



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

November 10, 2011

**Via first class mail and electronic mail**

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Scott E. Thomas, Esq.  
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1825 Eye Street, NW  
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RE: MUR 6403  
Ahtna, Inc.  
NANA Regional Corporation, Inc.

Dear Mr. Thomas:

On October 28, 2011, the Federal Election Commission notified your clients, Ahtna, Inc. and NANA Regional Corporation, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on November 1, 2011, determined to exercise its prosecutorial discretion and dismiss the allegations that Ahtna, Inc. and NANA Regional Corporation, Inc., violated 2 U.S.C. § 441c(a)(1), pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Christine C. Gallagher, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Susan L. Lebeaux  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: Ahtna, Inc.**

**MUR 6403**

**NANA Regional Corporation, Inc.**

**I. BACKGROUND**

This matter was generated by a complaint filed with the Federal Election Commission by the Joe Miller for U.S. Senate campaign, by Linda Johnson, Member. *See* 2 U.S.C. § 437g(a)(1). Complainant alleges that Ahtna, Inc. and NANA Regional Corporation, Inc. ("NANA Regional") are government contractors that knowingly and willfully violated 2 U.S.C. § 441c(a)(1) by making contributions to Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer ("AST"), a political action committee that made independent expenditures to influence the 2010 U.S. Senate general election in Alaska. Ahtna and NANA Regional deny the allegations, stating that (1) the contributions made to AST were permissible because they are not government contractors as defined by the Act and the Commission's regulations; (2) Ahtna and NANA Regional 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 Commission*, 130 S. Ct. 876 (2010) ("*Citizens United*"), and *SpeechNow.org. v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) ("*SpeechNow*").

For the reasons set forth below, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegations that Ahtna, Inc. and NANA Regional

1 Corporation, Inc. violated 2 U.S.C. § 441c(a)(1). *Heckler v. Chaney*, 470 U.S. 821  
2 (1985).

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Factual Background**

5 AST, an independent-expenditure-only political committee, registered with the  
6 Commission on September 23, 2010. According to AST's Statement of Organization, it  
7 is a political action committee that supports/opposes more than one Federal candidate and  
8 is not a separate segregated fund or party committee. AST's disclosure reports filed with  
9 the Commission show that in 2010, it made independent expenditures that supported  
10 Alaska Senator Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010  
11 U.S. Senate general election. Joe Miller won the Republican nomination for Alaska's  
12 2010 Senate seat in the primary election, but lost the general election to incumbent  
13 Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint  
14 alleges that AST is a "front group" for Senator Murkowski, and that Ahtna and NANA  
15 Regional, which made contributions to AST, obtained federal contracts through  
16 "earmarks" from Senator Murkowski.

17 Ahtna and NANA Regional are known as Alaska Native Corporations ("ANCs")  
18 because they were formed pursuant to the Alaska Native Claims Settlement Act of 1971,  
19 a federal law that extinguished aboriginal claims within the State of Alaska. The  
20 Commission has opined that ANCs are not "organized by authority of any law of  
21 Congress" for purposes of 2 U.S.C. § 441b(a)'s prohibitions. *See* Advisory Opinion

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1 1982-28 (Sealaska). Ahtna and NANA Regional wholly own subsidiaries that are federal  
2 government contractors.

3 On September 28, 2010, Ahtna, Inc. made a \$50,000 contribution to AST, and  
4 NANA Regional made a \$100,000 contribution to AST. Each of these ANCs has  
5 separate lease agreements with the federal government to supply either office space or  
6 land. Ahtna leases office space to the federal government at the rate of \$750 a month, or  
7 \$9,000 a year, and NANA Regional leases land to the U.S. Federal Aviation  
8 Administration at the rate of \$400 a year.

9 Ahtna's lease agreement with the federal government is dated October 29, 2010;  
10 however, negotiations between the General Services Administration and Ahtna regarding  
11 the lease terms began in May 2010, and government personnel began using the space in  
12 August 2010. According to the lease agreement, Ahtna is to provide the United States  
13 government with 250 square feet of office space for occupancy not later than September  
14 1, 2010, for a term of 5 years. In addition, Ahtna is to provide the federal government  
15 with the following services and utilities related to the use of the office space: heat,  
16 electricity, power (special equipment), water, snow removal, trash removal, chilled  
17 drinking water, air conditioning, toilet supplies, janitorial services and supplies, window  
18 washing, carpet cleaning, initial replacement lamps, tubes and ballasts, and painting.

19 Ahtna also states that it is a recipient of a federally-funded grant in the form of a  
20 self-determination agreement whereby Ahtna is to oversee a survey near certain Alaska  
21 villages for the benefit of Alaskan Natives in the area. Ahtna maintains that this type of

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1 federal grant is not covered by the prohibitions of 2 U.S.C. § 441c, and cites to Advisory  
2 Opinion 1993-12 (Mississippi Band of Choctaw Indians) in support of its position.

