REMINDER: ALASKA NATIVE CORPORATIONS ARE EXEMPT FROM CERTAIN SIZE RULES

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Before submitting a size protest, small businesses would be advised to consider that Alaska Native Corporations ("ANCs") are exempted from a number of the Small Business Administration ("SBA") size affiliation regulations. A recent protest urged the SBA Office of Hearings and Appeals to find that an ANC had a "substantial unfair competitive advantage," but OHA dismissed the appeal because only the SBA Administrator could make such a finding. *Size Appeal of The Emergence Group,* SBA No. SIZ-5766, July 28, 2016.

In *Emergence Group,* the protester asserted that Olgoonik Federal, LLC ("Olgoonik"), awardee in a total small business set-aside, was part of the Olgoonik family of "large" companies which, during 2015 received $200 million in federal contracting dollars. Even if the allegations were true, the SBA Area office found Olgonook not to be affiliated because of the SBA size regulations on ANCs, which state:

> Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations ("ANC"), Native Hawaiian Organizations ("NHOs"), Community Development Corporations ("CDCs" or wholly owned entities of Indian Tribes, ANCs, NHOs or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for these services. Affiliation may be found for other reasons.

13 CFR § 121.103(b)(2)(ii). Emergence asserted, however, that Olgoonik should not be subject to that regulatory exception because doing so would result in a "substantial unfair advantage," a specific exception found in the Small Business Act.

> In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the [SBA] Administrator determines that one or more such tribally owned business concerns have obtained or are likely to obtain, *a substantial unfair competitive advantage* within an industry category.

15 USC § 636(j)(10)(J)(ii)(II) (emphasis added).

The problem identified by the SBA Office of Hearings and Appeals was that its jurisdiction does not extend to the "unfair advantage" section of the Small Business Act. OHA's jurisdiction is limited to review of explicitly delegated proceedings by the SBA, including appeals from size determinations and NAICS code designations, other hearings, determinations, or appeal proceedings referred to OHA by the SBA Administrator or required by a specific Operating

Procedure, , Directive, Procedural Notice, or individual request from that administrator. 13 CFR § 134.102. The SBA Administrator is the only party that issues rulings on the "unfair advantage" section of the Small Business Act. Emergence's appeal did not assert that the Area Office size determination was erroneous, as required by OHA's jurisdictional regulations. Therefore, OHA had no choice but to dismiss the appeal based on lack of jurisdiction.

The lesson is straightforward. If you want to timely appeal a size determination that you believe was erroneously made by an Area Office based on the SBA regulations, you may do so at the OHA and the appeal will be considered. But where you seek review under a statute or provision not committed to OHA appeal, you will receive no consideration in that forum. This is particularly true in areas like ANCs, where the statutes have granted very specific exemptions from the size regulations.

Postscript: The complete jurisdictional delegation to OHA in the SBA regulations may be found at 13 CFR §134.102, Jurisdiction of OHA.