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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6403

DATE COMPLAINT FILED: October 21, 2010

DATE OF NOTIFICATION: October 28, 2010

LAST RESPONSE RECEIVED: December 13, 2010

DATE ACTIVATED: February 1, 2011

EXPIRATION OF SOL: September 24, 2015 (earliest)
October 29, 2015 (latest)

COMPLAINANT:

The Joe Miller for U.S. Senate campaign, by Linda
Johnson, Member

RESPONDENTS:

Alaskans Standing Together and Barbara Donatelli, in her
official capacity as treasurer

Jason Moore

Ahtna, Inc.

Aleut Corporation

Arctic Slope Regional Corporation

Bering Straits Native Corporation

Bristol Bay Native Corporation

Calista Corporation

Chugach Alaska Corporation

Cook Inlet Region, Inc.

Doyon, Limited

Koniag, Inc.

NANA Regional Corporation

Sealaska Corporation

Lisa Murkowski for U.S. Senate and Joseph M. Schierhorn,
in his official capacity as treasurer

Senator Lisa Murkowski

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441c

11 C.F.R. § 115.1

11 C.F.R. § 115.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

Complainant alleges that Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer ("AST"), a political action committee that has made independent expenditures regarding the 2010 U.S. Senate general election in Alaska, and AST's spokesperson, Jason Moore, knowingly and willfully violated 2 U.S.C. § 441c(a)(2) by soliciting and accepting \$805,000 in contributions from the Respondent corporations, which the Complainant alleges are government contractors. Complainant also alleges that the Respondent corporations knowingly and willfully violated 2 U.S.C. § 441c(a)(1) by making contributions to AST to influence a federal election. The Complainant further alleges that Lisa Murkowski for U.S. Senate and Joseph M. Schierhorn, in his official capacity as treasurer ("the Murkowski Committee") and Senator Lisa Murkowski knowingly and willfully violated the Federal Election Campaign Act of 1971, as amended, ("the Act") because Senator Murkowski was "the direct beneficiary of these illegally donated funds..." and AST "g[a]ve federal money to fund Lisa Murkowski's senatorial campaign." Complaint at 3 and 6.

The twelve Respondent corporations deny the allegations, and argue variously that (1) the contributions made to AST were permissible because the contributors were not government contractors as defined by the Act and the Commission's regulations; (2) the contributors were exercising their First Amendment speech rights when they made independent expenditures by contributing to AST, an independent-expenditure-only political committee; and (3) in the context of independent spending, the Act at 2 U.S.C. § 441c and the Commission's regulation at 11 C.F.R. § 115.2, which prohibit government contractors' contributions, are contrary to *Citizens United v. Federal Election*

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1 *Commission*, 130 S. Ct. 876 (2010) ("*Citizens United*"), and *SpeechNow.org v. Federal*
2 *Election Commission*, 599 F.3d 686 (D.C Cir. 2010) ("*SpeechNow*"). See Arctic Slope
3 Response at 3-5; see also Ahtna and NANA Joint Response at 6-7. Respondent AST
4 generally denies the allegations in the complaint and maintains it had no knowledge that
5 any of the Respondent corporations were government contractors based on its discussions
6 with executives at the Respondent corporations, and based on its own knowledge and past
7 experience. Therefore, AST claims it did not knowingly solicit contributions from
8 government contractors. See AST Response at 4-6. Last, Respondents Jason Moore,
9 Lisa Murkowski, and the Murkowski Committee, deny the allegations of the complaint.

10 For the reasons set forth below, we recommend that the Commission find no
11 reason to believe that nine of the corporations, Aleut Corporation, Bering Straits Native
12 Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska
13 Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag, Inc., and Sealaska
14 Corporation violated 2 U.S.C. § 441c(a)(1) because the available information shows that
15 these companies are not government contractors. We further recommend that the
16 Commission find no reason to believe that Lisa Murkowski for U.S. Senate and Joseph
17 M. Schierhorn, in his official capacity as treasurer, and Senator Lisa Murkowski violated
18 the Act or the Commission's regulations, and no reason to believe that Jason Moore
19 violated 2 U.S.C. § 441c(a)(2). As to the remaining three corporations and AST, we
20 recommend that the Commission exercise its prosecutorial discretion and dismiss the
21 allegations that Arctic Slope Regional Corporation, Ahtna, Inc., and NANA Regional
22 Corporation violated 441c(a)(1), and that Alaskans Standing Together and Barbara
23 Donatelli, in her official capacity as treasurer, violated 2 U.S.C. § 441c(a)(2). *Heckler v.*

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Chaney, 470 U.S. 821 (1985). Finally, we recommend that the Commission close the file as to all Respondents.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

AST, an independent-expenditure-only political action committee, registered with the Commission on September 23, 2010. According to AST's Statement of Organization, it is a political action committee that supports/opposes more than one Federal candidate and is not a separate segregated fund or party committee.

