The Honorable Nick LaLota
Chairman
House Small Business Subcommittee
Contracting and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Gil Cisneros
Ranking Member
House Small Business Subcommittee
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Chairman LaLota and Ranking Member Cisneros,

On behalf of the Native American Contractors Association (NACA), we respectfully submit the below testimony regarding the House Small Business Subcommittee on Contracting and Infrastructure's hearing: *"Leveling the Playing Field: Fostering Opportunities for Small Business Contractors,"* held on September 10, 2025. Thank you for holding this hearing on this important topic facing Native federal contractors. NACA stands at the ready to work with you and other members of the subcommittee to finding ways for federal contractors to provide cost effective and efficient service to the federal government, while supporting Native economies.

I. Executive Summary

NACA was formed in 2003 to promote the common interests of its members - federally-recognized Tribes (Tribes), Native Hawaiian Organizations (NHOs), and Alaska Native Corporations (ANCs) doing business with the Federal government and participating in the Small Business Administration's (SBA) 8(a) program. NACA represents and serves forty-five Native-owned firms across the nation. NACA's members represent hundreds of thousands Tribal Members, Alaska Native Shareholders, and Native Hawaiians, serving some of some of the most marginalized and underserved populations in America. Collectively, NACA's members perform government contracts in all fifty states, several U.S. territories, and foreign countries, employing thousands of workers and representing billions of dollars in the national economy. Benefits of these government contracts flow back to Native communities in an irreplicable array of grants, scholarships, community projects and support, and direct financial assistance.

When considering improvements to federal procurement programs' use of small businesses, and strengthening support for small business contracting programs, the Department of Defense should recognize that there is a Congressionally mandated policy of supporting small businesses, including in federal government contracting.[1] With the Small Business Act, Congress determined "that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality

[1] 15 U.S.C. § 631(a) ("It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.").

for such persons and improve the functioning of our national economy."[2] Congress has set by statute small business contracting goals for the federal government.[3]

Starting in 1986, and in an effort to meet the Federal Government's trust responsibilities to Alaska Natives and Native Americans,[4] and to assist the economic development of Native communities, Congress has amended the Small Business Act to provide Tribes, ANCs, or NHOs with a greater opportunity to participate in small business programs administered by the Small Business Administration, including the 8(a) Program. Over the past forty years, Congress has statutorily provided for increasing participation by Tribes, ANCs, and NHOs in federal contracting programs, including expressly confirming that Federal procurement programs for Tribes, ANCs, and NHOs are "enacted pursuant to its authority under Article I, Section 8 of the United States Constitution," i.e., the Indian Commerce Clause.[5]

Participation by Tribes, ANCs, and NHOs in the 8(a) Program is statutorily mandated by Congress, and is an exercise of Congress's constitutional authority to regulate commerce with Indians under the Indian Commerce Clause of the Constitution.[6] The United States Supreme Court has explained that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[7] Such congressional action is pursuant to the federal government's special relationship with Natives, and is based, as the United States Supreme Court determined fifty years ago, on the political classification of Natives, and not a racial classification.[8]

According to a 2021 study by the Center for Indian Country Development, a program of the Minneapolis Federal Reserve, federal contracting to companies owned by Tribes, ANCs, and NHOs increased from close to 0% of federal government contracting in the mid-1990s to 2.5% by the end of 2021.[9] According to the SBA's recent 2024 report on the 8(a) program, in FY2023,[10] ANCs provided over $1 billion in community benefits,[11] Tribes provided over $180 million in

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[2] 15 U.S.C. §631(f)(1)(a)).

[3] 15 U.S.C. §644(g)(2) (small business contracting goal is 23%).

[4] *Haaland v. Brackeen.* 599 U.S. 256, 275 (2023) (noting that the Federal Government has " 'charged itself with moral obligations of the highest responsibility and trust' " toward Indian tribes.") (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011)); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L. Ed. 1480 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

[5] Pub. L. No. 102-415, §10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. § 1626(e)).

[6] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…." U.S. Const. art. I, § 8, cl. 3.

[7] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

[8] *Morton v. Mancari*, 417 U.S. 535 (1974). The 8(a) Program does not have a racial component. While the 8(a) program did, at one time, have regulations stating that *individuals* applying to enter the 8(a) program and were of certain races and ethnicities had a presumption of social disadvantage, that presumption has been invalidated by court order. There is no current racial component to the 8(a) program. There was never a *racial* component to participation by Tribes, ANCs, and NHOs in the 8(a) Program because the access to the 8(a) Program provided to them by Congress is pursuant to the Indian Commerce Clause and their *political* classification.

[9] https://www.minneapolisfed.org/article/2022/federal-contractings-expanding-revenue-role-in-indian-country

[10] 8(a) Business Development Program FY 2023 408 Report to the Congress (https://www.sba.gov/document/report-408-report-us-congress-minority-small-business-capital-ownership-development).

[11] Community benefits include health, social, and cultural support; education, lands, economic and community development, employment, and economic benefits.

community benefits, and NHOs provided over $216 million in community benefits, much of which is due to revenue earned as result of federal contracting opportunities.