3 NANA Regional entered into a land lease with the Federal Aviation  
4 Administration ("FAA") that began on October 1, 2007, and runs through September 30,  
5 2026, for the FAA's use of 6.3976 acres off the Buckland Airport in Buckland, Alaska.  
6 The federal government uses the land for construction, maintenance, and operation of a  
7 non-directional beacon and related equipment. The land lease agreement also grants the  
8 FAA access to the leased property from NANA Regional's adjoining lands. Further,  
9 under the land lease, the government has the right to maintain the land parcel, including  
10 grading, conditioning, and installing drainage facilities; and the right to make alterations  
11 to the parcel, including installing fixtures, structures or signs. Anything the FAA attaches  
12 to the premises remains the property of the federal government.

13 According to Ahtna and NANA Regional, the office and land lease arrangements  
14 exist out of necessity because the government has no other options in the area, and the  
15 amounts they receive from the government are *de minimis*. Ahtna and NANA Regional  
16 also state that they relied on legal advice that the contributions were permissible. Ahtna  
17 and NANA Regional both maintain that the corporate officers involved in the  
18 discussions, meetings, and communications relating to the contributions to AST were not  
19 aware of the existence of the lease agreements at the time of their contributions to AST.  
20 NANA Regional states that its contract with the government provides that the revenues  
21 from its lease arrangement flow to NANA Development Corporation, a legal entity  
22 separate from NANA Regional. Other than these lease arrangements, neither Ahtna nor

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1 NANA Regional has contracts with the federal government. Although their subsidiaries  
2 are government contractors, they are separate and distinct legal entities, and each parent  
3 company had sufficient income to make its contribution with funds from sources other  
4 than their government contractor subsidiaries.

5 Ahtna and NANA Regional request that the Commission exercise its discretion  
6 not to pursue the alleged 2 U.S.C. § 441c violations arguing that although both  
7 corporations lease real property to the federal government, the statute attaches, in relevant  
8 part, to the selling of any land or buildings. They also request that AO 1984-53 (National  
9 Association of Realtors) not be applied in this context as it represents a “questionable  
10 leap in statutory construction.”

11 In addition, Ahtna and NANA Regional argue that when they made their  
12 respective contributions to AST for the purpose of funding independent expenditures,  
13 they were exercising their First Amendment speech rights. According to these  
14 respondents, given that their donations were not “direct or indirect contributions to  
15 candidates,” the Commission should apply the holdings in *Citizen United* and *SpeechNow*  
16 to their contributions supporting an independent-expenditure-only political action  
17 committee. Last, Ahtna and NANA Regional argue that the statute uses only the term  
18 “contribution,” and while the regulation at 11 C.F.R. § 115.2 includes the term  
19 “expenditure,” the Commission should interpret § 441c to reach only contributions, in  
20 light of the holdings in *Citizens United* and *SpeechNow*.

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**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).<sup>1</sup> 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

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<sup>1</sup> The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. *See Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

1 government contractors who are in negotiations for a federal government contract or  
2 during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).

3 When determining whether a committee has received, or that an entity has made,  
4 a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the  
5 entity met the statutory and regulatory definition of government contractor at the time the  
6 contribution was made. *See* MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR  
7 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Orthe  
8 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it  
9 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,  
10 and that it had sufficient funds to make the contributions from non-subsidiary income,  
11 then the prohibition on contributions by government contractors would not extend to the  
12 parent company. *See* Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians)  
13 (the government contractor status of a tribal corporation, a distinct and separate legal  
14 entity from the tribe, does not prohibit the tribe from making contributions to federal  
15 candidates, political parties, and political committees as long as the tribe does not use  
16 revenues from tribal corporation to make contributions), *citing* Advisory Opinion 1999-  
17 32 (Tohono O'odham Nation) (the commercial activity of the Indian tribe's utility  
18 authority as a government contractor treated as separate from the tribe and its political  
19 activities).

20 Ahtna and NANA Regional each have a lease with the federal government to  
21 supply either office space or land to a federal agency. Ahtna leases office space to the  
22 federal government, and provides services, supplies, and utilities under that lease

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1 agreement, at the rate of \$9,000 a year. NANA Regional leases land to the U.S. Federal  
2 Aviation Administration with rights including maintaining, making alternations to,  
3 attaching fixtures, and building structures or fixtures thereon, at the rate of \$400 a year  
4 for a term of 19 years. Based on the available information, the federal agencies make the  
5 rental payments to these ANCs with funds appropriated by Congress. *See* 11 C.F.R.  
6 § 115.1(a)(2).