1. Summary of Complaint

The complaint alleges that AST knowingly and willfully solicited and accepted \$805,000 in contributions from government contractors in violation of 2 U.S.C. § 441c(a)(2) for the purpose of funding independent expenditures that supported Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election. Complaint at Z-3. Joe Miller won the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost the general election to incumbent Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint alleges that AST is a "front group" for Senator Murkowski, and the Respondent corporations that made contributions to AST obtained federal contracts through "earmarks" from Senator Murkowski. Complaint at 2.

The twelve Respondent corporations are collectively known as Alaska Native Corporations ("ANCs") because they were formed pursuant to the Alaska Native Claims Settlement Act of 1971, a federal law that extinguished aboriginal claims within the State of Alaska. The Commission has opined that ANCs are not "organized by authority of

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1 any law of Congress" for purposes of 2 U.S.C. § 441b(a)'s prohibitions. See Advisory
2 Opinion 1982-28 (Sealaska). The Respondent ANCs wholly own a number of
3 subsidiaries, some of which are federal government contractors.

4 **2. Alaskans Standing Together's Response**
5

6 AST's response includes an affidavit from its President, William Anderson, Jr.,
7 averring that at the time AST solicited the contributions, its communications with the
8 chief executive officers and other officials of the ANCs were limited to discussions of
9 contributions from them as parent companies, not from their wholly-owned subsidiaries.
10 Anderson Affidavit 1 at ¶ 4.¹ AST's response further maintains that it was not aware that
11 any of the ANC parent companies were government contractors. AST Response at 6;
12 Anderson Affidavit 1 at ¶ 5. Based on Mr. Anderson's experience and familiarity with
13 the operation of the ANCs, the parent companies do not themselves enter into contracts
14 with the federal government; any federal contracting is done by legally-distinct
15 subsidiary companies. AST Response at 6; Anderson Affidavit 1 at ¶ 6.
16 According to its disclosure reports filed with the Commission, and Mr.
17 Anderson's affidavit, AST received the following contributions from the ANCs during
18 the 2010 general election for U.S. Senate in Alaska:

Ahtna, Inc.	\$50,000	9/28/10
Aleut Corporation	\$20,000	10/19/10
Arctic Slope Regional Corporation	\$140,000 \$60,000	9/30/10 10/29/10

¹ William Anderson, Jr. submitted two affidavits in this matter. He submitted the first on December 6, 2010, in his capacity as President of Alaskans Standing Together ("Anderson Affidavit 1"), and submitted the second on December 14, 2010, in his capacity as President and CEO of Koniag, Inc. ("Anderson Affidavit 2").

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Bering Straits Native Corporation	\$100,000	9/24/10
Bristol Bay Native Corporation	\$15,000	10/12/10
Calista Corporation	\$15,000 \$35,000	10/5/10 10/15/10
Chugach Alaska Corporation	\$100,000	9/27/10
Cook Inlet Region, Inc.	\$100,000	10/1/10
Doyon, Limited	\$100,000	9/28/10
Koniag, Inc.	\$100,000	9/28/10
NANA Regional Corporation	\$100,000	9/28/10
Sealaska Corporation	\$100,000	9/29/10

1

2 AST alleges that it solicited the contributions for the purposes of making
3 independent expenditures. Anderson Affidavit 1 at ¶¶ 2 and 7-17. AST further maintains
4 that after the complaint in this matter was filed, it confirmed with the ANCs that the
5 contributing entities were not government contractors, and that they had sufficient
6 revenue derived from subsidiaries that are not federal government contractors to make
7 their contributions. Anderson Affidavit 1 at ¶ 19. AST also denies the allegations in the
8 complaint that it had any connection with Senator Murkowski or her committee. AST
9 Response at 3-4.

10 3. Joint Response of Aleut Corporation, Bering Straits Native
11 Corporation, Bristol Bay Native Corporation, Calista
12 Corporation, Chugach Alaska Corporation, Cook Inlet Region
13 Inc., Doyon, Limited, Koniag, Inc., and Sealaska Corporation
14 ("Aleut, *et al.* Response")
15

16 The joint Aleut, *et al.* Response denies that any of these respondents met the
17 statutory and regulatory definitions of government contractor at the time they made their

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1 respective donations to AST, and states that these entities do not hold Federal
2 government contracts.² Aleut, *et al.* Response at 6 -7. Generally, each of the nine ANCs
3 represents the business interests of their respective shareholders; their subsidiaries engage
4 in various business activities including communications, construction, aerospace,
5 petroleum, engineering, and tourism. Aleut, *et al.* Response at 2-5. They further argue
6 that their contributions to AST were permissible, even though some of their respective
7 subsidiaries are government contractors, because as parent companies, they are separate
8 and distinct legal entities from their government contractor subsidiaries, and they are able
9 to demonstrate that their revenue is sufficiently large to make these donations from non-
10 subsidiary income.³ Aleut, *et al.* Response at 1 and 6-7.