II. Rule of Two

The SBA's small business programs are a direct implementation of Congress's determination that it is in the national interest, including the national defense interest, to have a robust and diversified small business contracting and manufacturing base. In the Small Business Act, Congress found that:

- the preservation and expansion of free competition in business is basic not only to the economic well-being but to the security of the Nation, and
- such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.[12]

Accordingly, Congress stated in the Small Business Act that:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, **to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises**, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.[13]

In support that declared policy, Congress has established a variety of small business contracting programs through the Small Business Act and other implementing legislation.

A critical component of those programs is the Rule of Two, which is the regulation mandating that federal agencies are to reserve contracts for small businesses whenever a reasonable expectation exists that at least two responsible small businesses are available to submit proposals with reasonable prices worthy of the agency's time in evaluating.[14] For the past forty years, since its enaction in 1985, the Rule of Two has been the backbone of small business participation in federal government contracting, including by Alaska Native Corporations, Tribes, and NHOs.

The Rule of Two is an integral part of the federal government's support of small businesses. As the Office of the Comptroller explained:

> [T]he Small Business Act does not, on its face, enunciate the Rule of Two. Instead . . . the rule was established to implement the Act. The origin of the Rule of Two predates the FAR; when the Far was promulgated, the Office of Federal Procurement Policy (OFPP) prepared a Federal Register notice seeking comments on the rule's inclusion in the new government-wide procurement regulation. This notice explains that the Rule of Two is intended to implement the Small Business

[12] 15 U.S.C. § 631(a).
[13] *Id.*
[14] *See also*, FAR 19.502-2; 13 C.F.R. § 125.2(f); 48 C.F.R. § 19.502-2.

> Act language in 15 U.S.C. sect. 644(a) . . . requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." In addition, the notice advised that, in the view of OFFP, **"the FAR language complies with current law and reflects the will of the Congress as expressed in the Small Business Act." Thus, while the Rule of Two is not specifically set out in the Small Business Act, it has been adopted as the FAR's implementation of the Act's requirements through notice and comment rulemaking**.[15]

This foundational small business contracting policy faces potential elimination despite driving record small business participation and supporting over one million jobs without increasing government costs. The Revolutionary FAR Overhaul mandated by Executive Order 14275 "Restoring Common Sense to Federal Procurement," issued April 15, 2025, specifically targets non-statutory provisions like the Rule of Two for removal, threatening to reverse decades of progress in small business contracting and severely impact Native American economic self-determination.

Without immediate congressional intervention through H.R. 2804 and protective appropriations language, the federal government risks eliminating a policy that has enabled Native entities alone to generate significant contracting revenue while maintaining competitive pricing and quality standards. The Rule of Two's built-in safeguards ensure it only applies when two or more responsible small businesses can perform work at fair market prices, making its potential elimination both economically harmful and unnecessary.

NACA is specifically concerned that the upcoming "rewrite" of the Federal Acquisition Regulations will impact, or even eliminate, the Rule of Two under the mistaken view that it is not mandated by statute. Executive Order 14275, mandates that the FAR Council remove all provisions "not required by statute" within 180 days. The Rule of Two faces potential elimination under this directive. The FAR Council has already begun implementation of Executive Order 14275 through model deviation text, with agencies required to implement deviations within 30 days of release. Over 500 requirements have been eliminated, demonstrating the aggressive pace of deregulation that threatens the Rule of Two.

Far from being merely an SBA regulatory creation, the Rule of Two is a fundamental part of the SBA's compliance with, and implementation of, Congress's statutory directive that a "fair portion" of federal contracting work be awarded to small businesses.[16] Without the Rule of Two, there would be no regulatory guidance or guardrails compelling federal agencies to ensure that, as Congress has mandated, a fair portion of federal work goes to small businesses. Congress should take the position that the Rule of Two is statutorily mandated, and not something that can, or should, be arbitrarily removed from the FARs without a comparable replacement.

The SBA, for example, recognizes that the Rule of Two is implementing the statutory mandates of the Small Business Act. The SBA has explained that "[t]he Rule of Two is the cornerstone of the Federal Government's support for small-business prime contracting[,]" and this rule "is expected to create more contract opportunities for small businesses, particularly small disadvantaged

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[15] *Matter of: Delex Sys., Inc.,* B- 400403, 2008 CPD P 181 (Oct. 8, 2008), *superseded by statute on other grounds in Matter of: ITility, LLC*, B- 419167, 2020 CPD P 412 (Dec. 23, 2020).
[16] 15 U.S.C. § 644(a)(1)(C).

businesses (SDBs)." SBA has also explained that the proposed rule is a result of "interagency negotiation among SBA, the FAR Council, and other agencies[,]" which was initiated to implement the Small Business Act's requirement to award a fair proportion of government purchase and contract dollars for supplies and services to small business concerns, specifically stating that the Rule of Two "further[s] this statutory provision" of the Small Business Act.[17] This Committee should recognize and advocate for the position that the Rule of Two is statutorily mandated as it is necessary to implement Congress's directive that a fair proportion of federal contracting dollars go to small businesses.

