, not broad public consumption.¹⁷¹ Tribes must advocate for themselves and dispel the appearance of impropriety when it arises.

Skewed versions of the truth such as this are the reasons tribally owned businesses must beware of obtaining government contracts unfavorable to the government. In the eyes of the media and the U.S. government, Native firms must be more versed on the proper drafting of the government’s contract than government contracting officials themselves if they want to avoid scrutiny. Otherwise, despite the outcome of congressionally mandated oversight reports by the GAO, the public and media alike will blame the Native firm for the appearance of any overcompensation due to pass-throughs in the contract. As explained in Part III.B below, considering the unique contracting position of Native businesses within the 8(a) scheme, Native businesses must use the media proactively to control their corporate images.

III. Avoiding Pitfalls

Despite negative media portrayals, government reports did not blame the Indian tribes for any sort of abuse of the government contracting system.¹⁷² The government instead repeatedly faulted the SBA and failed government oversight for poor contracting practices.¹⁷³ This inconsistency in contracting comports with the inconsistent federal policies toward Indian tribes’ governments and businesses throughout history, which should be taken into account before the court of public opinion casts harsh judgment on their business practices. However, Native businesses face the realities of negative media attention just as non-tribal companies have to deal with such attention. The rules of business do not and should not stop for tribal entities, and tribes

168. REPORT NO. GAO-08-269, *supra* note 125, at 20 (emphasis supplied).

169. GIMME FIVE, *supra* note 157.

170. *Id.* at 38.

171. *Id.* at title page.

172. REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

173. REPORT NO. GAO-08-269, *supra* note 125; REPORT NO. GAO-06-399, *supra* note 6.

must adapt to the markets in which they participate, if they have hopes for growth.

A. Staying Compliant when the Government Cannot: 8(a) Pass-Through Determinations

In the face of confusion and embarrassment for the federal government's contracting officials, agencies such as the DOD issued stricter guidelines to aid the government with compliance with its regulations, such as the clause disallowing excessive pass-through charges, described in Part II.A.1 above.¹⁷⁴ As the federal government beefs up its standards and oversight of Native 8(a) contracting, so too must Indian-owned businesses equip themselves with the legal foresight and insight to prepare for these changes.

If tribes or ANCs are subcontracting with non-qualifying entities, they should keep in mind the following tips to avoid negative consequences. Tribes should not fear subcontracting, but they should take the appropriate steps to create a paper trail evidencing that the value they and their subcontractors add to a project is substantial and not "negligible."¹⁷⁵ The regulations define the term "no or negligible value" to mean "the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract"¹⁷⁶ To a certain extent, a tribe must keep in mind that under the current FARs and DFARs, government contracting officials have the ultimate discretion to determine if the subcontracting work was negligible and, therefore, "excessive," or of sufficient value.¹⁷⁷ If the government contracting officer determines that the pass-through charges were excessive, that official can recover the excess amount charged, as determined by the amount in excess of the fixed price of the contract *or* otherwise as the government so determines.¹⁷⁸ Moreover, in creating the paper trail, the tribe must also consider that contracting officials must be able to access such records for up to three years after final payment is made on the contract, thus leaving the tribe vulnerable to the unpredictable nature of government audits long after work is done on the project.¹⁷⁹

174. 48 C.F.R. § 252.215-7004(b) & Alternate I(b) (2008) (allowing clause to be substituted), *available at* <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252215.htm>.

175. *Id.* § 252.215-7004(c).

176. *Id.* § 252.215-7004(a).

177. *Id.* § 252.215-7004(b) & Alternate I(b) (allowing clause to be substituted).

178. *Id.* § 252.215-7004(d).

179. 48 C.F.R. § 52.215-2 (2006); 48 C.F.R. § 252.215-7004(e), *available at* <http://www.>

The uncertain and potentially drastic nature of the penalty for failure to comply with the DFARs requires insight and diligence on behalf of counsel for the contracting tribe. Specifically, the DFARs provide straightforward rules on the notifications and revisions the contractor must provide the government contracting officer if changes to the subcontracting situation arise.¹⁸⁰ The notice should include any change in the subcontract amount if it approaches “70 percent [70%] of the total cost to be performed under the contract”¹⁸¹ Moreover, the contractor must also include the added value that it will provide the government on the contract where the subcontracting effort approaches 70% of the total value of the contract.¹⁸² The contractor and subcontractor should keep precise and detailed records of the value added to the contract, showing costs of work performed and maintaining copies of notices in any change of subcontracting roles, in their efforts to avoid a costly future government audit.