11 The Aleut *et al.* Response alternatively argues that 2 U.S.C. § 441c(a) is
12 unconstitutional to the extent it is read to restrict their contributions for the purpose of
13 funding independent expenditures, based on language in *Citizens United*, 130 S.Ct. at
14 910, that independent expenditures do not "lead to, or create the appearance of, *quid pro*

² For Aleut Corporation, *see* Mack Affidavit at ¶¶ 3, 4, 7; for Bering Straits Native Corporation, *see* Schubert Affidavit at ¶¶ 3, 4, 7; for Bristol Bay Native Corporation, *see* Sinz Affidavit at ¶¶ 4, 5, 8; for Calista Corporation, *see* Guy Affidavit at ¶¶ 2, 3, 4, 7; for Chugach Alaska Corporation, *see* Buretta Affidavit at ¶¶ 4, 5, 6, 7; for Cook Inlet Regional Corporation, *see* Brown Affidavit at ¶¶ 3, 6; for Doyon, Limited, *see* Johnsen Affidavit at ¶¶ 1-4, 7; for Koniag, Inc., *see* Anderson Affidavit 2 at ¶¶ 3, 6; and for Sealaska Corporation, *see* Morris Affidavit at ¶¶ 2, 3, 6.

³ For Aleut Corporation, *see* Mack Affidavit at ¶¶ 4-6; for Bering Straits Native Corporation, *see* Schubert Affidavit at ¶¶ 4-6; for Bristol Bay Native Corporation, *see* Sinz Affidavit at ¶ 6 and at Attachment A; for Calista Corporation, *see* Guy Affidavit at ¶¶ 4-6; for Chugach Alaska Corporation, *see* Buretta Affidavit at ¶¶ 4 and 8, and at Organizational Chart; for Cook Inlet Regional Corporation, *see* Brown Affidavit at ¶¶ 2-5; for Doyon, Limited, *see* Johnsen Affidavit at ¶¶ 1, 2, 4, 5, 8; for Koniag, Inc., *see* Anderson Affidavit 2 at ¶¶ 3-5; for Sealaska Corporation, *see* Morris Affidavit at ¶¶ 3-5. In addition, both Koniag and Sealaska receive public grants that serve public purposes and do not directly benefit the U.S. government. Anderson Affidavit 2 at ¶ 6; Morris Affidavit at ¶ 6. Koniag also receives funds for a conservation easement, as part of the Exxon Valdez Oil Spill Trustee Council's habitat restoration efforts. Anderson Affidavit 2 at ¶ 6.

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1 *quo corruption*” regardless of the speaker’s identity, and in the related holding in

2 *SpeechNow. Aleut, et al. Response*, at 8-9.

3 **4. Responses from Arctic Slope Regional Corporation, Ahtna, Inc.,**
4 **and NANA Regional Corporation, Inc.**
5

6 Arctic Slope made a \$140,000 contribution to AST on September 30, 2010, and
7 another \$60,000 contribution to AST on October 27, 2010. On September 28, 2010,
8 Ahtna, Inc. made a \$50,000 contribution to AST, and NANA Regional made a \$100,000
9 contribution to AST. Each of these ANC’s has separate lease agreements with the federal
10 government to supply either office space or land.

11 **a) Arctic Slope’s Lease Agreement**

12 Arctic Slope has leased office space to the Transportation Security Administration
13 (“TSA”) since 2006 and receives \$2,400 each month, or \$28,800 annually, directly from
14 the federal government. Arctic Slope Response at 2, and copy of U.S. Government Lease
15 for Real Property, GS 10B-06783, attached to response. According to the lease
16 agreement, Arctic Slope leased approximately 800 square feet of office space in Barrow,
17 Alaska, to the United States for a period of time beginning October 1, 2006, for a term of
18 5 years. *See id.* Under the terms of the lease agreement, Arctic Slope agreed to provide
19 various services and utilities as part of the rental of the space, including heat, electricity,
20 water, snow removal, toilet supplies, janitorial services and supplies, elevator service,
21 window washing, carpet cleaning, initial and replacement lamps, tubes and ballasts, and
22 painting. *Id.*

23 Arctic Slope contends that the rental is *de minimis*, the lease is a last resort for
24 TSA, and that it primarily benefits the public. *Id.*; Mellinger Affidavit at ¶ 7; Contrades

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1 Affidavit at ¶ 4. The proceeds from this lease arrangement represent 0.0015% of Arctic
2 Slope's gross revenue for 2009. Arctic Slope Response at 3; Mellinger Affidavit at ¶ 7.
3 According to Arctic Slope, this lease agreement with the federal government was not
4 discovered by the personnel who decided to make the contribution to AST because the
5 lease was listed under another entity's name in Arctic Slope's records, the person who
6 was primarily responsible for responding to the government's requests concerning the
7 lease is no longer employed by Arctic Slope, and the lease is an isolated arrangement as
8 Arctic Slope does not market itself as a lessor to federal government entities. Arctic
9 Slope Response at 2-3; Mellinger Affidavit at ¶ 6. Arctic Slope submitted an affidavit
10 from a corporate officer stating that, other than this lease, Arctic Slope is not a
11 government contractor, it represents the business interests of the Inupiat Eskimos, and it
12 had approximately \$1.128 billion in revenue during fiscal year 2009 that was attributable
13 to activities and operations of Arctic Slope and its subsidiaries that are not related to
14 federal government contracting. Mellinger Affidavit at ¶¶ 2, 4. The businesses of Arctic
15 Slope and its subsidiaries include energy services, construction, petroleum refining,
16 aerospace, and tourism operations. Mellinger Affidavit at ¶ 2.

