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TECHNICAL
REPORT

Assessing the Impact of
Requiring Justification
and Approval Review for
Sole Source 8(a) Native
American Contracts in
Excess of \$20 Million

Nancy Y. Moore, Amy G. Cox,
Clifford A. Grammich, Judith D. Mele

Prepared for the Office of the Secretary of Defense

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Preface

Among the benefits to participants in the federal 8(a) Business Development Program—named for Section 8(a) of the Small Business Act—is the ability to receive procurement contracts set aside for such businesses. Such contracts that are valued at less than \$6.5 million for manufacturing industries and \$4.0 million for all other industries need not be competitively bid.

Certain categories of 8(a) businesses receive additional benefits. Those owned by Alaska Native Corporations (ANCs) or Community Development Corporations (CDCs) as well as those owned by federally recognized Indian tribes or Native Hawaiian Organizations (NHOs) deemed to be economically disadvantaged can be awarded noncompetitive contracts of any amount. They are also exempt from certain other rules applicable to 8(a) businesses.

Contract revenues to such firms, especially those owned by ANCs, have risen rapidly. One recent analysis by the Small Business Administration found that federal contract obligations to 8(a) firms owned by ANCs increased fourteen-fold, from \$265 million to \$3.9 billion, between fiscal year (FY) 2000 and FY 2008.

Proponents of maintaining unlimited thresholds on noncompetitive awards for 8(a) businesses owned by Native Groups (ANCs and economically disadvantaged NHOs and federally recognized Indian tribes) point to the broad social purposes they serve, including their legislative mandate to provide a broad range of services to indigenous peoples, as reasons for these exceptions. They also note the need in some situations to award a contract rapidly.

Critics of the exceptions to the contract thresholds note the lack of effective oversight for many of these awards. They also contend that a growing share of 8(a) awards going to Native Group–owned businesses could limit such awards to other businesses.

Concern over these exemptions led Congress to stipulate, in the National Defense Authorization Act for FY 2010, that the head of an agency may not award a noncompetitive, 8(a) contract valued at more than \$20 million without an additional level of review through a justification and approval process. It is not known what effect, if any, this requirement will have on the contracting process and the competitiveness of Native American companies. Accordingly, Congress has requested a report discussing how this provision may affect the contracting process and competitiveness of Native Group–owned firms, whether it places an administrative burden on contracting personnel, and providing recommendations on mitigating any unintended negative consequences.

This technical report fulfills that request. The research was conducted from June 2010 to May 2011. It will be of interest to procurement officials, to persons concerned with firms owned by Native Groups, and to those concerned more generally with small-business policy, acquisition policy, and the 8(a) program.

This research was sponsored by the Department of Defense Office of Small Business Programs and was conducted within the Acquisition and Technology Policy Center of the RAND National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Department of the Navy, the Marine Corps, the defense agencies, and the defense Intelligence Community. For more information on the RAND Acquisition and Technology Policy Center, see <http://www.rand.org/nsrd/ndri/centers/atp.html> or contact the director (contact information is provided on the web page).

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Summary

One enduring theme of federal policy is its efforts to boost small businesses. These efforts have included establishing contracting goals, including a government-wide goal to spend at least 23 percent of federal dollars for goods and services with small businesses, and preferences, such as those for businesses deemed to be both small and disadvantaged. The definition of “disadvantaged” entities owning small businesses eligible for contracting preferences has expanded to include not only individuals of a number of racial and ethnic minorities but also organizations, especially those that serve the interests of large numbers of “disadvantaged” individuals such as federally recognized Indian tribes, Alaska Native Corporations, and Native Hawaiian Organizations, which we collectively call Native Groups to distinguish them from companies owned by Native American individuals.

Small businesses owned by Native Groups may receive benefits not available to other small businesses. Among these are their eligibility, through the 8(a) program (named for the section of the Small Business Act that, as amended, provides contracting preferences for small and disadvantaged businesses) to receive noncompetitive, or sole-source, contracts of any amount. Other small businesses participating in the 8(a) program may not receive sole-source contracts above specified thresholds, which were raised in FY 2011 from \$5 million to \$6 million for contracts in manufacturing industries and from \$3.5 million to \$4 million for those in nonmanufacturing industries (Luckey and Manuel, 2009).

Concern over large sole-source awards to Native Group organizations, particularly ANCs, led Congress to stipulate that noncompetitive 8(a) contracts exceeding \$20 million undergo an additional level of review through the justification and approval (J&A) process (Public Law 111-84, Section 811). It is not known what effect, if any, this requirement will have on contracting processes and the competitiveness of Native American companies. Accordingly, Congress also requested a report discussing the possible effects of the J&A requirement (House of Representatives, 2010). This technical report fulfills this request. It presents an overview of trends in contracting for Native American–owned and Native Group organizations, findings from interviews with relevant stakeholders, and conclusions and recommendations.

Native American Enterprises and Federal Contracts

Businesses owned by Native Americans seek and receive federal contracts in a wide variety of industries. Among the leading industries in which they fulfilled federal contracts in FY 2010 are construction and facilities support services.

Their business with the federal government has increased throughout the past decade, with Native American–owned business selling less than \$1 billion in goods and services to the federal government in FY 2000 but nearly \$7 billion in FY 2010.

Some of this increase is likely attributable to the general increase in contracting in recent years, with federal purchases for all goods and services increasing nearly three-fold. One initial reason for this increase may have been that, starting in FY 2000, Congress permitted the Department of Defense (DoD) to outsource activities deemed to be commercial directly to Native American–owned companies rather than going through cumbersome competition processes to determine whether the activities should stay in-house or be contracted out to private providers or another federal agency (Luckey and Manuel, 2009).

More recently, the number of DoD contract dollars going to Native American–owned companies has increased but not by more than the increase in contract dollars that have gone to small-business and other 8(a) providers. And, although the percentage growth of Native American contract dollars is higher, it began from a smaller base. Thus, the growth in 8(a) contract dollars for Native American–owned 8(a) firms does not appear to have reduced the growth that other contractors saw in the business they received from the government. Native Group–owned 8(a) firms are more likely to get large contracts, particularly those of at least \$20 million, but the competitors for such contracts are likely to be large firms rather than other 8(a) firms.

Personnel Perspectives

Native Groups defend their statutorily sanctioned preferential treatment on the grounds that they must provide benefits to a large number of individuals, not just a small number of owners. For example, benefits that ANCs provide to their shareholders, who can number in the thousands, include dividends, scholarships, and support for preserving cultural heritage. In hearings to gauge the possible effect of the J&A requirement, Native Group representatives suggested that the pending requirement was serving as a cap on their contract awards and dissuading some federal contracting officers from purchasing goods and services from them (Defense Procurement and Acquisition Policy, 2010).

Representatives for other small businesses suggest that the current processes induce contracting officers to prefer Native Group organizations over other small businesses. A lobbyist we interviewed cited several specific concerns, including the limits on size of sole-source contracts for most 8(a) businesses and the limits on challenges to 8(a) designations and contracts. Earlier congressional testimony by small-business representatives contended that contracts previously awarded to other small businesses had been aggregated for award as 8(a) contracts to Native Group firms.

Federal contract staff we interviewed suggested that customer urgency was the biggest reason for awarding large sole-source 8(a) contracts. Although these staff said that they preferred competitive award processes wherever possible, they also noted that such processes can take months and that their customers might claim a need in far shorter time. Sole-source contract awards can take typically as little as two months, whereas sole-source contract awards with J&A processes may take only up to four months.

Findings and Recommendations

Our analyses regarding the J&A requirement for 8(a) sole-source contracts valued at over \$20 million have several important findings. First, the increased workload resulting from a J&A is unlikely to reduce the number of 8(a) sole-source contracts over \$20 million because customer urgency, not workload, appears to be the primary reason for using such a contract. Though competition remains the primary means by which federal contracts are awarded (according to the contracting officers we interviewed), sole-source contracts provide a faster way of executing a contract when there is an urgent customer requirement. This is true whether J&As are required or not. J&As add administrative workload for this limited number of large sole-source contracts and are likely to delay the contracting process for them but not reduce the number of 8(a) sole-source contracts used.

Need for Speed

The root cause of the increased use of large, sole-source 8(a) contracts, for which businesses owned by Native Groups are among the few eligible to receive, appears to be speed. Some urgent deadlines will always be justified. We therefore recommend that the federal government create new contracting methods beyond those currently allowed that can meet urgent customer requirements for large procurements. One possible way to accelerate justification of large 8(a) sole-source contracts may be to require that customers help justify their short deadline. Another would be to develop a faster, streamlined J&A process.

Competition

To the extent that some Native American–owned firms have an unfair advantage in the larger sole-source 8(a) contracts they receive and reduce competition for time-sensitive contracts, policymakers could increase competition by expanding the pool of firms eligible for such contracts. This could be done by raising thresholds for sole-source 8(a) contracts, which have not kept pace with inflation and which also may not be keeping pace with the evolving requirements of scale and scope in some industries.

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Abbreviations

ANC	Alaska Native Corporation
ANCSA	Alaska Native Claims Settlement Act
CCR	Central Contractor Registry
CDC	Community Development Corporation
CFR	Code of Federal Regulations
DoD	Department of Defense
FAR	Federal Acquisition Regulation
FPDS	Federal Procurement Data System
FTE	full time equivalent
FY	fiscal year
GAO	Government Accountability Office
HUBZone	Historically Underutilized Business Zone
J&A	justification and approval
NA	Native American
NAICS	North American Industry Classification System
NCA	new contract award
NG	Native Group
NHO	Native Hawaiian Organization
OMB	Office of Management and Budget
SB	small business
SBA	Small Business Administration
SDB	small and disadvantaged business
SS	sole source
USC	U.S. Code

Introduction

Efforts to boost small businesses, both generally and of specific types, are an enduring theme of federal policy. One general policy to boost small businesses is a government-wide goal to spend at least 23 percent of its federal contract dollars for goods and services with small businesses.

