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United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

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October 12, 2011

Mr. Frank Kendall
Acting Undersecretary of Defense for Acquisition, Technology & Logistics
Pentagon, Room 3E1010
Arlington, VA 20301

Dear Mr. Kendall:

We were concerned to read a front-page story in *The Washington Post* last week about allegations that from 2007 through the present, contracting officers with the U.S. Army Corp of Engineers, an Alaska Native Corporation (ANC) called EyakTek, and an unnamed 8(a) small business subcontractor conspired to defraud the government of approximately $20 million on a contract valued at more than $1 billion. According to the indictment filed by the Department of Justice, these individuals also planned to steer a $780 million Army Corps contract to the same unnamed subcontractor.

As you know, for some time we have been concerned about abuses in defense contracting associated with the special exceptions, rules, and procedures that apply to ANCs under section 8(a) of the Small Business Act. Such abuses have been found in several reports issued from 2006 through 2009 by the Government Accountability Office (GAO) and the Subcommittee on Contracting Oversight of the Homeland Security and Governmental Affairs Committee, as well as by Inspectors General for the Department of Defense and the Small Business Administration.

These reports showed, among other things, how ANCs (and those joint-venture partners, non-native executives, consultants, and others associated with them) exploited the ability of ANCs to obtain sole-source contracts of unlimited size through the use of pass-through contracts, under which non-ANC subcontractors in fact perform most of the work under a government contract.

In the Senate Armed Services Committee, Chairman Levin and Ranking Member McCain, along with Senator McCaskill, addressed these abuses in the Fiscal Year 2010 National Defense Authorization Act. Section 811 of this Act requires the government to provide a "justification and approval" (J&A) for a decision to sole-source any government contract greater than $20 million under section 8(a) of the Small Business Act. As you know, J&As are routinely

used for all sole-source award decisions to justify an exception to the normal requirement for full-and-open competition under federal contracting law. Until section 811 was enacted, however, a J&A was not required for sole-source contracts to ANCs awarded through the 8(a) program. A J&A is critical to ensure the appropriate level of internal oversight and approval for sole-source contracting decisions.

Extending the "J&A requirement" to ANCs through section 811 is intended to ensure that large sole-source contracts awarded to ANCs are subject to the same level of oversight as other large sole-source contracts and that such contracts be entered into only when doing so is in the taxpayers' best interests.

In the case of EyakTek, its ability as an ANC to secure, without sufficient scrutiny and review, a sole-source contract and enter into a pass-through arrangement with the unnamed contractor were apparently key to facilitating this alleged fraud scheme. The same lack of oversight of 8(a) contracts may also have allowed the Army Corps officials and the unnamed subcontractor to rig a second, even more lucrative contracting opportunity.

We understand that the original sole-source award to EyakTek pre-dated section 811, which, had it been in effect at the time of the contract award, could have prevented the conspiracy by requiring that the sole-source decision be reviewed and approved by a higher authority than the contracting officer, who allegedly was deeply involved in the conspiracy in this case.

We also appreciate that regulations implementing section 811 were only issued in March 2011 and that, since section 811 was enacted, the Small Business Administration has taken action to strengthen some of the regulations applicable to ANCs. Nonetheless, we believe that this alleged fraud scheme involving an ANC, which has been described as "one of the most brazen corruption schemes in the history of federal contracting", is a clear indication that abuses by ANCs and those associated with them should remain a matter of concern. We have to make sure that section 811, and its supporting regulations, are being implemented fully and effectively.

With this goal in mind, we ask that you direct all relevant departments, components and agencies within the Department of Defense to conduct a top-down review of all active sole-source contracts awarded to ANCs before the effective date of section 811 (and its associated regulations and procedures) to identify where pass-through contracts may be in place. Where sole-source contracts to ANCs have not been reviewed and approved by a J&A as required by section 811, we ask that you address the risk of the Department's being defrauded and take appropriate action to protect the taxpayers' interests.

Also, please provide us with (1) the number of sole-source contracts greater than $20 million that have been awarded to each category of 8(a) participants, including but not limited to ANCs, from 2006 through the present; (2) the dollar amounts associated with these contracts; (3) the justifications supporting the approval of these awards (where these justifications exist); (4) a description of the goods or services that have been procured under these contracts; (5) the percentage of work on these contracts that were subcontracted by the awardee and performed by entities other than the awardee; (6) the dollar amount paid to these parties under these contracts; and (7) a description of what measures have been or will be taken by the Department to ensure that such contracts will not be abused. Please submit your response using a single, standardized spreadsheet.

Finally, please describe what controls are in place, or will be put in place, to help ensure that, especially on low-profile contracts of relatively small value, source-selection boards cannot be "stacked" or otherwise manipulated to favor any particular bidder, as was reportedly the intention of the co-conspirators in this case.

We know that the Department of Defense has taken steps to address abuses in contracting and that the Department has strengthened the rules that apply to ANCs. But, in light of the most recent allegations of brazen fraud that took advantage of the special status ANCs formerly enjoyed, we are sure you would agree the Department must aggressively and forthrightly address the lingering potential for abuse. Such steps would be consistent with the Department's renewed emphasis on competition and value and its commitment to transparency and fairness in contracting. These are objectives that we can all agree must, especially in the current climate of fiscal austerity, be achieved as soon as possible.

We look forward your reply.

Sincerely,

Claire McCaskill
Chairman, Subcommittee on Readiness
and Management Support

John McCain
Ranking Member