17 In addition, Arctic Slope argues that it is not a government contractor as defined
18 by the Act or the Commission regulations because leases are not types of contractual
19 agreements covered under the statutory or regulatory definitions. Arctic Slope Response
20 at 5. Arctic Slope contends that while the Commission opined in Advisory Opinion
21 1984-53 (National Association of Realtors), that leases equate to sales for purposes of
22 2 U.S.C. § 441c, the Commission did so "without attempt to account for the exclusion of
23 leases from the test or for possible relevant distinctions between leases and sales."

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1 Therefore, AO 1984-53 should not be applied to its lease agreement with the federal
2 government. Arctic Slope Response at 5, n.31.

3 Last, Arctic Slope argues that it was exercising its First Amendment speech rights
4 when it made its two contributions to AST for the purpose of making independent
5 expenditures. Arctic Slope relies on *Citizens United* to support its argument that because
6 its underlying activities are incapable of causing corruption or the appearance of
7 corruption, anti-corruption laws are not a "compelling interest" sufficient to validate
8 2 U.S.C. § 441c(a)'s ban on independent speech. Therefore, the prohibitions in 2 U.S.C.
9 § 441c are not applicable to the facts of this matter. Arctic Slope Response at 4.

10 **b) Ahtna and NANA's lease agreements**

11 Ahtna and NANA Regional submitted a joint response stating that Ahtna leases
12 office space to the federal government at the rate of \$750 a month, or \$9,000 a year, and
13 NANA leases land to the U.S. Federal Aviation Administration at the rate of \$400 a year.
14 Ahtna and NANA Regional Response at 3-5; *see also* copies of the lease agreements at
15 Attachments 3, 4, and 7 of the joint response.

16 Ahtna's lease agreement with the federal government is dated October 29, 2010;
17 however, negotiations between the General Services Administration and Ahtna regarding
18 the lease terms began in May 2010, and government personnel began using the space in
19 August 2010. Ahtna Response at 3; Martin Affidavit at ¶ 5. According to the lease
20 agreement, Ahtna is to provide the United States government with 250 square feet of
21 office space for occupancy not later than September 1, 2010, for a term of 5 years. In
22 addition, Ahtna is to provide the federal government with the following services and
23 utilities related to the use of the office space: heat, electricity, power (special

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1 equipment), water, snow removal, trash removal, chilled drinking water, air conditioning,
2 toilet supplies, janitorial services and supplies, window washing, carpet cleaning, initial
3 replacement lamps, tubes and ballasts, and painting. Ahtna and NANA Joint Response at
4 Attachment 3, copy of U.S. Government Lease for Real Property, lease number GS-10B-
5 07194.

6 Ahtna also states that it is a recipient of a federally-funded grant in the form of a
7 self-determination agreement whereby Ahtna is to oversee a survey near certain Alaska
8 villages for the benefit of Alaskan Natives in the area. Ahtna and NANA Joint Response,
9 at Attachment 4, at n. 3, copy of Cooperative agreement with the Department of Interior's
10 Bureau of Land Management. Ahtna maintains that this type of federal grant is not
11 covered by the prohibitions of 2 U.S.C. § 441c, and cites to Advisory Opinion 1993-12
12 (Mississippi Band of Choctaw Indians) in support of its position.

13 NANA Regional Corporation entered into a land lease with the Federal Aviation
14 Administration ("FAA") that began on October 1, 2007, and runs through September 30,
15 2026, for the FAA's use of 6.3976 acres off the Buckland Airport in Buckland, Alaska.
16 See Ahtna and NANA joint response at 4-5, Attachment 7, Copy of Land Lease Off
17 Airport. The federal government uses the land for construction, maintenance, and
18 operation of a non-directional beacon and related equipment. *Id.* The land lease
19 agreement also grants the FAA access to the leased property from NANA's adjoining
20 lands. *Id.* Further, under the land lease, the government has the right to maintain the
21 land parcel, including grading, conditioning, and installing drainage facilities; and the
22 right to make alterations to the parcel, including installing fixtures, structures or signs.

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1 *Id.* Anything the FAA attaches to the premises remains the property of the federal
2 government. *Id.*

3 According to Ahtna and NANA Regional, the office and land lease arrangements
4 exist out of necessity because the government has no other options in the area, and the
5 amounts they receive from the government are *de minimis*. Ahtna and NANA Response
6 at 3-5; Nelson Affidavit at ¶ 2; Martin Affidavit at ¶ 6. Ahtna and NANA Regional also
7 state that they relied on legal advice that the contributions were permissible. Ahtna and
8 NANA Regional Response at 3-5; Tansy Affidavit at ¶ 4; Blair Affidavit at ¶ 3. Ahtna
9 and NANA Regional both maintain that the corporate officers involved in the
10 discussions, meetings, and communications relating to the contributions to AST were not
11 aware of the existence of the lease agreements at the time of their contributions to AST.
12 Tansy Affidavit at ¶ 5; Greene Affidavit at ¶ 3. NANA Regional states that its contract
13 with the government provides that the revenues from its lease arrangement flow to
14 NANA Development Corporation, a legal entity separate from NANA Regional. Ahtna
15 and NANA Regional Response at 5; Blair Affidavit at ¶ 5. Other than these lease
16 arrangements, neither Ahtna nor NANA Regional is a government contractor. Ahtna
17 and NANA Regional Response at 4; Fehrenbach Affidavit at ¶ 4. Although some of
18 their subsidiaries are government contractors, they are separate and distinct legal entities,
19 and each company had sufficient income to make their contributions with funds from
20 sources other than their government contractor subsidiaries. Thomas Affidavit at ¶¶ 3-5;
21 Fehrenbach Affidavit at ¶¶ 5, 7, 8, 9.