Rescission or limiting the Rule of Two will also have a devastating impact on small businesses, including those owned by Native entities. Small business federal contractors, including those owned by Alaska Native Corporations, Tribes, and NHOs have spent the past forty years developing and investing in their small businesses in reliance on the Rule of Two and the expectation that, based on its application, a fair portion of small business contracting opportunities will be available to them. If the Rule of Two is removed, federal agencies will not have any regulatory directive to use small business set aside programs, and the plain impact of that will be a substantial reduction in the number of small business opportunities. Federal contracting is an extremely competitive and low margin business, with very long and unpredictable procurement schedules, such that small businesses have to be pursuing, and winning, multiple different small business contracting opportunities to survive, much less succeed. Elimination of the Rule of Two, and the resulting reduction in the number of small business contracting opportunities, will have a cascading effect of destroying small business contractors across the Nation and in every congressional district. This will severely degrade the small business contracting base in the United States, frustrating the basic mandate of the Small Business Act. And it will be a degradation that will take years, if not decades, to overcome and repair, if it could even be done.

Indeed, without Rule of Two protections, small business participation could revert toward pre-1984 levels, representing potential loss of billions in annual opportunities. The SBA estimates that applying Rule of Two to multiple award contracts could add $6 billion in small business spending - elimination of the Rule to Two would result in a much larger reduction in small business spending by the federal government.[18]

It is critical to remember that procurements set aside for small businesses pursuant to the Rule of Two are not handouts. Procuring agencies can, and do, impose significant qualification requirements for small business contracts, both in terms of past performance, key personnel, resource availability, and financial and other resources. Nor do small business contractors get to charge a premium. The small business contracting world is highly competitive, thanks to regulations such as the Rule of Two, which encourages and permits the growth of the small business contracting community. As a result, margins are necessarily narrow, and the pricing proposed by small business is competitive and, in many cases, more cost effective and efficient than what the government would receive in a non-small business procurement. When small businesses are given the opportunity to compete for a small business contract, the government receives excellent service at a good price, while fulfilling Congress's desire, and mandate, for a robust small business contracting base.

[17] 89 FR 85072-01.
[18] 89 FR 85074

Congress has clear authority under the Small Business Act (15 U.S.C. 644) to mandate specific small business contracting procedures. The Constitution's Commerce Clause and Spending Clause provide explicit congressional authority over federal procurement policy, making legislative protection of the Rule of Two both appropriate and necessary.

The Rule of Two represents one of the most successful small business policies in federal procurement history, enabling record participation without increasing costs while maintaining quality standards. For Native American contractors, it has been instrumental in generating $202 billion in economic activity over four decades, supporting tribal self-determination and fulfilling federal trust obligations.

The current FAR overhaul poses a threat to this successful policy. NACA urges the Committee to advocate for and protect the Rule of Two and its implementing regulations. It is a critical component in the implementation of the Small Business Act, providing for cost effective and efficient service to the federal government, while supporting small businesses, and good paying jobs, in every Congressional District across the United States.

III. FAR Part 10, Market Research

The revisions to FAR Part 10, Market Research, is an example of what NACA fears may happen to the Rule of Two.

On May 22, 2025, the FAR Council issued a re-write of FAR Part 10. Notably for small business contractors, the FAR Council deleted FAR 10.001(a)(3)(viii), which provided that "[a]gencies shall…[d]etermine whether the acquisition should utilize any of the small business programs in accordance with part 19…." While this revision did not eliminate FAR Part 19 or small business regulatory requirements, it removes the regulatory requirement to conduct market research in order to determine if the Rule of Two applies, and thus can, and likely will, have a negative impact on small business federal contracting.

Notably, the FAR Council made these changes prior to seeking any input from contractors or small businesses. While the FAR Council has provided interested parties an opportunity to submit comments after-the-fact, it is not going through any public notice and comment period prior to making material and foundational changes to the FARs, including provisions that directly impact small business contractors. It is doing so even though the regulations were implemented through formal notice and comment processes that provided an opportunity for small businesses and federal contractors to provide valuable insight and recommendations regarding these critically important regulations.

NACA urges the Committee to take action to protect small businesses from negative impacts arising out of the rewrite of the FARs, including ensuring that small businesses are given a fair opportunity to compete for and win federal contracts.

IV. Bona Fide Place of Business Rule

In the Small Business Act, Congress provides the following:

> To the maximum extent practicable, construction subcontracts awarded by the Administration pursuant to this subsection [the 8(a) Program] shall be awarded within the county or State where the work is to be performed.