7 In AO 1984-53 (National Association of Realtors), the Commission concluded  
8 that a lessor of real property to the federal government would be covered by the  
9 prohibitions of 2 U.S.C. § 441c and, therefore, would be prohibited from making  
10 contributions to federal candidates and committees. 11 C.F.R. § 115.2. The Commission  
11 viewed the lease of real property as a contract for "selling any land or buildings" within  
12 the meaning of 2 U.S.C. § 441c and 11 C.F.R. § 115.1(a)(1)(iii) because a lease of real  
13 property creates an estate in the tenant for a term of years, in effect, representing the sale  
14 of an interest in land or buildings, with the rent as the purchase price, and creates a  
15 continuing relationship between the lessor and lessee supporting the application of the  
16 statutory prohibition to a lease agreement. *See* AO 1984-53. In addition, the  
17 Commission noted that lease agreements usually contain explicit contractual provisions  
18 regarding repairs, furnishing of utilities, and other matters, and that such provisions can  
19 be viewed as contracts for the rendition of personal services or for the furnishing of  
20 material supplies, or equipment. *Id.*; 11 C.F.R. § 115.1(a)(1)(i) and (ii).

21 Ahtna's office space lease agreement with the federal government not only leases  
22 the rental space, but includes explicit provisions for this parent company to make repairs,

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1 and provide utilities, supplies, and services, such as snow removal and janitorial services,  
2 to the federal agency renting the space. NANA Regional's land lease agreement is for a  
3 term of 19 years, creating a continuing relationship between NANA Regional and the  
4 federal agency for a significant length of time.

5         Given these facts, Ahtna and NANA Regional are government contractors within  
6 the meaning of the Act and the Commission's regulations. *See* 2 U.S.C. § 441c(a)(1) and  
7 11 C.F.R. § 115.1(a); *see also* AO 1984-53. The analysis in AO 1984-53 is sound, it has  
8 been a source of guidance for 27 years without any intervening precedent to the contrary,  
9 and it applies precisely to the facts of this matter. *See also* Advisory Opinion 2008-11  
10 (Brown) (citing AO 1984-53 in analysis of 2 U.S.C. § 441c scenario). As federal  
11 government contractors, Ahtna and NANA Regional are prohibited from making  
12 contributions toward any "political party, committee or candidate for public office or to  
13 any person for any political purpose or use." 2 U.S.C. § 441c(a)(1).<sup>2</sup>

14         In their joint response, Ahtna and NANA Regional argue that their donations to  
15 AST were for the purpose of making independent expenditures, and since the statute uses  
16 only the term "contribution," the Commission should interpret § 441c to reach only  
17 contributions, in light of the holdings in *Citizens United* and *SpeechNow*, despite the  
18 regulation at 11 C.F.R. § 115.2 including the term "expenditure." However, these  
19 Respondents' activity fell squarely within the statute's prohibitions because they made  
20 contributions to AST; they themselves made no expenditures.

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<sup>2</sup>         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).

1           However, even though Ahtna and NANA Regional appear to meet the definition  
2 of government contractors under the Act and the Commission's regulations, given the  
3 unique facts in this matter, the Commission has determined to exercise its prosecutorial  
4 discretion and dismiss the allegations as to them. *Heckler v. Chaney*, 470 U.S. 821  
5 (1985). Ahtna and NANA Regional do not ordinarily enter into contracts with the federal  
6 government, and the executive officers who made the decision to contribute to AST have  
7 averred they were not even aware of the existence of these lease arrangements until after  
8 the complaint was filed.<sup>3</sup> Neither of the companies sought the leases in question.  
9 Rather, each company was approached by federal agencies to lease certain office space  
10 and land space only because the government had no other options in the area, and it  
11 appears that the lease arrangements primarily benefit the public, especially the lease for  
12 the FAA beacon.<sup>4</sup> Moreover, the amounts paid by the federal government for the lease  
13 agreements are relatively small taking into consideration these ANCs' other income and  
14 assets.<sup>5</sup>

15           Therefore, the Commission has determined to exercise its prosecutorial discretion  
16 and dismiss the allegations that Ahtna, Inc. and NANA Regional Corporation violated  
17 2 U.S.C. § 441c(a)(1). *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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<sup>3</sup> Ahtna and NANA Joint Response at 3-5; Roy Tansy, Jr., Affidavit at ¶¶ 4, 5; Marie N. Greene Affidavit at ¶¶ 3,4; and David Fehrenbach Affidavit at ¶ 4.

<sup>4</sup> Ahtna and NANA Joint Response at 3-5; Jeffrey Nelson Affidavit at ¶ 3; Kathryn Martin Affidavit at ¶¶ 5, 6.

<sup>5</sup> Ahtna and NANA Response at 3-5; Jeffrey Nelson Affidavit at ¶ 4; Kevin Thomas Affidavit at ¶¶ 3,4; David Fehrenbach Affidavit at ¶¶ 7,8.