22 Ahtna and NANA request that the Commission exercise its discretion not to
23 pursue the alleged 2 U.S.C. § 441c violations arguing that although both corporations

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1 lease real property to the federal government, the statute attaches, in relevant part, to the
2 selling of any land or buildings. Ahtna and NANA Joint Response at 2. Like Arctic
3 Slope, they also request that AO 1984-53 (National Association of Realtors) not be
4 applied in this context as it represents a "questionable leap in statutory construction." *Id.*

5 In addition, Ahtna and NANA argue that when they made their respective
6 contributions to AST for the purpose of funding independent expenditures, they were
7 exercising their First Amendment speech rights. According to these respondents, given
8 that their donations were not "direct or indirect contributions to candidates," the
9 Commission should apply the holdings in *Citizen United* and *SpeechNow* to their
10 contributions supporting an independent-expenditure-only political action committee.
11 Ahtna and NANA Joint Response at 1, 2 and 7. Last, Ahtna and NANA argue that the
12 statute uses only the term "contribution," and while the regulation at 11 C.F.R. § 115.2
13 includes the term "expenditure," the Commission should interpret § 441c to reach only
14 contributions, in light of the holdings in *Citizens United* and *SpeechNow*. *Id.* at 7-8, n.12.

15 **5. Responses from Senator Murkowski, the Murkowski Committee,**
16 **and Jason Moore**
17

18 Senator Murkowski and her committee submitted a joint response denying any
19 connection to AST or that any of AST's funds were donated to or received by her
20 principal campaign committee. Murkowski Response at 2-3. Jason Moore, AST's
21 spokesman, filed a separate response stating that he did not operate AST at any time;
22 rather, his position was that of an employee of MSI Communications, Inc., a vendor
23 providing marketing and media strategy services to AST. Moore Response at 2 -3.

B. Legal Analysis

The Act and the Commission's regulations prohibit government contractors from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure to any political party, committee or candidate for public office or to any person for any political purpose. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.2(a) and (b). A "federal contractor" is defined in terms of the substance of the contract and the source of funds for payment of performance of the contract. 2 U.S.C. § 441c; 11 C.F.R. § 115.1. With respect to the substance of the contract, it includes the rendering of personal services, the furnishing of materials, supplies, or equipment, or the selling of land or buildings. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(1); *see* Advisory Opinion 1984-53 (National Association of Realtors) (lessor of land to federal agency is also considered a government contractor). The prohibition applies if payment to the contractor is to be made in whole or in part from funds appropriated by Congress. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(2). The prohibition extends for the period of time between the earlier of the commencement of negotiations or when requests for proposals are sent out, and the later of the completion of performance or the termination of negotiations for such contract. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(b). The Act and the Commission's regulations further prohibit any person from knowingly soliciting any contributions from government contractors who are in negotiations for a federal government contract or during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).

When determining whether a committee has received, or that an entity has made, a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the

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1 entity met the statutory and regulatory definition of government contractor at the time the
2 contribution was made. *See* MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR
3 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Ortho
4 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it
5 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,
6 and that it had sufficient funds to make the contributions from non-subsidiary income,
7 then the prohibition on contributions by government contractors would not extend to the
8 parent company. *See* Advisory Opinion 2005-01 (Mississippi Band of Choctaw
9 Indians)(the government contractor status of a tribal corporation, a distinct and separate
10 legal entity from the tribe, does not prohibit the tribe from making contributions to
11 federal candidates, political parties, and political committees as long as the tribe does not
12 use revenues from tribal corporation to make contributions), *citing* Advisory Opinion
13 1999-32 (Tohono O'odham Nation)(the commercial activity of the Indian tribe's utility
14 authority as a government contractor treated as separate from the tribe and its political
15 activities).