In addition to this general goal, Section 8(a) of the Small Business Act seeks to “promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals” (Public Law 85-536).¹ The federal government pursues this goal through a variety of business-development services as well as through the award of government contracts. Since 1988, the government-wide goal has been to spend 5 percent of all prime-contract dollars for goods and services with small and disadvantaged businesses (SDBs). (Such purchases count toward goals both for small businesses generally and for small and disadvantaged businesses specifically.)

Federal efforts to boost small and disadvantaged businesses originally focused on African American businesses but over time have encompassed those owned by other groups. Section 8(a) benefits are now available to small and disadvantaged businesses defined by (1) Small Business Administration (SBA) thresholds by industry and (2) at least 51 percent ownership and operation by individuals “who have been subjected to racial or ethnic prejudice or cultural bias within American society” and “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others . . . who are not socially disadvantaged” (13 Code of Federal Regulations [CFR] §124, 8(a), annual).

In addition, small businesses owned at least 51 percent by organizations recognized as representing groups of individuals such as Alaska Native Corporations (ANCs), economically disadvantaged federally recognized Indian tribes, Native Hawaiian Organizations (NHOs),² as well as Community Development Corporations (CDCs) may qualify for the 8(a) program. These categories, like those for racial and ethnic groups other than African Americans, have been added over time as Congress became concerned with the economic development of other groups. The ANC qualifications, for example, were instituted in part to support ANCs’ efforts to provide a wide variety of benefits to Alaska Natives, who received such benefits in part, as we will discuss, in settlement over land claims. (See Appendix C for selected dates in the evolution of policy for Native Groups.)

¹ For further discussion of how congressional concern with small businesses merged with presidential concern with minority business development, see Luckey and Manuel (2009).

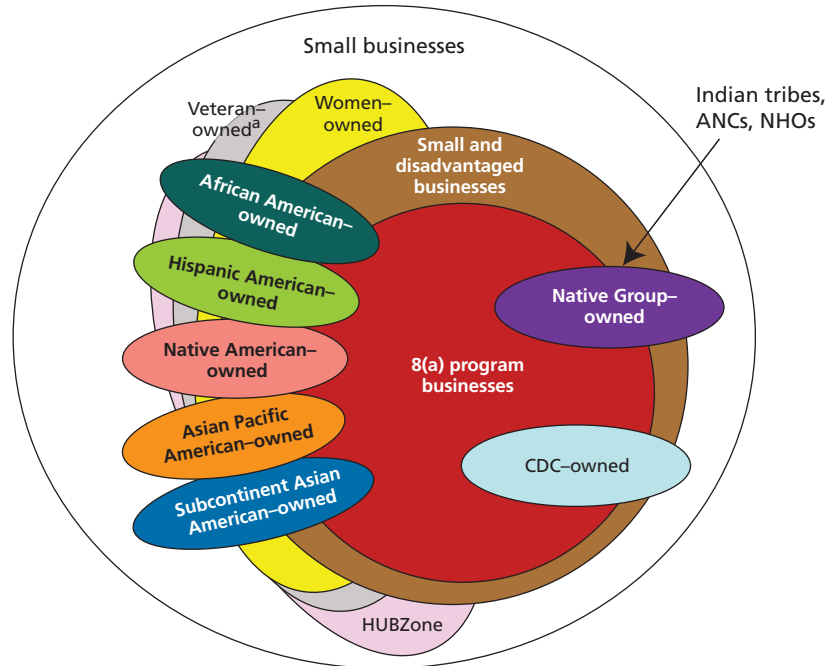
² Throughout this report, we use the term Native Group to refer to these organizations, which are recognized as representing Alaska Natives (e.g., Eskimos, Aleuts), American Indians or Native Americans, and Native Hawaiians. They represent a subset of all companies owned by Native Americans.

Figure 1.1 illustrates these categories and shows how they can overlap. Note that small businesses owned by Native American individuals, ANCs, NHOs, and economically disadvantaged Indian tribes fall into multiple categories.

Participants in the 8(a) program are eligible to receive government contracts set aside for them. Using such contracts for purchases of goods and services can also help agencies meet their contracting goals for both small businesses and small and disadvantaged businesses.

Before 1988, 8(a) contracts were not subject to competitive bidding, which meant that they could also offer a faster way to meet urgent customer requirements. This, critics charged, led to a few select firms receiving disproportionately large contracts (“Overhaul of Small Business Administration (SBA) Minority Program Cleared,” 1988).³ As a result, Congress required that contracts set aside for 8(a) participants that exceed specified thresholds be subject to competition. These caps, originally set in 1988 at \$5 million for manufacturing industries and \$3 million for nonmanufacturing industries, were raised in fiscal year (FY) 2011 to \$6.5 million for manufacturing and \$4 million for nonmanufacturing contracts (see Federal Acquisition Regulation [FAR] 19.805-1). Congress also barred firms from selling or transferring 8(a) contracts to non-8(a) firms without a waiver and set a nine-year limit for participation in the program.

Figure 1.1
Overlaps in Definitions of “Small” Businesses Eligible for Federal Programs



^aIncludes a subset of service-disabled veteran-owned.

RAND TR1011-1.1

³ The most extreme example was that of Wedtech Corp. (Stengel, Boyce, and Constable, 1987).

There are some exceptions to 8(a) eligibility and contract rules. For example, although most 8(a) business owners can participate in the program only once in their lifetimes, ANCs, CDCs, and economically disadvantaged Indian tribes and NHOs can own more than one 8(a) firm as long as each is in a different primary industry. Contracts set aside for 8(a) businesses are now subject to competition if their dollar amounts exceed specified thresholds, but 8(a) contracts with firms owned by ANCs, CDCs, and economically disadvantaged Indian tribes and NHOs are not. Table 1.1 summarizes the key differences in requirements for 8(a) businesses by type. (See Appendix D for more details on the variance in 8(a) requirements by type of business.)

These rules have led to a sharp increase in contracting with firms owned by Native Groups. These firms have also benefited from a large increase in government contracting generally. Within the Department of Defense (DoD), for example, the nominal dollar value of purchased goods and services (excluding procurement of weapons) has nearly tripled since 1948 and is now approaching \$250 billion annually (Office of the Under Secretary of Defense (Comptroller), March 2010). Native Group firms also benefited from provisions in the 2000 Defense Appropriations Act that allowed DoD organizations, when outsourcing to any Native American–owned firm, to perform direct conversions without the usual costs and time required

Table 1.1
Differences in Requirements for 8(a) Businesses, by Type

Requirement	Other 8(a) Businesses	8(a) Businesses Owned by ANCs, CDCs, or Economically Disadvantaged Indian Tribes and NHOs
Number of firms an 8(a) participant may own	Only one in a lifetime; no more than 20 percent of another 8(a) firm	No limit as long as each is in a different primary industry
Consideration of affiliates in determining size	Yes	If SBA determines affiliates provide unfair competitive advantage
Competition requirements for federal contracts	Procurements must be competed whenever possible, but firms can receive noncompetitive contracts for amounts up to \$6.5 million for manufacturing industries and \$4 million for nonmanufacturing industries, with \$100 million total cap on noncompetitive contracts	No threshold above which competition is required for individual contracts for ANCs, economically disadvantaged Indian tribes, or, on DoD contracts, for NHOs, and no total cap for ANCs or Indian tribes; justification and approval now required for noncompetitive Native American contracts exceeding \$20 million
Social and economic disadvantage	Persons owning 51 percent of a firm must prove disadvantage (with some deemed to have a social disadvantage)	Need not prove social disadvantage; Indian tribes and NHOs must prove economic disadvantage on first application
President or chief executive officer	Must be a socially and economically disadvantaged individual	Need not be a disadvantaged individual if SBA determines that such management is necessary to assist the business's development, etc.

SOURCES: Luckey and Manuel (2009); Jordan (2009).

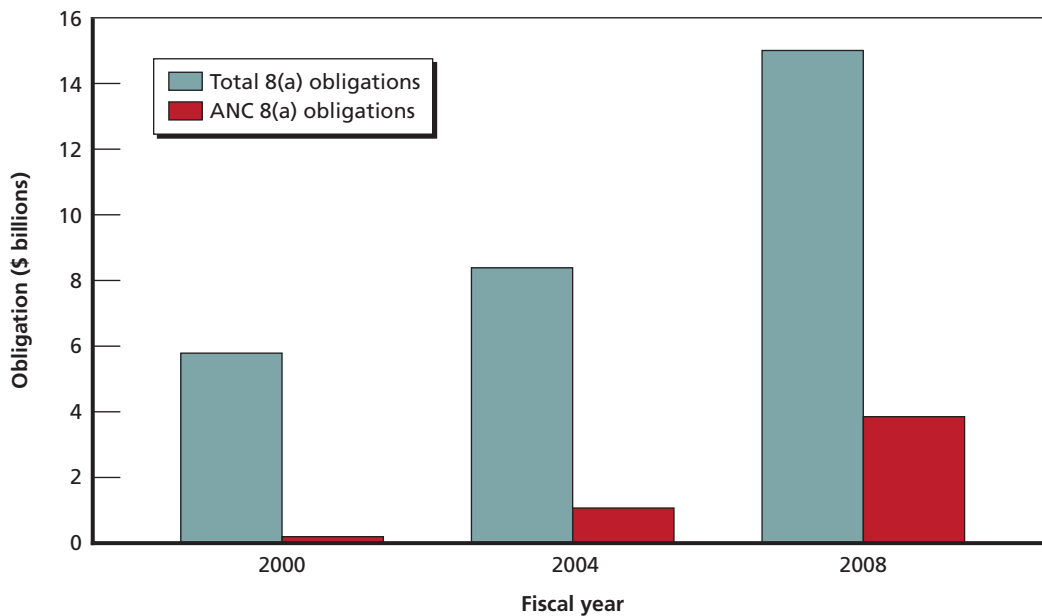
to complete a formal A-76 competition.⁴ (See Lumpkin, 1999; Soteropoulos, 1999; Luckey and Manuel, 2009.)