15 U.S.C. § 637(a)(1)(A)(16)(B).

The Small Business Administration ("SBA") has construed this statutory directive to require 8(a) companies with 8(a) construction contracts to have a "bona fide place of business" in the geographic area where the construction project is located. As is common in a regulatory regime, the SBA has revised and expanded the rules governing this "bona fide place of business" rule over the years to the point where there is now a byzantine maze of restrictions and requirements that have to be followed in order to comply with the rule.[19] For example, even though the Small Business Act states that 8(a) contracts should be "awarded within the county or State where the work is to be performed," the current regulatory regime permits an 8(a) contractor in Nevada to perform an 8(a) construction contract anywhere in any contiguous state, i.e., Utah, California, New Mexico, etc. That the SBA adopted a regulation that permits an 8(a) company to use an office in a neighboring state as the "bona fide place of business" a construction contract demonstrates the fallacy and illogic of the SBA's approach.

The additional red tape and administrative burden imposed by the SBA on small businesses participating in the 8(a) Program is unnecessary. In fact, we know that the rule is not necessary because the SBA adopted a moratorium on the rule in 2021 and has kept that moratorium in place over the past four years. See https://www.sba.gov/article/2024/06/11/sba-announces-extension-moratorium-8a-eligibility-requirement-small-disadvantaged-businesses. If the rule has not been needed during the past four years, that demonstrates it is not needed at all and should be rescinded.

In today's technologically advanced world, requiring a construction contractor to have a brick-and-mortar physical location in the area where they are working is simply unnecessary and is a significant barrier to all small businesses that participate in the federal marketplace within the 8(a) Program, particularly, those that have just entered the program as they do not have the resources or capital to meet this requirement.

There are other ways for the SBA to implement Congress's directive that 8(a) construction contracts should be awarded within the county or State where the work is to be performed "to the maximum extent practicable," including through the delegation of authority to the procuring contracting officers to determined what is required or needed for their project.

V. Consolidation and Bundling

As part of its implementation of President Trump's executive orders, the federal government has been moving to consolidate and bundle procurements with the General Services Administration and to contract vehicles. For example, the FAR Council's revisions to the FARs, in multiple locations, now provide that existing contract vehicles and consolidation of contract actions should be favored. Such consolidation may result in contracting efficiencies, as procurement functions are centralized, leading to more consistent approaches to procurement and contract management, and NACA is supportive of efforts that reduce the regulatory cost and burden on small businesses and Native owned entities, and is hopeful that this consolidation will have that impact.

However, NACA is concerned that consolidation will lead to an increase in the bundling of contract requirements, or the use of large contract vehicles which small businesses have difficulty accessing. NACA urges the House Small Business Committee to engage with the GSA and the

[19] *See* 13 CFR 121.105.

SBA to ensure that small business contracting opportunities are preserved at the current level with this consolidation at GSA, and small businesses continue to have a fair opportunity to win work.

Specifically, small businesses will be negatively impacted by the transfer of procurement opportunities to large contract vehicles that are generally populated only by large businesses due to the qualification requirements, and resources of time and money, which are necessary to obtain a seat on those vehicles. Many small businesses, including those owned by Native entities, are not able to obtain seats on larger contract vehicles because of the time and expense involved in preparing qualifying proposals. The federal government should not sacrifice small business contractors on the altar of consolidation.

Furthermore, it is important to remember that Congress itself has directed, via statute, that the federal government should avoid the bundling and consolidation of federal procurements in a manner that negative impacts small businesses. In the Small Business Act, Congress specifically found that:

> CONTRACT BUNDLING.—In complying with the statement of congressional policy expressed in subsection (a), relating to fostering the participation of small business concerns in the contracting opportunities of the Government, **each Federal agency, to the maximum extent practicable, shall—**
>
> (1) comply with congressional intent to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers;
>
> (2) **structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation**; and
>
> (3) **avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors**.[20]

FARs 7.107-2 and 7.107-3[21] implement the Small Business Act[22] requirements regarding federal consolidation and bundling.[23] As mandated by the Small Business Act, each regulation acknowledges that while consolidation and bundling may provide a benefit to the government in certain cases, there are also potential detriments to small business participation. As such, the Small Business Act, and FARs 7.107-2 and -3 mandate, prior to an acquisition strategy involving either estimated to exceed $2 million, that a federal agency must make a written determination that such strategy is necessary and justified.

Under FAR 7.107-2, consolidation is necessary and justified if the benefits would substantially exceed those from alternative contracting approaches, including those quantifiable. Under FAR

[20] 15 U.S.C. § 631(j).
[21] *See also,* 48 C.F.R. §§ 7.107-2 and 7.107-3.
[22] P.L. 111-240 (Sept. 27, 2010) (codified at 15 U.S.C. § 631 *et seq.*).
[23] 15 U.S.C. §§ 644(e) and 657q.

7.107-3, bundling is considered necessary and justified if the benefits an agency would obtain are measurably substantial as compared with those involving separate smaller contracts or orders.

NACA urges the Committee to review the administration's efforts to accelerate bundling and consolidation, and to ensure that they do not harm small business contracting by mandating compliance with the Small Business Act and FAR 7.107.