16 **1. Aleut Corporation, Bering Straits Native Corporation, Bristol**
17 **Bay Native Corporation, Calista Corporation, Chugach Alaska**
18 **Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag,**
19 **Inc., and Sealaska Corporation Are Not "Government**
20 **Contractors" as Defined by the Act and the Commission's**
21 **Regulations**

22
23 Based on the responses and supporting documentation, including affidavits from
24 corporate officers, it appears that Aleut Corporation, Bering Straits Native Corporation,
25 Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook
26 Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., and Sealaska Corporation have sufficiently

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1 demonstrated that as parent companies without contracts with the federal government,
2 they are not government contractors, and therefore their contributions to AST were
3 permissible. Although they each have subsidiaries that hold federal contracts, those
4 subsidiaries are separate and distinct legal entities from them, and the parent companies
5 have sufficiently demonstrated that they made their contributions to AST with revenue
6 from sources other than the federal-contract-holding subsidiaries. See footnote 3 and
7 accompanying text, *supra*. Therefore, they are not government contractors as defined by
8 the Act and the Commission's regulations. 2 U.S.C. § 441c; 11 C.F.R. § 115.1; see AO
9 2005-01 (Mississippi Band of Choctaw Indians) *citing* AO 1999-32 (Tohono O'odham
10 Nation). Further, the parent company ANCs' contributions to AST do not violate the
11 Act's prohibition on corporate contributions in connection with federal elections, 2
12 U.S.C. § 441b(a), because the contributions to AST, an independent-expenditure-only
13 political action committee, were made for the purpose of making independent
14 expenditures. See *Citizens United*, 130 S. Ct. at 913; AO 2010-11 (Commonsense Ten)
15 at 3.⁴

16 Given the above, we recommend that the Commission find no reason to believe
17 that Aleut Corporation, Bering Straits Native Corporation, Bristol Bay Native
18 Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc.,
19 Doyon, Ltd., Koniag, Inc., and Sealaska Corporation violated 2 U.S.C. § 441c(a)(1).

⁴ As a final note, it appears that Koniag and Sealaska's receipt of the public grants do not make them government contractors. The public grants that Koniag and Sealaska receive from the federal government, see footnote 3, *supra*, appear to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); see AO 1993-12 (Mississippi Band of Choctaw Indians) (federal grant for public service activity, which does not directly benefit the U.S. Government, is not a "contract" as defined by 11 C.F.R. § 115.1; note that the part of this opinion's analysis concerning procurement contracts between tribal enterprises and the federal government is superseded by AO 1999-32 (Tohono O'odham Nation)).

**2. Arctic Slope Regional Corporation, Ahtna, Inc., and NANA
Regional Corporation Appear to be Government Contractors as
Defined by the Act and the Commission's Regulations**

Arctic Slope, Ahtna, and NANA Regional each have a lease with the federal government to supply either office space or land to a federal agency. Arctic Slope leases office space to TSA, provides various services, supplies, and utilities under that lease agreement, and receives \$28,800 in direct payment from federal government a year. Ahtna also leases office space to the federal government, and provides services, supplies, and utilities under that lease agreement, at the rate of \$9,000 a year. NANA Regional leases land to the U.S. Federal Aviation Administration with rights including maintaining, making alternations to, attaching fixtures, and building structures or fixtures thereon, at the rate of \$400 a year for a term of 19 years. Based on the available information, the federal agencies make the rental payments to these ANC's with funds appropriated by Congress. See 11 C.F.R. § 115.1(a)(2).

In AO 1984-53 (National Association of Realtors), the Commission concluded that a lessor of real property to the federal government would be covered by the prohibitions of 2 U.S.C. § 441c and, therefore, would be prohibited from making contributions to federal candidates and committees. 11 C.F.R. § 115.2. The Commission viewed the lease of real property as a contract for "selling any land or buildings" within the meaning of 2 U.S.C. § 441c and 11 C.F.R. § 115.1(a)(1)(iii) because a lease of real property creates an estate in the tenant for a term of years, in effect, representing the sale of an interest in land or buildings, with the rent as the purchase price, and creates a continuing relationship between the lessor and lessee supporting the application of the statutory prohibition to a lease agreement. See AO 1984-53. In addition, the

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Commission noted that lease agreements usually contain explicit contractual provisions regarding repairs, furnishing of utilities, and other matters, and that such provisions can be viewed as contracts for the rendition of personal services or for the furnishing of material supplies, or equipment. *Id.*; 11 C.F.R. § 115.1(a)(1)(i) and (ii).

Arctic Slope and Ahtna's office space lease agreements with the federal government not only lease the rental space, but include explicit provisions for those parent companies to make repairs, and provide utilities, supplies, and services, such as snow removal and janitorial services, to the federal agency renting the space. The land lease agreement is for a term of 19 years, creating a continuing relationship between NANA and the federal agency for a significant length of time.

Given these facts, Arctic Slope, Ahtna, and NANA are government contractors within the meaning of the Act and the Commission's regulations. *See* 2 U.S.C. § 441c(a)(1) and 11 C.F.R. § 115.1(a); *see also* AO 1984-53. As federal government contractors, Arctic Slope, Ahtna, and NANA Regional are prohibited from making contributions toward any "political party, committee or candidate for public office or to any person for any political purpose or use." 2 U.S.C. § 441c(a)(1).⁵ These respondents' requests that the Commission disavow or not apply AO 1984-53 in this matter should be rejected because the analysis in that AO is sound, it has been a source of guidance for 27 years without any intervening precedent to the contrary, and it applies precisely to the facts of this matter. *See also* Advisory Opinion 2008-11 (Brown) (citing AO 1984-53 in analysis of 2 U.S.C. § 441c scenario).