The increase has been particularly sharp for firms owned by ANCs (Figure 1.2). From FY 2000 through FY 2008, federal 8(a) obligations to ANC-owned firms increased fourteen-fold, from \$265 million to \$3.9 billion (Government Accountability Office, 2006; U.S. Small Business Administration Office of Inspector General, 2009b). In FY 2008, ANC-owned firms accounted for 26 percent of total 8(a) dollars—an increase from 13 percent in FY 2004. Most of these awards were to the 11 largest ANCs, with most involving noncompetitive contracts. One ANC firm in FY 2008 received approximately \$531 million in 8(a) contracts, of which \$426 million, or four-fifths, were noncompetitive (U.S. Small Business Administration Office of Inspector General, 2009).

Proponents of these rules note the large number of shareholders that Native Groups must benefit, as well as the procedural efficiencies that noncompetitive contracts can offer. Critics note higher costs to taxpayers that could result from noncompetitive contracts, as well as the possible effect on other 8(a) firms.

Concern over the large size and increasing number of noncompetitive awards to Native Group-owned companies, particularly those owned by ANCs, led Congress to stipulate, in Section 811 of the National Defense Authorization Act for FY 2010 (Public Law 111-84),

Figure 1.2
Federal 8(a) Obligations for All Firms and for ANCs, FY 2000 to FY 2010



RAND TR1011-1.2

⁴ A-76 is the name of the Office of Management and Budget Circular that established federal policies for the competition (between public and private providers) of activities that have been designated as commercial (i.e., a recurring service that could be performed by the private sector). It can take from 90 to 135 days to complete a streamlined competition (65 or fewer full time equivalent (FTE) positions are being competed) to 12 to 18 months for a standard competition (more than 65 FTEs are being competed). See Office of Management and Budget, 2003; Andrews, 2004. However, large, complex competitions can take two years or more (Grasso, 2009, p. 4).

that noncompetitive 8(a) contracts exceeding \$20 million may not be awarded unless there is a justification and approval (J&A) of the need for it. (See Appendix A for Section 811.) It is not known what effect, if any, this requirement will have on contracting processes and the competitiveness of Native Group–owned firms that can currently receive these large contracts noncompetitively without a J&A. Accordingly, Congress has also requested a report discussing how the J&A requirement may affect the contracting process generally and the selection of Native American companies for large contracts particularly, whether it places an excessive administrative burden on contracting personnel, and recommendations on mitigating any unintended negative results (House of Representatives, 2010). (See Appendix B for the specific language requesting this study.)

This report fulfills that request. As background, in the next chapter, we briefly review 8(a) policies, particularly those on contracting preferences and especially those affecting Native Group–owned firms. We provide an overview of Native Groups, their purposes, and the reasons policymakers deemed the small businesses they own to be eligible for noncompetitive 8(a) contracts of any amount. We also review some of the effects that similar rules have reportedly had on other 8(a) firms.

In the third chapter, we use data from the Federal Procurement Data System (FPDS) to explore concerns regarding the relatively large increase in sole-source contracts to Native Group–owned companies. We also explore the possible effects of the J&A requirement on the contracting process and possible administrative burdens resulting from the requirement. We do so by exploring all, small business, and 8(a) DoD contract dollars over time as well as contracts above and below the threshold of \$20 million—the threshold for noncompetitive manufacturing contracts (raised to \$6.5 million in FY 2011)—and the threshold for noncompetitive contracts in other industries (raised to \$4 million in FY 2011).

In the fourth chapter, we summarize research and interviews with three key stakeholders in the contracting process—prospective competitors for the large contracts, Native Groups, and contracting officers who will be responsible for executing the change in policy—regarding prospective effects of the change.⁵

In the fifth and concluding chapter, we summarize our findings, review their implications, and offer recommendations for policymakers.

⁵ The requirements for a J&A of sole-source 8(a) contracts over \$20 million had not yet been implemented in the FAR when this study was written, thus we could identify only prospective effects.

8(a) Policies and Native American Companies

8(a) Program Background

The 8(a) program takes its name from Section 8(a) of the Small Business Act. The current program, including its provisions for helping SDBs gain access to federal contracts, is a result of evolving, parallel efforts by Congress and successive administrations to help small businesses generally and those owned by members of racial and ethnic minorities particularly. (Appendix C lists several significant dates in the evolution of the 8(a) program and the eligibility of Native Group–owned companies.)

Small and Disadvantaged Businesses

Small and disadvantaged businesses are those meeting two broad criteria. First, their size must be below the size threshold specified for their industry. (For current size thresholds by industry, see 13 CFR §121, annual.) Second, typically, they must be owned and controlled by economically disadvantaged *individuals* who are also members of socially disadvantaged groups. Congress has identified several groups, including African Americans, Hispanics, Native Americans, and other minorities as socially disadvantaged (Luckey and Manuel, 2009). The SBA subsequently added Asian Pacific Americans and Subcontinent Asian Americans to these groups (Halchin et al., 2009). Economically disadvantaged individuals are “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged” (13 CFR §124.104). Initial 8(a) eligibility is limited to those whose net worth, excluding home and business equity, is less than \$250,000, with participants continuing in the program limited to a net worth of \$750,000 (13 CFR §124.104).

Businesses whose majority owners are Native Groups or CDCs are presumed to have social disadvantage (i.e., they are *organizations* representing socially disadvantaged individuals). Small businesses owned by ANCs and CDCs are also presumed to have economic disadvantage. Federally recognized Indian tribes and NHOs must, when their first business applies to the 8(a) program, prove economic disadvantage.¹

¹ Subsequent businesses owned by the same Indian tribe applying for the 8(a) program need not prove economic disadvantage. Jordan (2009) suggests that there may have never “been a case where a tribe was rejected” for the 8(a) program for failure to prove economic disadvantage.

8(a) Program Eligibility

Small and disadvantaged businesses are eligible for the 8(a) business development program. The 8(a) program “authorizes the Small Business Administration to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation” (FAR, 2010). It further authorizes that, for noncompetitive contracts, SBA may, when mutually agreeable, “authorize the contracting activity to negotiate directly with the 8(a) contractor.”

Businesses may participate in the 8(a) program for no more than nine years (graduating early if their size surpasses the small-business threshold in their industry). During their last five years of eligibility, they must demonstrate progress in developing business that does not rely on the 8(a) program.²

Congress, as noted above, requires that 8(a) contracts be subject to competition if they exceed specified thresholds. In addition, 8(a) participants may generally receive no more than \$100 million in noncompetitive contracts while in the program.³ At least 51 percent of 8(a) contract work must be performed by the 8(a) contractor; the remainder may be subcontracted (13 CFR §125.6). Businesses in the 8(a) program and owned by ANCs, economically disadvantaged tribes, CDCs, or, for DoD contracts only, NHOs, can receive noncompetitive contracts of any amount.⁴ Furthermore, those owned by ANCs or economically disadvantaged Indian tribes are not subject to the \$100 million total contract cap while in the program (13 CFR §124.519).

Native Groups and CDCs are also exempt from restrictions on the number of 8(a) firms that they can own (15 U.S. Code [USC] §644; 13 CFR §125.6; 48 CFR §52.219-14; 15 USC §636). Although the 8(a) businesses they own must fall below the size threshold for firms in their primary industry, there is no limit on the number of 8(a) firms they can own, as long as each is in a different primary industry.

Several justifications are given for the exemptions afforded to Native Groups. Perhaps the most cited is that these entities, rather than profiting a typically small number of owners, must benefit communities typically numbering in the thousands. Supporters also cite the dire economic need of many in these groups; more than one in four members lives in poverty, a proportion twice that for the general population (Ogunwole, 2006). To better understand these organizations and how 8(a) contracting preferences can benefit them, we review their origins and purposes.

² Non-8(a) revenue targets increase from 15 percent of revenue in the fifth year of the program to 55 percent in the ninth year (13 CFR §124.509).

³ The SBA administrator may waive this requirement if the head of the procuring agency determines that a sole-source award to a firm is necessary “to achieve significant interests of the Government.” Firms surpassing this ceiling may still receive competitive 8(a) contracts (13 CFR §124.519; Luckey and Manuel, 2009).

⁴ Such businesses would, if receiving a contract pushing them above the size threshold for their industry, subsequently graduate from the 8(a) program, like any other 8(a) business surpassing its size threshold.

Native Groups

Three types of Native Group organizations, as noted, are eligible to own 8(a) businesses. These are Alaska Native Corporations, federally recognized economically disadvantaged Indian tribes, and Native Hawaiian Organizations. We first review NHOs, whose 8(a) businesses have drawn the least attention, then Indian tribes, then ANCs, whose 8(a) businesses have drawn the most attention.

Native Hawaiian Organizations

In 2003, Congress extended to NHOs many of the contracting preferences that ANCs enjoy. NHOs started using their 8(a) preferences to win federal contracts in 2005 (Dooley, 2010). As of December 2010, there were 14 NHOs (Dooley, 2010). The Central Contractor Registry (CCR) indicates that, as of August 2010, 382 unique contractors were owned by NHOs seeking federal contracts. The FPDS shows 77 contractors owned by Native Hawaiians (which may include contractors owned both by NHOs and by Native Hawaiian individuals).

American Indian Tribes

As of October 1, 2010, 564 tribal entities were recognized by the Bureau of Indian Affairs (2010) as Indian tribes. Recognized tribes are considered “nations within a nation” or “domestic dependent nations” with sovereign authority to govern themselves. Because tribes are sovereign nations, no central governing authority can speak for all of them. Consequently, there is no one all-inclusive source of national tribal business statistics.⁵

The Government Accountability Office (2002) observed that “the isolated geographic location and distance from markets of many reservations limits their access to markets and makes it difficult for many businesses to operate successfully.” That said, tribes reported to a GAO survey that they owned a number of different enterprises. These included

- 87 tribes (of 116 owning businesses and responding to the survey) owning an enterprise in gaming
- 56 in tourism
- 50 in natural resources
- 45 in agriculture or ranching
- 19 in manufacturing
- 53 in other industries.

Most tribes owning enterprises reported owning them in multiple sectors. Nevertheless, only about 22 percent reported that they provided payments to members. Of those reporting payments to members, most reported that their payments were less than \$5,000 annually.