Finally, the tribe must provide the SBA with a report of all work done by their attorneys and other professional representatives who assisted in obtaining the federal contract, whether or not the business engaged in pass-through subcontracting.¹⁸³ If a tribe or tribally owned business has general counsel, such counsel should prepare this report. But, for those tribal businesses lacking in-house counsel, the tribe should be aware that it, and not its hired professionals or employees, is solely responsible for complying with the reporting obligation.¹⁸⁴ Compliance is maintained by submitting an annual report to the Indian business’ assigned SBA Business Opportunity Specialist (known as a “BOS”).¹⁸⁵ The annual report must include “a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such participant in obtaining a federal contract.”¹⁸⁶ Such a list must also “indicate the amount of compensation paid and a description of the activities performed for such compensation.”¹⁸⁷ Moreover, to drive home the importance of this reporting mechanism, “[f]ailure to submit the report is good

acq.osd.mil/dpap/dars/dfars/html/current/252215.htm.

180. 48 C.F.R. § 252.215-7004(c), available at <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252215.htm>.

181. *Id.* § 252.215-7004(c)(1).

182. *Id.*

183. 13 C.F.R. § 124.601 (2006).

184. *Id.*

185. *Id.* § 124.601(a).

186. *Id.*

187. *Id.*

cause for initiation of a termination proceeding” against the business, disqualifying it from the lucrative 8(a) BD program altogether.¹⁸⁸

B. Avoiding Negative Media Attention: Cooperation Leads to Sustainable Growth

Native businesses must avoid being negatively portrayed by media looking to sell a sensational story at their expense. As many Native businesses and tribes have successfully done, advertising the positive aspects of the tribe or the tribally owned business can create a more favorable image of tribes. For instance, the Chickasaw Nation created television commercials touting their place in the “united” community, which were widely broadcast throughout their community and posted on their tribal website.¹⁸⁹ Moreover, tribes should also advertise where the proceeds of their business ventures are spent. In many cases, tribal law mandates a tribally owned business distribute profits to the tribal citizens or be used to further tribal infrastructure.¹⁹⁰ Such spending shows that as tribes experience economic prosperity, so too do their citizens and neighboring communities. When tribal economies flourish, the surrounding, non-tribal communities prosper as well.¹⁹¹ Tribes must dispel the aura of greed and underhandedness that taints some Native Americans to the disadvantage of all tribes.¹⁹²

To further dispel the negative portrayals of Native businesses, tribes should spend time and money on public relations campaigns to avoid conflicts with competitors and legislators. As described more fully below, 8(a) contracting remains viable today through the efforts of legislators such as Senator Ted Stevens and Representative Don Young, both from Alaska, who championed the 8(a) contracting cause on the public stage for the benefit of ANCs and

188. *Id.* § 124.601(b).

189. Chickasaw Nation, Video Gallery: John Herrington – Kids & Science, http://www.chickasaw.net/newsroom/index_955.htm (last visited July 10, 2009); Chickasaw Nation, Video Gallery: Margaret Wheeler – Creative Thought, http://www.chickasaw.net/newsroom/index_955.htm (last visited July 10, 2009).

190. See generally Robert Brodsky, *Out in the Cold: Business Is Booming for Alaska Native Corporations*, GOV'T EXECUTIVE, Mar. 6, 2009, http://www.govexec.com/story_page.cfm?articleid=42211; Williams, *supra* note 1; Elizabeth Bluemink, *Stevens, Young Defend Contracts for Native Corporations, Success: Alaska Lawmakers Thwart Naysayers in Congress*, ANCHORAGE DAILY NEWS, Oct. 2, 2008, available at <http://www.adn.com/money/story/543400.html>.

191. *Weekend Edition*, *supra* note 59.

192. See, e.g., FROMSON, *supra* note 3.

Indian tribes alike.¹⁹³ This resulted in continued prosperity and economic strength for Native businesses.