⁵ The federally-funded grant which Ahtna receives to oversee a survey near certain Alaska villages for the benefit of Alaskan Natives in the area, however, appears to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); *see* AO 1993-12 (Mississippi Band of Choctaw Indians), *supra*.

1 In their joint response, Ahtna and NANA Regional argue that their donations to
2 AST were for the purpose of making independent expenditures, and since the statute uses
3 only the term "contribution," the Commission should interpret § 441c to reach only
4 contributions, in light of the holdings in *Citizens United* and *SpeechNow*, despite the
5 regulation at 11 C.F.R. § 115.2 including the term "expenditure." *See supra*, at p.13.
6 However, these respondents' activity fall squarely within the statute's prohibitions
7 because they made contributions to AST; they themselves made no expenditures.⁶

8 As for AST, since it knowingly solicited contributions from Arctic Slope, Ahtna,
9 and NANA Regional, it apparently violated 2 U.S.C. § 441c(a)(2). *See FEC v. John A.*
10 *Dramesi for Congress Comm.*, 640 F. Supp. 985, 986-7 (D.N.J. 1986) ("a 'knowing'
11 standard, as opposed to a 'knowing and willful' one, does not require knowledge that one
12 is violating a law, but merely requires an intent to act.").

⁶ Even if these ANCs' contributions to AST were incorrectly viewed as expenditures, they would still be covered by the statute. The statute at 2 U.S.C. § 441c explicitly prohibits government contractors "directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party committee, or candidate for public office or to any person for any political purpose or use." 2 U.S.C. § 441c(a)(1)(emphasis added). As the Explanation and Justification for the Commission's implementing regulation at 11 C.F.R. § 115.2 explains, the term "expenditure" was specifically placed in the regulation based on historical use of the term "indirect contribution" as meaning "expenditure." Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, (April 13, 1977) ("E&J"), citing House Document No. 95-44, 78-81 (January 12, 1977). The original ban on government contractors' contributions included the term "indirectly," and was enacted in the 1940 extension of the Hatch Act, making it unlawful "for any person directly or indirectly, to make contributions in an aggregate amount in excess of \$5,000..." E&J at 80. According to the E&J, "[b]y use of the term indirect, Congress intended the prohibition to extend to the spending of funds by a government contractor for campaign purposes regardless of whether the funds were given to the candidates or spent by the government contractor. This argument is strengthened by the fact that contributions and expenditures were not precisely defined as they now are." *Id.* The Commission explained that the use of the term "indirectly" and the phrase "in any person for any political purpose or use" in the original statutory language indicates a Congressional intent to include expenditures as now defined in the Act. *Id.* "The House Special Committee to Investigate Campaign Expenditures studied the scope of the term contribution [...] and concluded that the Act was intended to prohibit such expenditures." *Id.*, citing H.R. Rep. No. 2739, 79th Cong. 2d Sess. 40.

1 However, even though Arctic Slope, Ahtna, and NANA Regional appear to meet
2 the definition of government contractors under the Act and the Commission's regulations,
3 and AST apparently knowingly solicited them for contributions, given the unique facts in
4 this matter, we recommend that the Commission exercise its prosecutorial discretion and
5 dismiss the allegations as to them. *Heckler v. Chaney*, 470 U.S. 821 (1985). Arctic
6 Slope, Ahtna, and NANA Regional do not ordinarily enter into contracts with the federal
7 government, the executive officers who made the decision to contribute to AST have
8 averred they were not even aware of the existence of these lease arrangements until after
9 the complaint was filed. None of the three companies sought the leases in question.
10 Rather, all three companies were approached by federal agencies to lease certain office
11 space and land space only because the government had no other options in the area, and it
12 appears that the lease arrangements primarily benefit the public, especially the lease for
13 the FAA beacon. Moreover, the amounts paid by the federal government for the lease
14 agreements are relatively small taking into consideration these ANC's other income and
15 assets. Ahtna's and NANA Regional's lease agreements with the federal government are
16 at the rate of \$9,090 and \$400 a year, respectively. Ahtna and NANA Regional Response
17 at 3-5; see also copies of the lease agreements at Attachments 3, 4, and 7 of the joint
18 response. While Arctic Slope's lease arrangement is the most lucrative, at a rate of
19 \$28,800 a year, this amount represented only 0.0015% of Arctic Slope's gross revenue
20 for 2009. Arctic Slope Response at 3; Mellinger Affidavit at ¶ 7.

21 With respect to AST, William Anderson averred that although the ANC's were
22 parents of subsidiaries that hold contracts with the federal government, it was AST's
23 understanding, based on Mr. Anderson's knowledge and experience, and communications

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1 with the executive officers of the ANCs at the time it solicited contributions, that the
2 parent companies themselves were not the entities that entered into the federal contracts,
3 but were separate legal entities, and that each ANC had revenue from sources other than
4 its government contractor subsidiaries to make the contributions. Anderson Affidavit 1 at
5 ¶¶ 4-6. After receiving the complaint, AST confirmed its understanding with the ANCs.
6 Anderson Affidavit 1 at ¶ 19. Most of the ANCs that contributed to AST were not
7 government contractors as defined by the Act and the Commission's regulations, and
8 there is no available information indicating that AST knew that Arctic Slope, Ahtna, or
9 NANA Regional had lease agreements with the federal government, or that these ANCs
10 advised AST of their existence at the time the contributions were made. Arctic Slope
11 Response, Mellinger Affidavit at ¶ 6; Ahtna and NANA Joint Response, Greene
12 Affidavit at ¶3, Tansy Affidavit at ¶5. Thus, although these respondents apparently
13 violated the letter of 2 U.S.C. § 441c, it appears they believed they were in compliance at
14 the time the contributions were solicited and made.