Alaska Native Corporations and Related Entities

Alaska Native Corporations have their origins in the Alaska Native Claims Settlement Act (ANCSA). This legislation, enacted in 1971 shortly after the discovery of oil on Alaska’s North Slope, sought to settle Alaska Native land claims (General Accounting Office, 1983; O’Harrow, 2010c). Rather than establishing reservations, as had been done for Indian tribes in the con-

⁵ Telephone conversation with U.S. Census Bureau personnel, March 24, 2011.

tiguous United States, the ANCSA conveyed title to approximately 44 million acres of land and \$962.5 million in cash to what was then a population of about 80,000 Alaska Natives.

The ANCSA accomplished this distribution through the creation of two types of Alaska Native Corporations (General Accounting Office, 1983; Government Accountability Office, 2006). First, it created 13 regional ANCs, one for each of 12 regions of Alaska and a 13th for Alaska Natives living elsewhere.⁶ Second, it created about 200 village, urban, or group corporations for Alaska Natives living within the 12 regions. Regional ANCs are required to be profitmaking entities; village, urban, or group corporations may be profitmaking or nonprofit entities. Both types are incorporated under Alaska law.

Eligible Alaska Natives received shares of the corporation created for their region as well as any corporations created for their village, urban area, or group (Government Accountability Office, 2006). The size and number of shareholders vary by corporation; in 2004, the ANC with the fewest shareholders had 137; that with the most had more than 17,000.⁷ Shareholders can generally transfer shares only under certain circumstances such as divorce or death.

ANCs seek to provide a wide variety of benefits for their members (Government Accountability Office, 2006; O'Harrow, 2010a). These may include direct benefits such as dividends, employment assistance, scholarships, or burial assistance and indirect benefits such as support of subsistence life, cultural preservation, and donations to nonprofit organizations aimed at benefitting the group.

ANCs may provide these benefits through several means, including the creation of small businesses. Although these can employ Alaska Natives, they need not do so to qualify for the preferences afforded to small and disadvantaged businesses. In addition, even though the president or chief executive officer of a typical 8(a) business must be a socially and economically disadvantaged individual, that of an 8(a) business owned by an ANC, CDC, or economically disadvantaged Indian tribe need not be. Rules governing NHOs do not explicitly address this issue; however, Luckey and Manuel (2009) note the unlikelihood that NHOs would be treated differently from other Native Group enterprises.⁸

The exceptions to typical 8(a) regulations for small businesses owned by ANCs and similar entities originated in the mid to late 1980s. (See Appendix C.) Some (O'Harrow and Higham, 2004) have suggested that the special 8(a) provisions for ANCs and similar entities were implemented to stabilize their finances.⁹ Others have noted congressional concern at the time regarding why few Native American-owned firms participated in government contracting (Johnson-Pata, 2009).

⁶ One of the 13 original ANCs, the Aleut Corporation, was purchased by another, the NANA Regional Corporation, in 2009.

⁷ ANCs also initially differed widely in their shares of the settlement fund, reflecting variation in acreage and population for regions and villages (Halchin et al., 2009).

⁸ The rules for ANCs and related entities also contrast with the requirement that businesses in Historically Underutilized Business Zones (HUBZones) receive contracting preferences. The HUBZone program, which seeks to promote economic development in specified areas, offers its benefits only to businesses for which HUBZone residents constitute at least 35 percent of all employees. See 13 CFR §126, annual; also see Halchin et al. (2009) for additional discussion of ANC businesses and the benefits they offer to Alaska Natives.

⁹ One Native American business advocate notes that ANCs have an "extremely limited base of business skills and experience [that] made progress [for them] very difficult" (McNeil, 2006). By the early 1990s, the 12 regional ANCs had seen nearly four-fifths of the value of their initial cash distributions dissipate through money-losing businesses. For three corporations, the average annual return rate on equity was -3.4 percent.

Throughout the late 1980s and into the 1990s, few ANCs took advantage of the program. Indeed, before 1995, fewer than 20 ANC subsidiaries were in the program (Government Accountability Office, 2006). In the past decade, however, the number of ANC subsidiaries in the program has grown to more than 300 (O’Harrow, 2010c). Most of these are in services. In FY 2008, 66 percent of the 8(a) obligations to ANC services companies were for Facilities Support Services, the industry receiving the second-largest amount of money from all 8(a) contracts (U.S. Small Business Administration Office of Inspector General, 2009). Similarly, more than 70 percent of DoD 8(a) contracts with ANCs are reportedly for services (Assad, 2009). Because so much of the work done by ANC-owned firms is in support services, which typically must be done on-site, it is difficult for such firms to actually employ Alaska Natives. (By contrast, manufacturing work can be remote and shipped.) For example, one ANC technology services firm had less than three dozen Alaska Natives among its 2,300 employees and had its headquarters in Alexandria, Virginia (O’Harrow and Higham, 2004).

Several commonly cited explanations are given for the growth in contracts to ANCs (O’Harrow, 2010c). In the decade before the rapid growth of ANCs, the Pentagon contracting workforce was cut in half. This “loosened oversight of federal contracts across the government” (O’Harrow, 2010c). A result, one former contracting officer suggested, is that “procurement officials are in the constant process of performing contracting triage . . . to see what requirements can be legally awarded in the shortest . . . time using the least . . . resources” (Lumer, 2009).

This problem was compounded when, following the September 2001 terrorist attacks against the United States, the government increased its purchases of goods and services, especially for military and homeland-security functions, and continued pushing outsourcing of these to the private sector.¹⁰ As we will discuss below, the urgency of some of these purchases combined with the time required to do competitive procurement may have also played a role in large 8(a) sole-source awards to Native Groups. As a result, total government spending on contracts in the past decade has nearly tripled, with that on ANC subsidiaries permitted to receive noncompetitive 8(a) contracts increasing tenfold (O’Harrow, 2010c). The Government Accountability Office (2006) hypothesized that federal officials found ANCs to be “a quick, easy and legal method of awarding contracts for any value.”

Another possible explanation for the initial growth of Native Group contracts after FY 2000 that is unrelated to their 8(a) status was the ability, noted above, of DoD to directly outsource some civilian jobs to Native American–owned companies without going through a costly and disruptive cost comparison competition. (For more on this, see Appendix E.)

In addition to the need to stabilize ANC finances and to increase the participation of indigenous peoples in government contracting, some have cited the lack of “business models that have provided any modicum for success in tribes and ANCs” (Murkowski, 2009) as well as the need to serve as “engines of economic opportunity for entire communities and cultures” (Totemoff, 2006) as reasons to support Native Group contracting preferences. The program, advocates claim, has been more successful than others in building “self-determination, self-

¹⁰ On outsourcing of security services to ANC-owned firms, including that permitting the Army to free soldiers (who had been providing such services) for other military duty, see Miller (2004) and Wayne (2004). Army contracts with ANC-owned firms for security services came under criticism because of the large amount of work that the ANC firms subcontracted, as well as because of previous performance of, and labor management issues with, the subcontractors.

sufficiency, and . . . sustainable economies” for indigenous peoples (McNeil, 2006).¹¹ Small businesses have provided ANCs with economic opportunities besides “conservative passive investments in surface land leases” (Garber, 2006). Supporters have also appealed to the unique legal and political relationship between the United States and its indigenous peoples, enshrined in part by the granting in the Constitution (Article I, Section 8) to Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (Johnson-Pata, 2009).

Advocates also suggest, especially in light of sometimes lengthy and onerous contract processes, the need for an expedited process—and for small and disadvantaged businesses, such as those owned by Native Groups, to be able to receive such contracts. One supporter of the Native Group preferences argued that such contracts offer “an administrative savings . . . because it just takes a lot less time to negotiate the deal” (Lukin, 2009). A former contracting officer (Lumer, 2009) also testified

the unlimited sole source authority for ANCs was a very useful tool to get contracts awarded quickly under the Competition In Contracting Act. I authorized its use myself about [six] times in my 13 years . . . for hundreds of millions of dollars. I received very good performance from the ANCs and the prices proposed were audited, negotiated and ultimately determined to be fair and reasonable. I am not in favor of having that tool completely eliminated.

Concerns About Growth in 8(a) Obligations to ANC Firms

One concern about this growth is how it may adversely affect other small businesses. The same contracting officer cited above who described the ability to award contracts to ANCs without competition as “very useful” also noted the problems that such privileges pose to other small and disadvantaged businesses. In his subsequent career representing a small disadvantaged business, he found it

incredibly difficult to compete with ANCs under the current rules . . . los[ing] contracts that were bundled and awarded to ANCs, and . . . opportunities to compete because a contract was awarded to an ANC non-competitively. As a general rule, [we] will not compete for any procurement if there is a history of ANC involvement or where there is the likelihood that an ANC will go after the opportunity directly (Lumer, 2009).

Similarly, local contractors near Fort Drum in upstate New York contend they have had contracts taken away from them and awarded to ANCs. The representative (Schneider, 2009) of one testified

¹¹ ANCs are private companies and “do not have to comply with disclosure rules applicable to publicly-traded corporations.” In response to a 2009 request by Senator Claire McCaskill, Chairman of the Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, 12 of 13 Alaska regional corporations and seven of the largest village corporations reported that from 2000 to 2008 they “distributed \$1.3 billion in cash dividends and \$303.7 million in scholarships, community development, and other social and cultural contributions.” Federal prime contracts provide about 44 percent of their revenue. Assuming that respondents’ federal prime contract revenue and its resultant benefits were evenly distributed over time and among respondents, Alaska Native community members received an estimated average benefit of about \$615 per year per member. (United States Senate, undated (b), p. 6).

From 2002 to 2007, our company was one of two local contractors holding a term contract to provide various construction services . . . at Fort Drum . . . Both firms involved in this contract received multiple commendations for the work performed . . .

In 2004, the government anticipated exceeding our contract value limits, so they began preparing for the procurement of a follow-on contract—which we assumed would be procured through a competitive bidding process . . . [instead,] two new contracts [were awarded] to two Alaska Native Corporations . . . on a sole-source, no-bid basis. . . .

In addition to being excluded from the bidding process, we had no opportunity to protest the decision. Federal regulations dictate that only a competing bidder on a project has legal standing to protest.