However, other minority groups competing for 8(a) contracts and legislators looking to remove earmarks and pork barrel spending are quick to point the finger at tribes for hogging an unfair portion of the 8(a) pie.¹⁹⁴ Collaborating with other 8(a) minority businesses creates shared prosperity for both tribally-owned 8(a) businesses and the Native community at large.¹⁹⁵ For instance, the president and CEO of the National Black Chamber of Commerce was initially outraged that ANCs are awarded many of the most lucrative 8(a) contracts, but after successful collaboration, ANCs and the National Black Chamber will work together facilitating contracts to their mutual benefit.¹⁹⁶

All in all, tribes must create a thorough media campaign, touting the impact of their project work. Although tribes are sovereign nations, in reality they intermingle with their neighboring communities, providing jobs and economic opportunity.¹⁹⁷ Tribal and non-tribal communities alike rely on this interdependence,¹⁹⁸ and tribes should budget for advertising money to brief the community about the value added to contracts, promoting awareness of where the contract proceeds are going and promoting pride in their projects. Furthermore, the campaign should create a record of transparency of the contracting process that brought about the profits from the project and winning the award. Tribes should be proud of a job well done and share that prosperity of pride and profit with their communities. Creating this record not only serves the purpose of putting a positive public face on a project, but also memorializes the events of the contract and its upsides for future audits, such as the DOD audits mandated by the DFARs.¹⁹⁹

193. Bluemink, *supra* note 190.

194. See Elizabeth Bluemink, *Black Businesses Mend Fences with Native Corporations: Contracts: Alaska Firms, Facing Bad Rap for Sweet Deals, Earn New Allies with Plans for Collaboration*, ANCHORAGE DAILY NEWS, May 29, 2008, available at 2008 WLNR 10230757.

195. *Id.*

196. *Id.*

197. *Weekend Edition*, *supra* note 59 (specifically noting that tribal gaming enterprises provide jobs for tribal members and members of the local community, who experience good times and bad together, including layoffs prompted by recession).

198. *Id.*

199. See discussion *supra* Part II.A.1.

IV. The Future of 8(a) Status

As a general goal, all tribes should create their own sustainable economies that are equipped to grow small businesses.²⁰⁰ Likewise, the 8(a) BD program requires businesses to take “maximum efforts to obtain business outside” the program.²⁰¹ The first step for most tribes is to create a tribal corporation, or at the very least a separate tribal agency, tasked with the obligation of growing and maintaining the business affairs of the tribe.²⁰² Once a tribe understands its financial structure, it can engage in more direct approaches to economic stimulus for small businesses within the tribe. For instance, one commentator suggests that tribes should provide financial capital and other business solutions to small business entrepreneurs in their tribes who would not otherwise qualify for traditional, collateral-backed loans, described in Part IV.B below.²⁰³ Yet, until all tribes can maintain these innovative financing institutions, government programs can provide the stimulus needed to launch a Native American small business.

A. Section 8(a) Is Intact . . . for the Moment

As tribes deal with the recession alongside the rest of the country, they can rest easy that Native American 8(a) contracting perks remain intact.²⁰⁴ Congress approved the National Defense Authorization Act for Fiscal Year 2009 on September 24, 2008, without a rider aimed at limiting sole-source contracts awarded to Native businesses.²⁰⁵ The Act authorizes Native 8(a) contracting to continue throughout fiscal year 2009.²⁰⁶ Thus, through the hard work of a number of congressmen and lobbyists, Native business can continue to count on the lucrative sole-source contract awards to sustain their business.

200. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01 & 21.01 n.5.

201. 13 C.F.R. § 124.509(a) (2006).

202. Williams, *supra* note 1, at 94-101.

203. R.H. Tipton III, Note, *Microenterprise Through Microfinance and Microlending: The Missing Piece in the Overall Tribal Economic Development Puzzle*, 29 AM. INDIAN L. REV. 173 (2004-2005).

204. National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008); Margaret Bauman, *SBA 8(a) Contracts for Alaska Native Firms Still Protected*, ALASKA J. COMMERCE, Oct. 5, 2008, available at http://www.alaskajournal.com/stories/100508/hom_20081005017.shtml; Royal, *supra* note 155.

205. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).

206. *Id.*

However, President Barack Obama, alongside several prominent members of Congress, announced his policy against non-competitive contracts, stating “[t]he days of giving defense contractors a blank check are over.”²⁰⁷ In his memorandum outlining the proposed changes, President Obama directed the Director of the Office and Management and Budget (OMB) to “govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts to maximize the use of full and open competition and other competitive procurement processes.”²⁰⁸ Furthermore, the OMB Director must “develop and issue” new “guidelines to assist agencies in reviewing, and creating processes for ongoing review of existing contracts . . . and to formulate appropriate corrective action,” which may include “modifying or cancelling” contracts deemed wasteful.²⁰⁹ In sum, more change and strict oversight is on the horizon for 8(a) contracting, and the President and Congress aim to eradicate any contracting processes that smell of pork.