VI. SBA Staffing

SBA staff are hard-working professionals, with a detailed understanding of SBA's regulations and small business programs and a dedication to the SBA's mission. They are also being put under tremendous pressure due to a lack of staffing. There are three (3) Business Opportunity Specialists in Anchorage, with over 100 8(a) companies assigned to each of them. There are only two (2) Business Opportunity Specialists in Hawaii, and they are overloaded as well. The number of SBA personnel able to approve 8(a) applications is remarkably small, such that it is taking many *months* for Alaska Native Corporations, Tribes, and NHOs to have their 8(a) applications approved, even when such applications are very simple given the lack of any need to establish social disadvantage or economic disadvantage in the case of Alaska Native Corporations, as well as Tribes and NHOs that have previously established economic disadvantage.

This level of staffing is unsustainable and does not benefit small businesses and Native-owned entities *or* the SBA. Small businesses and Native-owned entities are harmed through delays in approvals of their 8(a) applications and mentor-protégé agreements, such that they miss out on critical contracting opportunities that are needed to support their businesses and their local communities. Where an Alaska Native Corporation, Tribe, or NHO has submitted the required documentation, review and approval of their 8(a) application should be a matter of hours, and not months, given that they only need to establish that their proposed 8(a) entity is (1) owned and controlled by a Native entity, (2) does not have the same primary North American Industry Classification System (NAICS) code as another 8(a) entity owned by the same Native entity within the past two years, (3) is supported by the parent Native entity, and (4) has qualified personnel heading the 8(a) company. These matters, and the required review, is not complicated or difficult, and should not take months or up to a year to complete.

The SBA is also harmed by the current staffing levels. Given the workload demanded of the SBA's current, shrunken workforce, SBA personnel will either (1) delay actions and approvals to the point that small businesses lose out on contracting opportunities, or (2) expedite their review of matters, leading to them missing issues or problems and permitting bad actors to exploit the lack of staff and take unfair advantage of SBA programs. Moreover, the crushing workload currently demanded of BOSs, particularly in Anchorage, will only result in higher turnover, leading to further reduced staffing and degradation in the experience and historical knowledge of the BOSs, which will in turn only further cause more delays and work. There will be a cycle of turnovers that feeds itself, significantly impairing the SBA's ability to manage the 8(a) and other small business programs.

NACA urges the Committee to recognize that one of its critical Congressional mandates is to support and manage the federal government's small business programs, and that the SBA cannot

do so without professional, experienced, and supported staff. The SBA have the staff necessary to effectively, efficiently, and *timely* manage the 8(a) and other small business programs.

VII. Security Clearances

Current Department of Defense regulations[24] require government contractors to obtain multiple security clearances for the same personnel from different government agencies. This is unnecessary and burdensome to small businesses. It is both costly and inefficient for the government and puts significant financial burdens on government contractors, particularly small businesses. The current system has also led to inconsistent processing times at different agencies which makes it difficult for contractors to plan and provide needed services.

The Committee should engage with the Department of Defense and urge it to revise its regulations to provide for reciprocity with respect to agency clearances. That is, if one agency has determined that an individual is eligible for a top-secret clearance, the other agencies should respect that and grant a similar clearance without requiring the individual to repeat the same investigation that the original agency conducted. This reciprocity would ensure that the clearance process is expedited, and the investigation and adjudication processes more quickly meet the needs of the government. Reciprocity for security clearances would also support a more agile and skilled workforce that can quickly meet the needs for innovation and new technology that the government requires. Finally, this process would also allow the government to refine their regulations and systems to ensure that the highest standards for clearances are met across all agencies.

VIII. Section 865 - Affiliate Past Performance

Section 865 of the 2024 NDAA required the Department of Defense to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to mandate that Department of Defense agencies consider the past performance information of affiliates:

> Not later than July 1, 2024, the Secretary of Defense shall amend section 215.305 of the Defense Federal Acquisition Regulation Supplement (or any successor regulation) to require that when small business concerns bid on Department of Defense contracts, the past performance evaluation and source selection processes shall consider, if relevant, the past performance information of affiliate companies of the small business concerns.

The Department of Defense amended DFAR 215.305 to include a subparagraph (c) that states

> When evaluating the past performance of an offeror that is a small business concern in response to a competitive solicitation, contracting officers shall consider relevant past performance information provided for affiliates of the offeror.

Department of Defense agencies, however, are limiting the application of DFAR 215.305(c), including by arguing that it is limited solely to Part 15 procurements and does not apply to Part 16 procurements.

This artificial limiting of DFAR 215.305(c) is in contravention of Congress's intent that Department of Defense agencies consider affiliate past performance when evaluating proposals. Department of Defense agencies should not frustrate the intent of Congress by applying an overly

[24] 32 C.F.R. § 2001 and 32 C.F.R. § 147.

technical parsing of the phrase "affiliate companies of the small business concerns" in Section 865 of the 2024 NDAA. As the United States Supreme Court has repeatedly and recently stated, it is not the job of federal agencies to create new law – it is their job to follow the directions of Congress.[25]

NACA therefore recommends that the Committee engage with the Department of Defense on its implementation of Congress's directive that Department of Defense agencies consider affiliate past performance when evaluating proposals, as well as consider clarifying Section 865 of the 2024 NDAA to make it clear that Department of Defense agencies must consider affiliate past performance in all procurements, and not just Part 15 procurements.