Other anecdotal, less specific evidence also points to 8(a) firms losing government contracts to ANCs (Alford, 2006, especially pp. 305-306). In several ANC contracts, large businesses rather than the ANCs were reportedly performing the work (O’Harrow, 2010b).

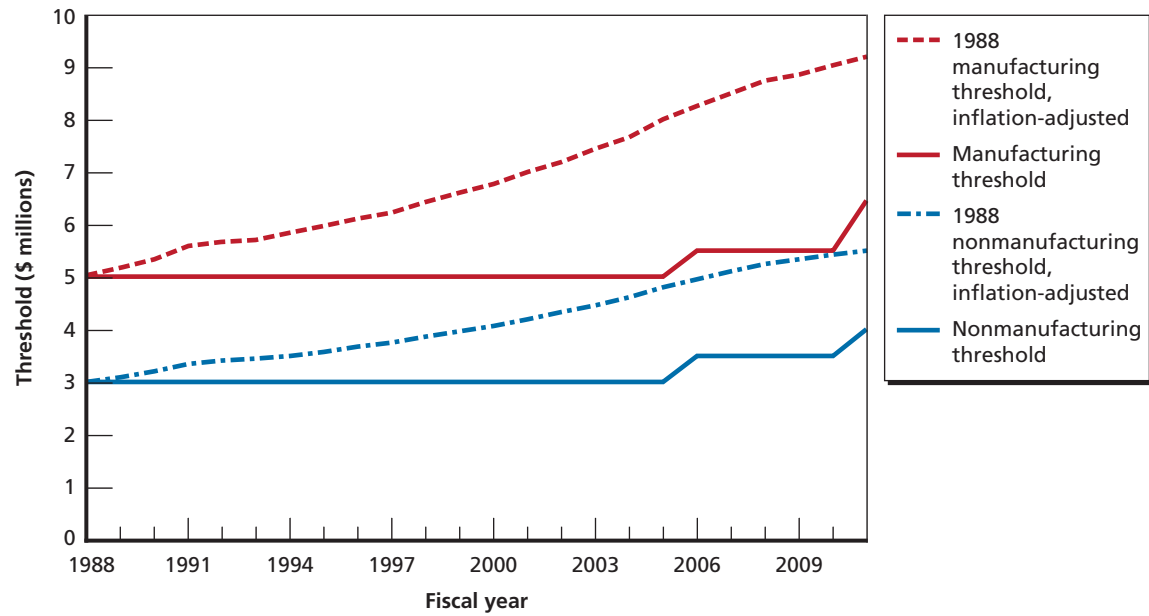
Such results, one skeptic (Davis, 2006) of ANC preferences claims, are an “unintended consequence” of driving “procurement officers to meet a certain percent and threshold [for SDB contracts], because it is so easy for them to go no-bid, sole-source.” Such expediency, a DoD procurement official notes, requires that a premium cost be paid (O’Harrow, 2010c).

Other critics of the program have suggested that contract preferences to Native Groups and similar entities have evolved beyond the original intent of the 8(a) program, which was to help small businesses grow and develop the capacity to successfully compete on their own. One said that the 8(a) program “was not set up to be a community development program. It was set up to be a helping hand for small, struggling businesses until they are able to go out and compete on their own” (Manzullo, 2006). Another questions whether “this is a capacity building, which traditionally is what the 8(a) program was designed to be” (McCaskill, 2009).

Several proposals have been made to reduce the advantages that Native Groups and CDCs have over other 8(a) businesses. One of these has been to increase the thresholds for which 8(a) businesses can receive noncompetitive contracts or the limits on wealth for typical 8(a) owners (see, for example, Sullivan, 2006). Indeed, although the noncompetitive contract limits were increased in FY 2006 (from \$5.0 to \$5.5 million for manufacturing industries and \$3.0 million to to \$3.5 million for nonmanufacturing industries) and in FY 2011 (to \$6.5 million for manufacturing and \$4.0 million for nonmanufacturing), they have still failed to keep pace with inflation (Figure 2.1).

A new policy, which Congress seeks to evaluate, is to cap at \$20 million the size of an 8(a) noncompetitive contract that could be awarded without a J&A process. In the next chapter, we review some quantitative indicators of sole-source, 8(a), Native American, and Native Group contracting, including those currently above and below specified thresholds, in an effort to discern what effect the new provisions might have. In Chapter Four, we review elements of a J&A process and how its implementation might affect the awarding of contracts.

Figure 2.1
Actual and Inflation-Adjusted Thresholds for Noncompetitive Contracts Held by 8(a) Businesses, FY 1988 to FY 2011



SOURCES: FAR 19.805-1; Office of the Under Secretary of Defense (Comptroller) (2010).

RAND TR1011-2.1

Quantitative Analysis of Recent Contracts Awarded to Native Groups

To explore the possible effects of a J&A process on Native American companies in particular and on contracting processes in general, we use two data sources: the Central Contractor Registry and the Federal Procurement Data System. Firms willing and able to do business with the federal government must register with the CCR, providing ownership and industry information. The FPDS provides details of federal purchases with private contractors, including ownership information, industry and amount of purchase, and other details.

The data on contractors owned by Native Americans, to include Native Groups and those owned by individuals of Native American, Alaskan, or Hawaiian heritage, are not always definitive. Table 3.1 lists the number of unique businesses in the CCR by different Native Group categories as of August 2010. Note that the groups in the table are not mutually exclusive; a company can be listed in more than one category. Note also that Native American is the most inclusive category and that there are two different categories for firms owned by Indian tribes.

Similarly, the FPDS has overlapping and somewhat ambiguous categories for Native American–owned companies. Table 3.2 lists contractors by these categories. Note that Native American is the most inclusive category and, as we will discuss below, the most enduring category in the FPDS. Note also that there are considerably more Native American–owned firms¹ seeking federal business (i.e., listed in the CCR) than there are who have won DoD contracts (i.e., listed in the FPDS).

Table 3.1
Native Group Firms Listed as Active in the CCR
in 2010

Ownership Category	Number
Native American	8,025
American Indian	4,284
Indian Tribe (federally recognized)	1,818
Indian Tribe (other)	853
Alaska Native Corporation	969
Native Hawaiian Organization	382

¹ This category includes firms owned by individuals and organizations (i.e., Native Groups).

Table 3.2
Native Group Firms Identified in the FPDS

Ownership Category	Number
Native American	1,378
American Indian	706
Alaska Native	289
Tribal	178
Indian Tribe	160
Native Hawaiian	77

Native Groups may also own firms of differing status. As Figure 3.1 demonstrates, Native Groups can own firms that are classified as small and other-than-small in their primary industries. And, of course, some of the small firms they own may be in the 8(a) program.

Similarly, Native Group businesses may have a range of federal contracts. As Figure 3.2 shows, these may include contracts held by large businesses, contracts held by small ones, and contracts set aside for small businesses, including competitive and noncompetitive (or sole-source) 8(a) contracts.

Information available on 8(a) contracts, contractors owned by Native Groups, and the expected amount of a contract award has changed over time, as Table 3.3 indicates. As a result, we have only limited ability to assess Native Group ownership as well as contracts above and below the threshold over time, with varying numbers of years available to assess these characteristics. Furthermore, as we will discuss, we have concerns about the quality of new data elements in the initial years they are used, especially those for Native Groups.

We analyzed DoD contract action data from 1995 to 2010 to see how contracts awarded to Native American–owned companies, particularly awards of large sole-source contracts, have

Figure 3.1
Differing Status of Native Group Firms

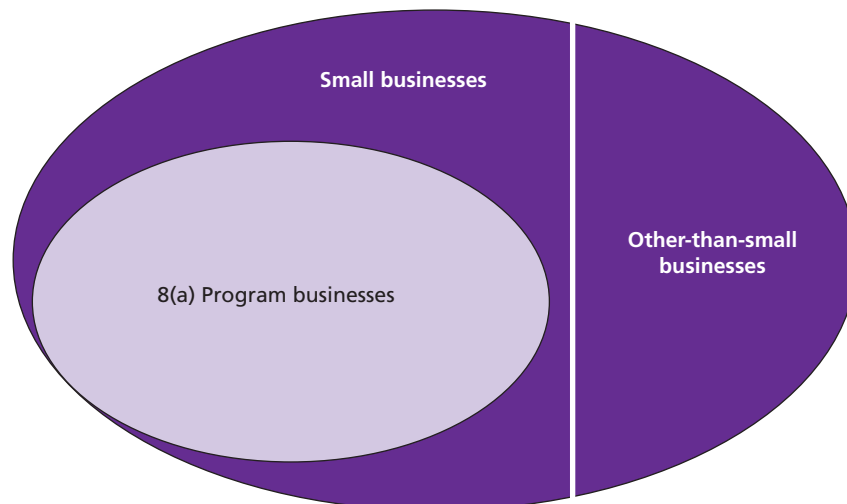
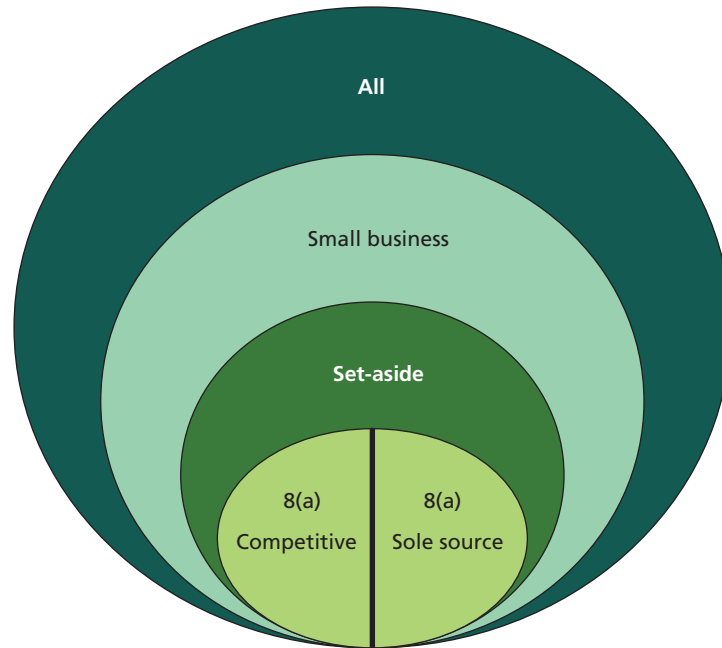