Unfortunately, that contracting process already reeks because of the cloud of corruption surrounding the strongest proponent for 8(a) contracting, former Alaska Senator Ted Stevens. Champion of Native 8(a) contracting, Senator Stevens took a dishonorable leave from Congress after being convicted of seven felony counts for taking home renovations from an oil executive and failing to disclose them, adversely impacting the reputation of tribes and ANCs that benefited from his efforts in Congress.²¹⁰ Yet, despite the taint of corruption Stevens exudes, Alaska media, among other media outlets, continue to champion his leadership in promoting tribal business concerns by firmly establishing tribes and ANCs among those eligible for the 8(a) BD program.²¹¹ In fact, U.S. Attorney General Eric A. Holder, Jr., “asked that the case [against Stevens] be dismissed” due to prosecutorial misconduct and “said the department would not seek to retry Mr. Stevens.”²¹² Stevens was narrowly defeated in his re-election bid and is no longer a member of the Senate.²¹³

207. Obama: “No More Excuses” for Waste (MSNBC television broadcast, Mar. 2, 2009), available at <http://www.msnbc.msn.com/id/21134540/up/29509173#29509173>.

208. Memorandum, *supra* note 125.

209. *Id.*

210. Neil A. Lewis, *Alaska Senator Is Guilty Over His Failures to Disclose Gifts*, N. Y. TIMES, Oct. 15, 2008, at A1.

211. Bauman, *supra* note 204.

212. Neil A. Lewis, *Ted Stevens Rejected Deal to Admit Guilt*, N.Y. TIMES, Apr. 14, 2009, at A16.

213. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1.

Notwithstanding potential riders, presidential condemnation, and corruption, new prerequisites continue to arise for Native businesses, for the time being. As a recovery measure after the terrorist attacks of September 11, 2001, Congress enacted the Emergency Supplemental Act in 2002.²¹⁴ A recent federal regulation that became effective in 2007 furthering the Act allows contractors to count subcontracts given to any Indian tribe or ANC toward its federally mandated goals for providing subcontracts to disadvantaged small businesses under the Emergency Supplemental Act.²¹⁵ Under the new regulations, an Indian tribe or ANC subcontractor need not have 8(a) status to contract with the government's general contractor.²¹⁶ Although this raises some controversy over whether it defeats the purpose of helping small businesses, the overall effect is clearly positive for Indian tribes and ANCs.²¹⁷ Providing even more incentives to the tribes, the subcontractor has some added power in the negotiating process because it gets to choose amongst the general and subcontractors as to which entity gets the credit toward its federal SBA subcontracting goals.²¹⁸ In short, the tribe that keeps up with the ever-evolving nuances of the federal contracting standards is the tribe best suited to survive the recession and post-recession economies.

B. "Shovel Ready" Proposals for Economic Stimulus: The American Recovery and Reinvestment Act of 2009²¹⁹ and Potential Changes in the SBA 8(a) Program

Certain "shovel ready" proposals and proposed bills can provide true economic stimulus for the nation's economic backbone: the (Native) small business. One proposal focuses on the development of "microeconomics" within individual tribes.²²⁰ That is, tribes can create tribally owned financial institutions to provide capital for small business startups within their own

214. Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117, 115 Stat 2230 (2002).

215. Small Business Credit for Indian Tribes and Alaska Native Corporations, 72 Fed. Reg. 46345-01 (Aug. 17, 2007) (noting that "[s]uch credit is taken even where the ANC or Indian tribe may be 'other than small' under the Small Business Administration (SBA) regulations.").

216. *Id.*

217. Posting of Michael Payne to Federal Construction Contracting Blog, <http://federalconstruction.phslegal.com>, *New Rule Allows Subcontracts to Companies Owned by American Indian Tribes to Count Toward Small Business Subcontracting Goals*, (Sep. 6, 2007).

218. *Id.*

219. Pub. L. No. 111-5, 123 Stat. 115.

220. Tipton, *supra* note 203.

communities, giving opportunity to entrepreneurs who lack collateral to obtain business loans from traditional financial institutions.²²¹ This idea is consistent with the “federal government’s treaty-based and trust obligations to tribes,” while at the same time promoting the ideals of “self-determination . . . to transfer control over tribal economies to tribes . . .”²²² Currently, the SBA has in place a number of mechanisms through which any qualifying minority business can obtain some amount of monies.²²³ However, “[t]ribal officials have criticized SBA programs for failing to adjust to the different legal, social, and political environments present in tribal economies.”²²⁴ Instead of handing out money to Wall Street banks that fail to funnel the money to main street entrepreneurs, the federal government could help tribes fund these local businesses. Money would immediately be pumped into the economy instead of being stuffed into mattresses as banks wait out the risky economic environment.