IX. The Negative Impact To Small Businesses On Variances In Minimum Wage Requirements

There is a conflict between federal and state/local laws that is unfairly increasing the cost of performing federal contracts, and forcing small business contracts to bear those increased costs.

Most federal contracts set a minimum wage that the contractor, including contractors owned by Tribes, ANCs, and NHOs, must pay their employees working on a federal contract the federal contractor minimum wage mandated by Executive Order 14026, the Davis-Bacon Act, or the Service Contract Act. While these mandatory minimum wages are subject to periodic increase by the Department of Labor, the Federal Acquisition Regulations give contractors the opportunity to recover the additional costs that are imposed on the contractors by any such wage adjustments from the federal government. The federal government recognizes that if it is going to increase the cost of performance after awarding a contract by mandating an increase in the minimum wage a contractor must pay, the federal government should pay for the cost increase, instead of leaving the contractors, and its tribal members and shareholders, to bear that extra and unexpected burden.

Federal contractors, however, are more and more often having to deal with ever-increasing state or local minimum wage obligations when performing federal contracts. Many states and localities (i.e., cities and towns) are enacting their own minimum wage requirements that exceed the minimum wages specified for federal contractors, including the minimum wages required by DBA and SCA wage determinations. For example, Seattle's minimum wage is $19.97/hour. Flagstaff's is $17.40/hour, Los Angeles' is $17.28/hour, San Francisco's is $18.67/hour, Denver's is $18.29/hour, and the District of Columbia's is $17.50/hour. In each of these localities, the local minimum wage exceeds the federal contractor minimum wage of $17.20/hour, and in some cases exceeds the applicable SCA wage determinations.

Similarly, several states have also adopted laws and regulations that require employers to pay a higher salary to exempt employees than required by federal law. Alaska, California, Colorado, New York, Oregon, and Washington have all adopted rules that require employers to give raises to their employees or classify them as non-exempt employees. For example, under federal law, an employee must be paid at least $844 a week as of January 1, 2024, in order to be classified as an exempt employee. As of January 1, 2024 however, California state law requires an employee to be paid at least $1,280 a week to be classified as exempt. This means that, as of January 1, 2024, an

[25] *See e.g., Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (agencies can only take action authorized by Congress); *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) ("the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits")

employer in California had to increase an exempt employee's pay by a minimum of $436 a week (over $22,000 a year) in order to maintain that employee's exempt status.

While these higher minimum wage and salary requirements could be categorized as a simple cost of doing business, contractors are put in an impossible situation. Federal contracts are often long-term contracts, running up to or more than five years. When submitting proposals for federal contracts, contractors have to price those contracts for that time period based on the information that they have when they submit their proposal. It is not reasonable or possible for contractors to account for future, unknown changes in state law, much less changes at the city and county level.

Furthermore, while a contractor is entitled to recover the additional cost incurred by a change in the federal government's minimum wage, a recent decision from the Civilian Board of Contract Appeals ("CBCA") found that there is no method for a contractor to recover the additional costs incurred by a change in state law, even though a contractor often has to commit to perform a federal contract for five or more years.

Didlake, Inc. v. General Services Administration, CBCA No. 7769, 7911, (Apr. 23, 2024), involved a contractor doing work on an SCA contract in Maryland. After the contractor was awarded the SCA contract, the minimum wage for janitors mandated by state law increased to the point that it exceeded the applicable SCA wage rate in the contract. The contractor was therefore required by state law to pay its employees more than what was required by the wage determination included in its federal contract, or that it accounted for when pricing its proposal. The CBCA rejected the contractor's request for additional compensation from the federal government, finding that the SCA price adjustment clause did not apply to changes in state law.

This puts federal contractors in a difficult position: a contractor must pay the higher state or local wage rate (or increase) to be compliant with state or local law and perform the federal contract, but lacks a contractual mechanism to recover that difference from the federal government. As a result, contractors now must simply absorb the cost incurred whenever state or local wage rates changed post contract award to exceed the applicable federal contractor minimum wage. Recovery from a federal agency after-the-fact simply is not a viable option absent a specific contractual provision addressing recovery for these types of increases.

Requiring small businesses to bear the risk that their cost of performance on a federal contract will be significantly increased due to a state or local law change in the minimum wage, without any method of recovering the actual cost of performance, will have an adverse impact on federal contractors. In response, contractors will have to either artificially increase the prices charged to the federal government to account for the risk of a raise in the minimum wage at the state or local level or decline to participate in federal contracting. Either approach will only increase the final cost to the federal government, either through higher cost proposals or reduced competition.