Figure 3.2
Different Types of Federal Contracts Going to Native Group Businesses



RAND TR1011-3.2

Table 3.3
Time Line for Select FPDS Elements

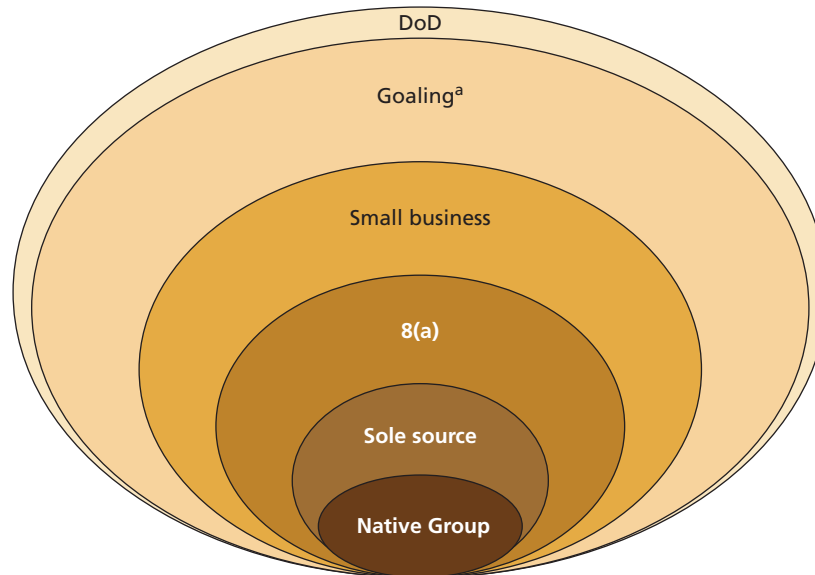
Year	Data Element
1983	8(a) sole-source contracts
1988	8(a) competitive contracts
1989	Native American–owned firms
2004	ANC-owned firms
2004	Tribally owned firms
2004	NHO-owned firms
2004	Amount of contract award (base plus all expected options)

changed over time relative to other contract awards. We are unable to analyze Native Group contracts, which are a subset of Native American contracts, until 2004 when they were broken out in the FPDS data.

Figure 3.3 illustrates how Native Group 8(a) sole-source contracts (the focus of the new J&A requirement because they and CDCs are the only entities that can be awarded 8(a) sole-source contracts greater than \$20 million) are a subset of all 8(a) contracts, small-business contracts, DoD goaling-dollar contracts,² and DoD contracts.

² Goaling dollars are those that count in determining how well an agency is doing in meeting small-business goals. They omit certain categories of purchases, such as those from UNICOR (also known as Federal Prison Industries) as well as those

Figure 3.3
Subset of the Many Categories of Native Group Contracts



^aThis category includes contract actions that count toward small-business goals (it omits the Javits-Wagner-O'Day Program; UNICOR; American Institute in Taiwan; contracts performed out of the United States, on behalf of foreign governments or entities, or funded mostly with agency-generated sources). U.S. Small Business Administration (2009).

RAND TR1011-3.3

We used the 2010 CCR to identify the industries (as defined by the North American Industry Classification System [NAICS]) in which Native American–owned firms are seeking federal contracts. Table 3.4 ranks industries by the number of firms, categorized as either Native American, American Indian, Indian Tribe, Alaska Native Corporation, or Native Hawaiian Organization, seeking federal contracts within them. These industry categories are not exclusive; a firm may seek a contract in more than one industry.

Using the FPDS, we also identified the top 15 industries in which firms identified as either Native American, American Indian, Alaska Native, Tribal, Indian Tribe, or Native Hawaiian had DoD contract actions in FY 2010. Table 3.5 ranks these by total contract action dollars to Native Group firms and also shows the numbers of Native Group contractors and contracts in these industries. Six of these industries—commercial and institutional building construction, facilities support services, engineering services, industrial building construction, other heavy and civil engineering construction, and administrative and general management consulting services—are also among the 15 industries with the highest number of Native-owned firms.

To put contracts awarded to all types of Native American–owned companies into perspective, we first used the FPDS to analyze trends in DoD goaling dollars for all firms on

- all contract actions
- sole-source (SS) contract actions

made on behalf of foreign governments. For further discussion of goaling dollars, see U.S. Small Business Administration (2009a).

Table 3.4
Industries with the Highest Number of Native American–Owned Firms
Seeking Federal Contracts

	NAICS-Defined Industry	Number of Firms
1	Commercial and Institutional Building Construction	1,707
2	Industrial Building Construction	1,288
3	Site Preparation Contractors	1,285
4	Engineering Services	1,198
5	Other Heavy and Civil Engineering Construction	1,168
6	Water and Sewer Line and Related Structures Construction	1,149
7	All Other Specialty Trade Contractors	1,138
8	Highway, Street, and Bridge Construction	1,071
9	Electrical Contractors and Other Wiring Installation Contractors	1,047
10	Administrative and General Management Consulting Services	962
11	Facilities Support Services	943
12	Single-Family Housing Construction (except Operative Builders)	897
13	Plumbing, Heating, and Air-Conditioning Contractors	869
14	Residential Remodelers	856
15	Poured Concrete Foundation and Structure Contractors	813

- small-business (SB) contract actions
- small-business sole-source (SB SS) contract actions
- 8(a) contract actions
- 8(a) sole-source contract actions.

Figure 3.4 shows trends in the value of all DoD contract actions, those with small-businesses, and all sole-source and small-business sole-source contract actions in recent years. Note the increase in expenditures following the September 11, 2001, terrorist attacks against the United States and the subsequent military actions in Afghanistan and Iraq. From FY 2000 to its peak in FY 2008, all DoD contract action dollars increased 299 percent, and its sole-source contract action dollars rose 290 percent. Similarly, from FY 2000 to the FY 2009 peak in DoD contract action dollars, dollars with small business rose 301 percent, and sole-source small-business contract action dollars rose 282 percent. In FY 2010, sole-source contract action dollars constituted 35 percent of all DoD contract action dollars and 17 percent of all small-business contract action dollars.

Just as small-business contract action dollars are a small proportion of all DoD contract action dollars, so DoD 8(a) dollars are a small proportion of its small-business dollars. Figure 3.5 shows trends in small-business and 8(a) dollars, both total and sole-source, for all DoD contractors from FY 1995 to FY 2010. It shows that total small-business dollars grew more rapidly than 8(a) dollars from FY 2000 through FY 2009 and fell more in FY 2010, although the percentage change in 8(a) contract action dollars was greater at 408 percent than the 301

Table 3.5
Industries in Which Native Group–Owned Firms Received the Most DoD Contract Action Dollars in FY 2010

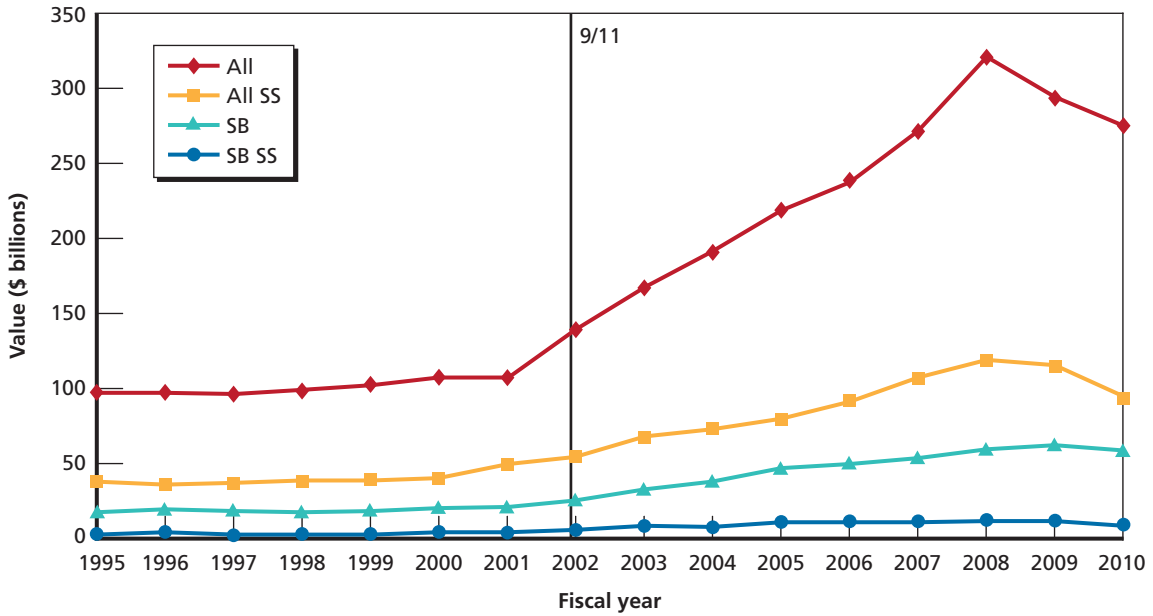
	NAICS-Defined Industry	Contract Amount (\$ millions)	Number of Contracts	Number of Contractors
1	Commercial and Institutional Building Construction	1,432	785	315
2	Facilities Support Services	840	233	124
3	Engineering Services	307	198	114
4	Electronic Computer Manufacturing	275	56	22
5	Industrial Building Construction	237	120	87
6	Other Heavy and Civil Engineering Construction	216	189	103
7	Remediation Services	215	150	71
8	Other Computer-Related Services	205	188	74
9	Administrative and General Management Consulting Services	175	106	65
10	Computer Facilities Management Services	136	64	43
11	Other Aircraft Parts and Auxiliary Equipment Manufacturing	123	201	50
12	Security Guards and Patrol Services	116	25	15
13	Wired Telecommunications Carriers	97	21	14
14	R&D in Physical, Engineering, and Life Sciences (except Biology)	80	64	35
15	Other Electronic Component Manufacturing	78	27	15

percent increase for small-business contract action dollars. Further, 8(a) sole-source contract action dollars grew 490 percent during that time, whereas small business sole-source contract action dollars grew 282 percent. Although sole-source dollars were only 17 percent of all DoD small-business contract actions in FY 2010, they constituted 60 percent of all DoD 8(a) program dollars.