Another “shovel ready” economic stimulus program is House Report 2284, which currently sits in referral from the Senate to the Senate Small Business and Entrepreneurship Committee.²²⁵ House Report 2284 would amend the Small Business Act to allow federal grants to create a “Small Business Development Center” in any state with a combined Native population of at least 1% of the state’s total population.²²⁶ The grants would be up to \$300,000

221. *Id.*; see also ROBERT H. WHITE, TRIBAL ASSETS: THE REBIRTH OF NATIVE AMERICA 78 (1990); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01 (“Tribes often require adequate federal assistance to finance social and economic development efforts, particularly when private capital is limited.”).

222. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.01 (noting such government funding would not “diminish[] the federal support that is a necessary part of its ongoing trust responsibility”).

223. For instance, see the SBA 7(a) Loan Guaranty Program, which helps (all) small businesses obtain loans from private lenders. 15 U.S.C. §§ 632(d), 636(a) (2006); 13 C.F.R. § 120.1 (2006). See the Microloan Demonstration Program, which makes small loans averaging \$10,000 to nonprofit intermediaries. 13 C.F.R. § 120.701 (2006). And see the Certified Development Company (504) Program, which provides long-term, fixed rate loans to (all) qualifying small businesses, but only for “major fixed assets, such as land and buildings.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.03(4)(b).

224. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, § 21.03(4)(b); *HUBZones Implementation in Indian Country: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong. 62-64 (1999) (statement of Kenneth Robbins, President, Nat’l Ctr. for Am. Indian Enter. Dev.); *Small Business Development in Indian Country: Hearing Before the Senate Comm. on Small Bus.*, 103d Cong. 16 (1993) (statement of Gregg J. Bourland, Chairman, Cheyenne River Sioux Tribe).

225. H.R. 2284, 110th Cong. (2007).

226. *Id.*

per state.²²⁷ The program would provide much needed access to business advice for novice small businesses and entrepreneurs ready to make an immediate impact in their local economies.²²⁸ Overall, these are only two out of many shovel-ready projects Congress should consider to bolster the overall economy and unemployment rates. Yet, with a Congress demanding “specifics” from those seeking government funds, Indian Country should be prepared to present these shovel-ready projects to obtain SBA contracts and grants from the stimulus bill.²²⁹

Although the stimulus bill only includes \$2.5 billion for the entirety of Indian Country, tribes must endeavor to obtain funds from opportunities available for tribal businesses in other provisions of the overall bill.²³⁰ The bill contains \$2.5 billion in direct aid “to create jobs and economic opportunity in Indian Country,”²³¹ but tribes are also eligible to compete for other financial aid programs and federal contracts.²³² For instance, “green” energy programs promoting energy efficiency create “Tribal Energy Efficiency and Conservation Block Grants,” which can total up to \$56 million.²³³ Moreover, tribes can compete for grants totaling \$5 billion available under the “Weatherization Assistance Program.”²³⁴ To be sure, businesses at the forefront of their industries are taking advantage of these contracts, and Native businesses must follow suit if they hope to weather the economic storm.

Conclusion

In recent years, the United States provided Indian tribes with many federal programs aimed at promoting the growth of tribally owned businesses. The greatest drawbacks of these programs are found in the strictures of the regulations and in the court of public opinion. Although the 8(a) BD program is under intense scrutiny in the media and in Congress, tribally owned

227. *Id.*

228. *Id.*

229. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

230. Press Release, U.S. Senate Comm. on Indian Affairs, Recovery and Reinvestment Package Includes Major Push to Create Jobs, Economic Opportunity in Indian Country (Feb. 13, 2009), available at http://indian.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=32de1b92-b63b-4a34-af7a-7679d41ca9a0&Month=2&Year=2009. Although the National Congress of American Indians asked for \$6 billion, tribes will only receive \$2.5 billion in direct aid. *Weekend Edition, supra* note 59.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

businesses will continue to prosper by avoiding the pitfalls of negative media attention and unpredictable government regulation.