A more fiscally appropriate and fair result is to either (1) exempt federal contractor employees working on federal contracts from state or local minimum wage laws, or (2) provide an avenue for federal contractors to recover the excess costs imposed by a mandatory increase in the minimum wage at the state or local level from the federal government. Exempting federal contractor employees working on federal contracts from state or local minimum wage laws does not mean that those employees will not be paid a competitive wage or have protections. Those employees would still be subject to the wage protections, including minimum wage obligations, of Executive

Order 14026, the Davis-Bacon Act, and the Service Contract Act. But, federal contractors would not be required to solely bear the cost of changes to minimum wage at the state or local level.

Maintaining a strong small business contractor base is a critical goal of Congress and the federal government. Prompt action should be taken to avoid the unfair shifting of cost of performance to contractors.

X. Restrictions on Native-Owned 8(a) Companies

In order for a company to be eligible for entry to, or continued participation in, the SBA's 8(a) Program, a company must be "small." The SBA has established size standards for each code assigned by the North American Industry Classification System (NAICS) to an economic activity or industry type. Each company in the 8(a) Program (and the SBA's small business programs generally) has a primary NAICS code, defined as the NAICS code where the company realizes the most significant amount of its revenue. If a company concern is not "small" under the applicable size standard assigned by the SBA to that company's primary NAICS code, it is not eligible to receive 8(a) contracts. Therefore, having a NAICS code that accurately reflects the company's business plan is important, as different size standards apply to different NAICS code.

Congress, pursuant to the Small Business Act and related legislation, has explicitly authorized ANCs, Tribes, and NHOs to have more than one subsidiary participating in the 8(a) Program.[26] The only restriction imposed by Congress is that an ANC, Tribe, and NHO cannot have two or more companies that are active in the 8(a) Program with the same NAICS code.[27]

In 13 C.F.R. 124.109(c)(3)(ii), however, the SBA has imposed additional regulatory limitations on that congressional mandate. Under 13 C.F.R. 124.109(c)(3)(iii), the primary NAICS code of a subsidiary owned by an ANC, Tribe, or NHO that graduates or voluntarily withdraws early from the 8(a) Program cannot be used by another subsidiary of that same Native entity for a period of two years:

> A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant.

For example, if an ANC-owned company exits the 8(a) Program and their primary NAICS code was 541330, engineering services, that ANC would have to wait two years before applying to have another company with the primary NAICS code of 541330 enter the 8(a) Program.

There is no statutory basis for the SBA's imposition of a regulatory two year "hold" on primary NAICS code(s). Congress provided that an ANC, Tribe, or NHO cannot have two or more active companies in the 8(a) Program that have the same primary NAICS code, but did not impose any two year "hold" on an NAICS code.

The SBA's two year "hold" also unnecessarily burdens the development of Native-owned businesses and limits their ability to provide cost-effective and efficient services to the federal government. As federal procurement needs and technologies advance and change, the limited

[26] *See* 15 U.S.C. § 636(j)(11)(B)(iii).

[27] 15 U.S.C. § 636(j)(11)(B)(iii) (An ANC, Tribe or NHO "may own more than one small business concern eligible for assistance pursuant to paragraph (10) and section 637(a) of this title if—(I) the Indian tribe does not own another firm in the same industry which has been determined to be eligible to receive contracts under this program….")

number of viable and relevant NAICS codes is becoming a significant challenge to the overall small business development objectives of the 8(a) Program.

The two-year NAICS code hold is particularly antiquated and limited in the 51 – Information and 54 – Professional, Scientific, and Technical Services series. The last 15 years of technical progress and scientific development have created new needs and established industries for Cybersecurity, Cloud Computing, Artificial Intelligence and Machine Learning, Unmanned Aerial Vehicles, and Commercial Satellites that have not been reflected with new NAICS code opportunities for 8(a) businesses. Therefore, by imposing a two year "hold" on the use of a NAICS codes after a Native-owned entity graduates from the 8(a) Program, the SBA is artificially preventing Native-owned companies from fully participating in the 8(a) Program and government contracting and providing greater competition (and thus better services and lower prices) for the federal contracts. Fundamentally, neither the federal government nor the public is served by imposing an artificial regulatory two year "hold" on NAICS codes.

NACA proposes that the Committee take action to ensure that the two-year hold requirement in 13 CFR 124.109(c)(3)(ii) be eliminated to provide additional opportunities for federal contracting participation.

XI. Restrictions on Follow-On Contracts

The Small Business Act permits directed awards to companies in the 8(a) Program, including those owned by ANCs, Tribes, and NHOs.[28] The Small Business Act also permits ANCs, Tribes, and NHOs to have more than one company in the 8(a) Program.[29]

The SBA has adopted 13 CFR § 124.109 (c)(3)(ii)(A), which bars the direct award of a "follow-on contract," i.e., a contract for the same work, to a "sister company" of the 8(a) company that was performing the immediately preceding contract:

> Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

This means that if Company A is performing an 8(a) contract, and that contract expires, the next 8(a) contract for that same scope of work can be awarded as a directed award to any 8(a)-company other than a company that is owned by the same Native entity that owns Company A.