Just as 8(a) dollars are a small proportion of sole-source dollars spent on DoD contracts, so dollars spent with Native American–owned companies are a small proportion of all 8(a) dollars. Figure 3.6 shows 8(a) dollars spent by DoD with all contractors and with Native American contractors from FY 1995 to FY 2010, including those spent on sole-source contracts. In the late 1990s and early 2000s, 8(a) dollars spent with Native American–owned firms increased and 8(a) dollars spent with all firms decreased. Note in particular the increase in 8(a) dollars for Native American–owned firms from FY 2000 to FY 2003. Although 8(a) contract action dollars increased 188 percent and 8(a) sole-source contract action dollars increased 237 percent, those for Native American–owned contract action dollars rose 370 percent and 415 percent, respectively. This *may* have been caused in part by Congress permitting DoD to avoid the A-76 process if the contract went to a Native American–owned business.³ In mid-2003, the

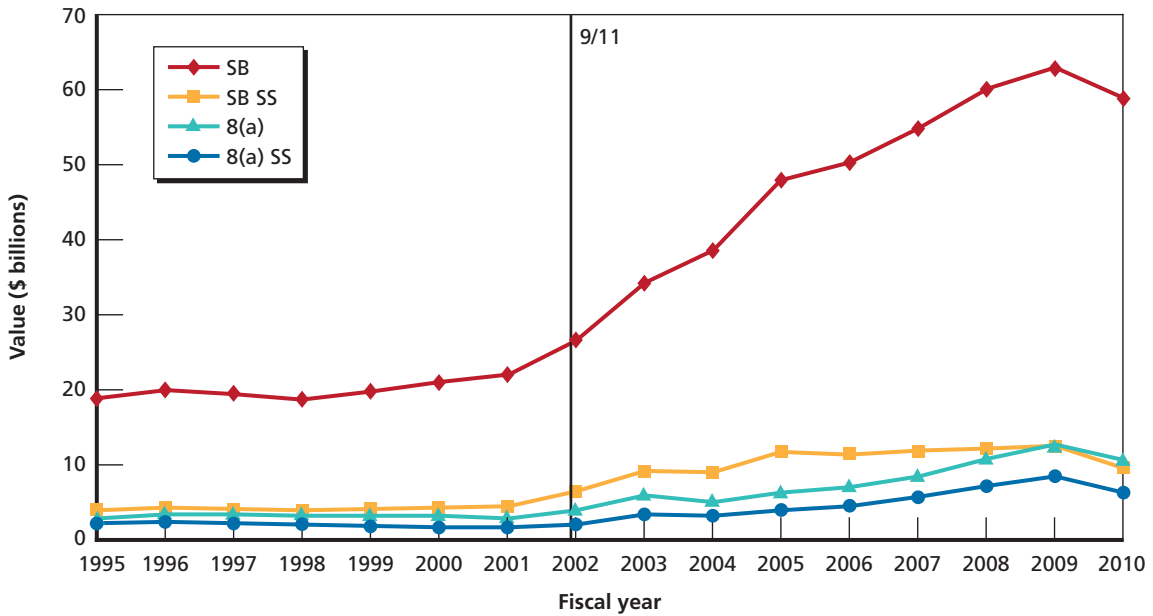
³ At the same time, OMB set a goal for competitively bidding 5 percent of all commercial activities by the end of FY 2002 and an additional 10 percent by the end of FY 2003. As a result, DoD directly outsourced 1,800 civilian jobs in FY 2002 and FY 2003. For further details, see Appendix E.

Figure 3.4
Total and Sole-Source DoD Contract Action Goaling Dollars to All Businesses and to Small Businesses, FY 1995 to FY 2010



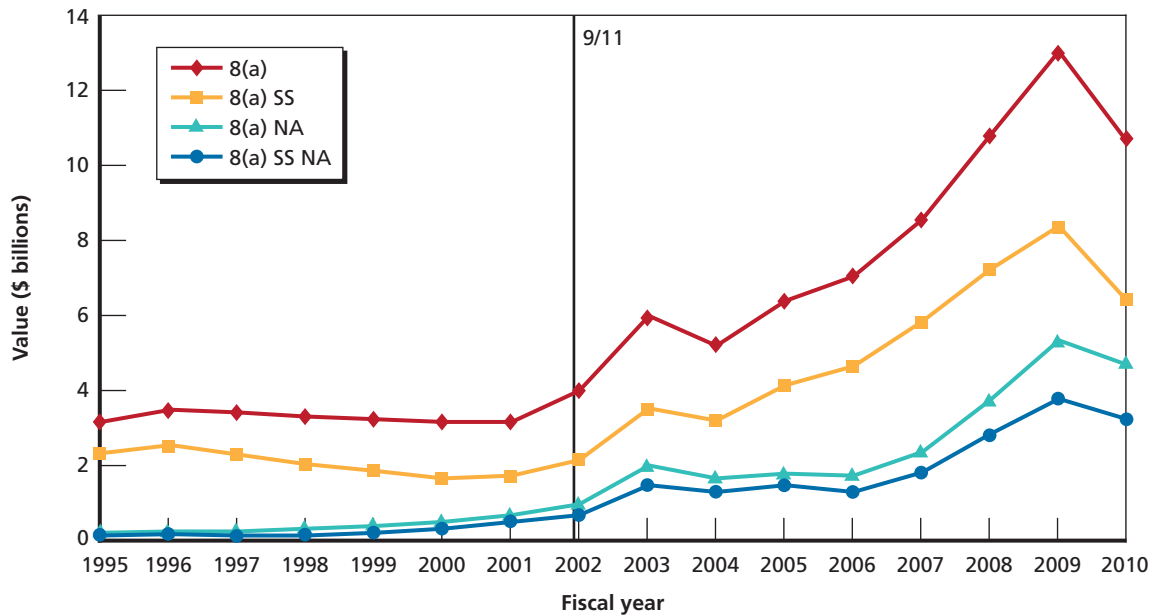
RAND TR1011-3.4

Figure 3.5
Total and Sole-Source DoD Contract Action Goaling Dollars to Small-Businesses and to Businesses with 8(a) Contracts, FY 1995 to FY 2010



RAND TR1011-3.5

Figure 3.6
Total and Sole-Source DoD 8(a) Contract Action Goaling Dollars, Overall and to Native Americans, FY 1995 to FY 2010



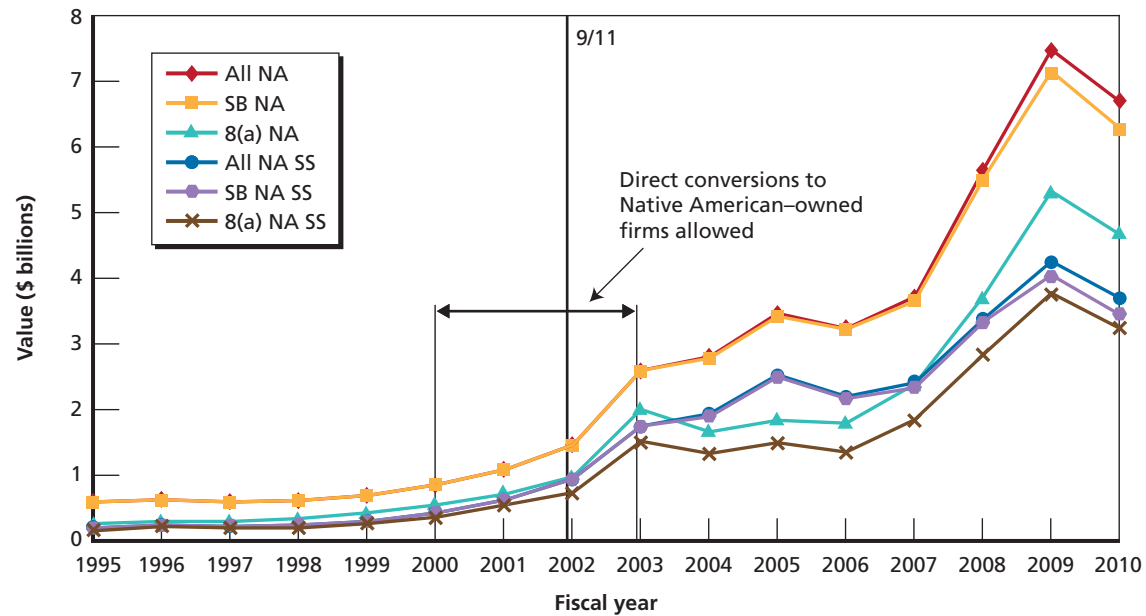
RAND TR1011-3.6

Office of Management and Budget (OMB) no longer allowed such direct conversions. Similarly, from FY 2003 to FY 2009, 8(a) contract action dollars rose 217 percent and sole-source contract dollars rose 237 percent, whereas contract action dollars spent with Native American–owned firms rose 265 percent and 250 percent, respectively. Sole-source contracts represented 60 percent of all 8(a) dollars in FY 2010 and 70 percent of all such dollars going to Native American–owned companies.

Not all DoD contract action goaling dollars for Native American–owned companies are classified as small business or 8(a). Figure 3.7 shows all DoD contract action dollars going to Native American–owned companies, including those spent on small business (94 percent in FY 2010) or 8(a) contracts (70 percent in FY 2010) and those that were spent on sole-source contracts (55 percent of total contract action dollars in FY 2010). Sole-source dollars for all three categories grew rapidly between FY 2000 and FY 2003. This period, as shown, coincided with that in which direct conversions to Native American–owned companies without going through the A-76 process were permitted. Before FY 2000, sole-source dollars were only about a third of all dollars for Native American–owned companies and Native American–owned small businesses and just over half of all 8(a) dollars for Native American–owned firms. Since 2000, sole-source dollars have constituted most DoD dollars for Native American–owned firms and most dollars going to Native American–owned small businesses, as well as about two-thirds of 8(a) dollars going to such firms. In FY 2010, the vast majority, 87 percent, of Native American–owned firms’ sole-source contract action dollars were 8(a).