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10 Under all the circumstances set forth above, we recommend that the Commission
11 exercise its prosecutorial discretion and dismiss the allegations that Arctic Slope
12 Regional Corporation, Ahtna, Inc., and NANA Regional Corporation violated 2 U.S.C.
13 § 441c(a)(1) and that Alaskans Standing Together and Barbara Donatelli, in her official
14 capacity as treasurer, violated § 441c(a)(2). *See Heckler v. Chaney*, 470 U.S. 821, 831
15 (1985) ("an agency decision not to enforce often involves a complicated balancing of a
16 number of factors which are peculiarly within its expertise," including "whether the
17 agency's resources are best spent on this violation or another, whether the agency is
18 likely to succeed if it acts, [and] whether the particular enforcement action requested best
19 fits the agency's overall policies...").⁷

⁷ Both Calista Corporation and AST reference a \$35,000 contribution that Calista Corporation made, and AST accepted, in October 2010. *See Aleut, et al. Response* at 5, Anderson Affidavit 1 at ¶ 16. However, our review reveals that AST has not disclosed this contribution in its reports filed with the FEC.

| However, once this case is closed, we plan to contact AST's counsel and advise that AST has not reported the contribution.

**6. There is No Reason to Believe that Lisa Murkowski for U.S.
Senate and Senator Murkowski Violated the Act**

There is no available information to support the complaint's general allegations that AST is a "front group" for Senator Murkowski or that the Respondent ANCs' contracts were the result of "earmarks" from her. The Murkowski Response specifically denies these allegations. Further, the screenshot of AST's "About Us" page from its website, which Complainant attached to the complaint, specifically states AST "is not affiliated in any way with the Lisa Murkowski Campaign." Complaint, at Exh. A, p. 2. According to the disclosure reports the Murkowski Committee filed with the Commission, that committee did not receive any contributions from AST. Moreover, there is no available information indicating that AST's expenditures in connection with the 2010 general election for Alaska's Senate seat were coordinated with Senator Murkowski or her committee. Therefore, we recommend that the Commission find no reason to believe that Lisa Murkowski for U.S. Senate and Lisa Murkowski violated the Act.

7. There is No Reason to Believe that Jason Moore Violated the Act

The complaint's general allegations that Jason Moore solicited contributions to AST from the Respondents or that he had actual authority with regard to AST, are sufficiently rebutted by the specific denial in Mr. Moore's response and affidavit. According to Mr. Moore, he was an employee of a vendor to AST, MSI Communications, a media strategist and account executive, and he was engaged by AST as a spokesperson in connection with activities to support Senator Murkowski and oppose Mr. Miller in the U.S. Senate race. Mr. Moore's affidavit specifically denies that he was

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1 at any time an operator or employee of AST, and states that he did not have any authority
2 to direct the actions of AST or that he solicited contributions on AST's behalf. We have
3 no information to the contrary. Therefore, we recommend that the Commission find no
4 reason to believe that Jason Moore violated 2 U.S.C. § 441c(a)(2). Finally, we
5 recommend that the Commission close the file as to all Respondents.

6 **III. RECOMMENDATIONS**

- 7 1. Find no reason to believe that Aleut Corporation, Bering Straits Native
8 Corporation, Bristol Bay Native Corporation, Calista Corporation,
9 Chugach Alaska Corporation, Cook Inlet Region, Inc., Doyon, Limited,
10 Koniag, Inc., and Sealaska Corporation violated 2 U.S.C. § 441c(a)(1).
11
12 2. Find no reason to believe that Lisa Murkowski for U.S. Senate and Joseph
13 M. Schierhorn, in his official capacity as treasurer, and Senator Lisa
14 Murkowski, violated the Act.
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16 3. Find no reason to believe that Jason Moore violated 2 U.S.C. § 441c(a)(2).
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18 4. Dismiss the allegations that Arctic Slope Regional Corporation, Ahtna,
19 Inc., and NANA Regional Corporation violated 2 U.S.C. § 441c(a)(1)
20 pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).
21
22 5. Dismiss the allegations that Alaskans Standing Together and Barbara
23 Donatelli, in her official capacity as treasurer, violated 2 U.S.C.
24 § 441c(a)(2) pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).
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26 6. Approve the attached Factual and Legal Analyses.
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28 7. Approve the appropriate letters.

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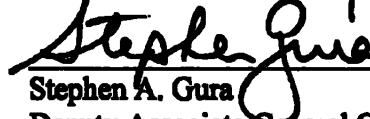
8. Close the file as to all Respondents.

8-25-2011

Date



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