There is no statutory basis for this regulation. There is nothing in the Small Business Act or elsewhere that prohibits the direct award of an 8(a) contract to a Native-owned entity solely because a sister company previously performed the same scope of work.

This restriction of follow-on direct awards in the 8(a) Program also contradicts the SBA's mission to support Indian Country through business development. Congress included Native-owned entities in the 8(a) program to (1) inject much-needed resources into some of the most underserved areas of the country, (2) fulfill the trust obligation the federal government has to ANCs, Tribes,

[28] 15 U.S.C. § 637(a).
[29] 15 U.S.C. § 636(j)(11)(B)(iii).

and NHOs, and (3) to include Native communities in the broader market economy. This regulation stops successful Native communities from fully benefiting from the investments made to secure and perform contracts for the federal government.

Moreover, in many cases, ANCs, Tribes, and NHOs establish multiple companies to specialize in different sectors, geographies, or customer agencies. Prohibiting a sister company from pursuing follow-on work penalizes this legitimate diversification strategy. Similarly, the subsidiaries of a Native entity often share back-office services, compliance infrastructure, and best practices across their companies. This rule effectively tells them that investment in shared strength is a waste because only one company at a time can benefit from follow-on opportunities. Finally, every dollar of government contract revenue flowing through Native companies creates jobs, dividends, training, and economic activity in Native communities. Blocking sister companies from follow-on awards chokes off this pipeline without any statutory basis or benefit to the federal government.

Rescinding 13 CFR 124.109 (c)(3)(ii) does not mean that Native-owned entities are guaranteed the follow-on work. The procuring agencies have discretion as to whether to make a directed award or to have a competitive process. Moreover, any 8(a) company has to prove that they can perform the work for a fair price prior to being awarded any contract. In other words, even without § 124.109(c)(3)(ii)(A), a sister company would not be "guaranteed" the follow-on award. The agency would retain full authority to evaluate whether the sister company is qualified and cost-effective.

Indeed, only those 8(a) companies that are providing cost-effective and efficient work will even have an opportunity to receive directed awards of follow-on work if 13 CFR 124.109(c)(3)(ii) is rescinded. By keeping this regulation in place, the SBA artificially and unnecessarily ties the procuring agencies hands by barring them from using what may be the most efficient and cost-effective contracting for reasons entirely divorced from actual contract performance. Rescinding 13 CFR 124.109(c)(3)(ii)(A) would restore agency discretion to select the best-qualified 8(a) company—without unnecessary regulatory interference.

NACA proposes that the Committee take action to ensure that 13 CFR 124.109 (c)(3)(ii) is rescinded because it is not statutorily mandated and its rescission will spur economic development for ANCs, Tribes, and NHOs.

XII. Recertificate Requirements For Long-Term Contracts

As a general matter, if a company is small when it is awarded a contract, it is considered small for the life of that contract.[30] This makes sense, as it would be unfair to the small business if they are forced to give up a contract simply because they grew as a result of their success during their performance of the contract. This rule also benefits the federal government by providing procurement certainty – once a small business contract is awarded, the procuring agency does not need to worry about an unexpected disruption in service that could arise if it were prevented from, for example, exercising an option year on the contract because the small business had organically grown in size.

[30] 13 C.F.R. § 121.404(a) ("Once awarded a contract as a small business, a firm is generally considered to be a small business throughout the life of that contract.")

The SBA, however, has chosen to impose a recertification requirement on companies in the 8(a) Program with long term contracts (i.e., contracts longer than five years) that requires the 8(a) company to recertify their size after five years. 13 C.F.R. § 124.521(e)(2) states:

> For the purposes of 8(a) contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must verify in SAM.gov (or successor system) whether a business concern continues to be an eligible 8(a) Participant no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Where a concern fails to qualify or will no longer qualify as an eligible 8(a) Participant at any point during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.

If the 8(a) company cannot recertify that they are a small business at this five-year mark, any contract options remaining on the contract "shall not be exercised."[31]

The 8(a) Program was established to provide federal contracting opportunities for disadvantaged businesses, first providing access to compete for initial 8(a) contracts and then the ability to grow into successful federal contractors. This arbitrary rule, not mandated by any statue, inhibits the ability of a small business to grow and succeed within the 8(a) program and has resulted in Federal customers issuing fewer longer-term contracts to 8(a) companies due to those participants not being able to recertify at the 5-year mark. Due to the government's hesitancy to issue longer-term contracts to 8(a) companies, 13 C.F.R. §124.521(e)(2) incentivizes small businesses to limit their growth in order to permit them to complete their long-term contracts. The SBA should be imposing regulatory burdens that disincentives growth and encourages companies to remain "small," and that punishes them by kicking them off a contract if they are too successful.

NACA proposes that Congress take action to eliminate the five-year recertification requirement in 13 CFR 124.521(e)(2).

Thank you again for the opportunity to submit these comments on behalf of NACA. We look forward to continuing to work with you and the committee on these important issues facing Native federal contractors.

Sincerely,

Quinton Carroll

Quinton Carroll
NACA Executive Director

[31] *Id.*