The FPDS does not distinguish between Native Group contract actions and all Native American contract actions until FY 2004. Nor does it include new contract awards values (base plus all options) before FY 2004. Initial trends for 8(a) NCA contract action dollars rise very

Figure 3.7
Total and Sole-Source DoD Contract Action Goaling Dollars to Native American–Owned Firms, to Native American–Owned Small Businesses, and to Native American Businesses with 8(a) Contracts, FY 1995 to FY 2010



RAND TR1011-3.7

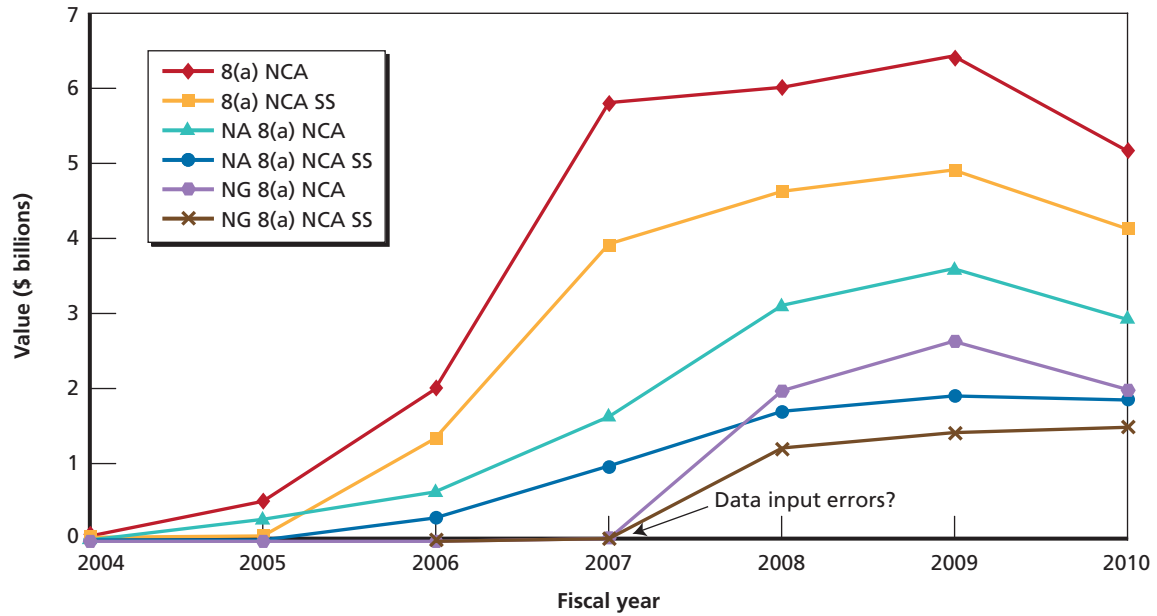
quickly from 2004 to 2007 and Native Group 8(a) NCA contract action dollars, as seen in Figure 3.8, appear flat, leading us to surmise that there were initial coding problems associated with the introduction of the new data elements for Native Groups and NCAs. More recently, all and sole-source 8(a) NCAs for Native American–owned firms rose from FY 2007 through FY 2009 before decreasing in FY 2010. In FY 2010, 80 percent of all 8(a) NCAs were sole source, and 63 percent of Native American 8(a) NCAs were sole source, as were 75 percent of Native Group 8(a) NCAs. (For the corresponding numbers of contracts for these groups, see Appendix F.)

The new requirement for a J&A applies to the award of new 8(a) sole-source contracts with estimated values (base year plus options) greater than \$20 million. We therefore analyzed FPDS data on values of new 8(a) contract awards for all and for Native American–owned firms. Figure 3.9 shows that most 8(a) NCAs were below the thresholds—initially \$5 million for manufacturing and \$3 million for nonmanufacturing industries, raised to \$5.5 million for manufacturing and \$3.5 million for other industries from FY 2006 to FY 2010⁴—above which most 8(a) contracts must be competed. In FY 2010, 61 percent of the aggregate value of new 8(a) contract awards was below these thresholds with the remaining 39 percent above the threshold split almost evenly between below and above \$20 million.

Similarly, as Figure 3.10 shows, most recent 8(a) sole-source NCAs have been below the thresholds. In FY 2010, \$2.9 billion of the aggregate \$4.2 billion, or 71 percent, in new 8(a) sole-source contract awards by DoD were below the thresholds specified for these contracts.

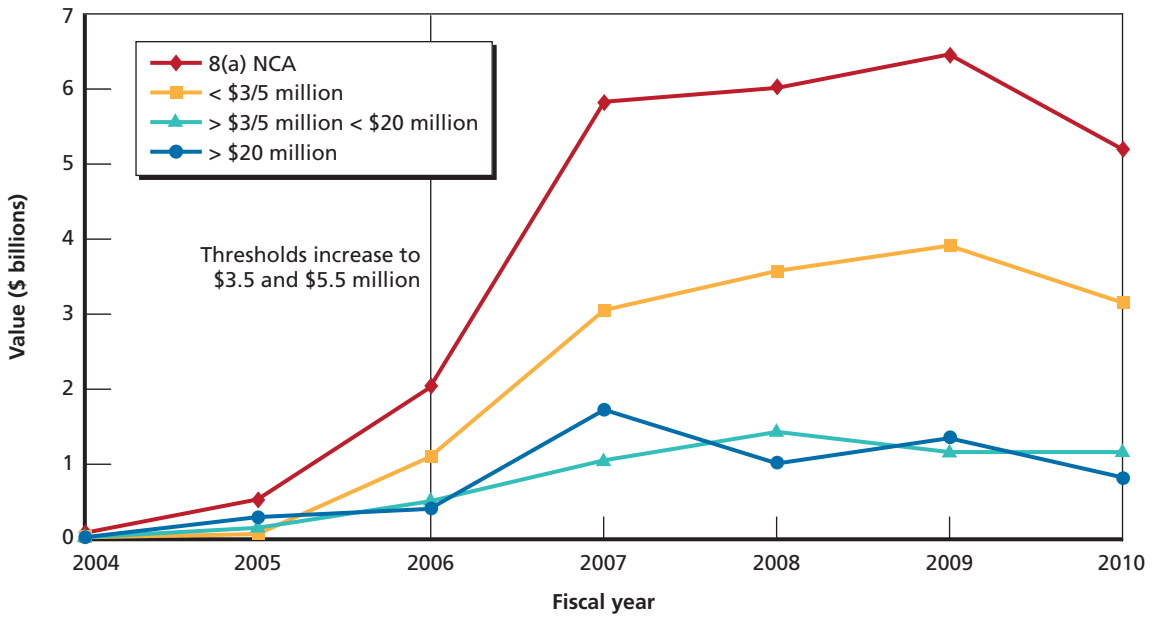
⁴ As discussed above, these thresholds were raised to \$6 million for manufacturing and \$4 million for nonmanufacturing in FY 2011.

Figure 3.8
Total and Sole-Source DoD New Contract Award (NCA) Goaling Dollars to Native American and to Native Group Firms, FY 2004 to FY 2010



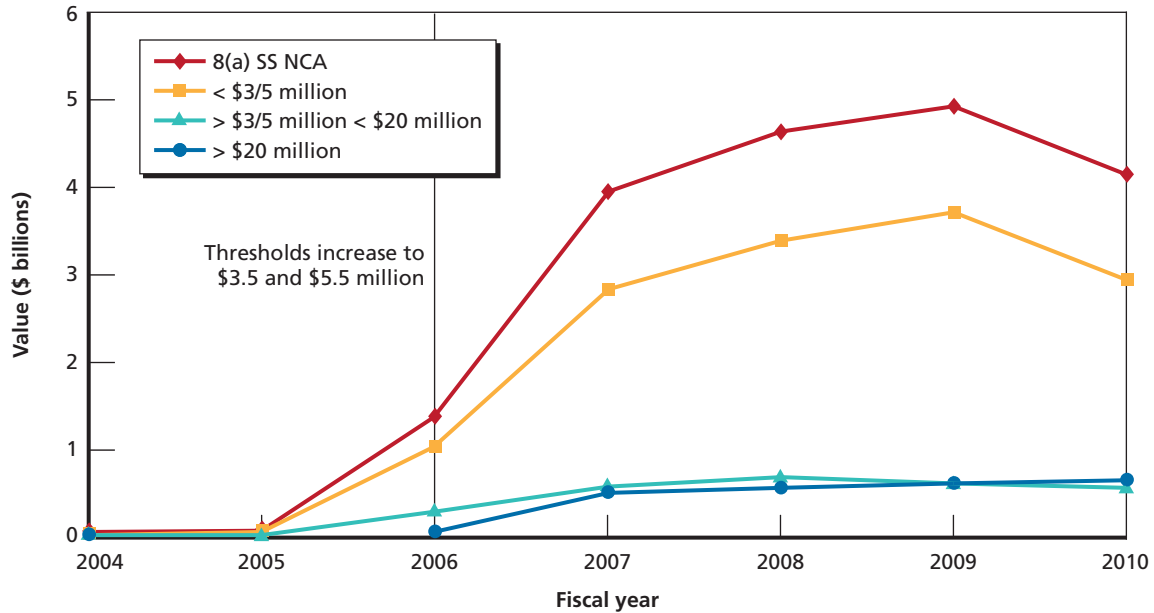
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Figure 3.9
Aggregate Value of New DoD 8(a) Contract Awards, by Value of Contract, FY 2004 to FY 2010



RAND TR1011-3.9

Figure 3.10
Aggregate Value of New DoD 8(a) Sole-Source Contract Awards, by Value of Contract,
FY 2004 to FY 2010



RAND TR1011-3.10

The remaining 29 percent of sole-source contracts above the threshold was almost evenly split between below and above \$20 million. (For the corresponding numbers of contracts for these groups, see Appendix F.)

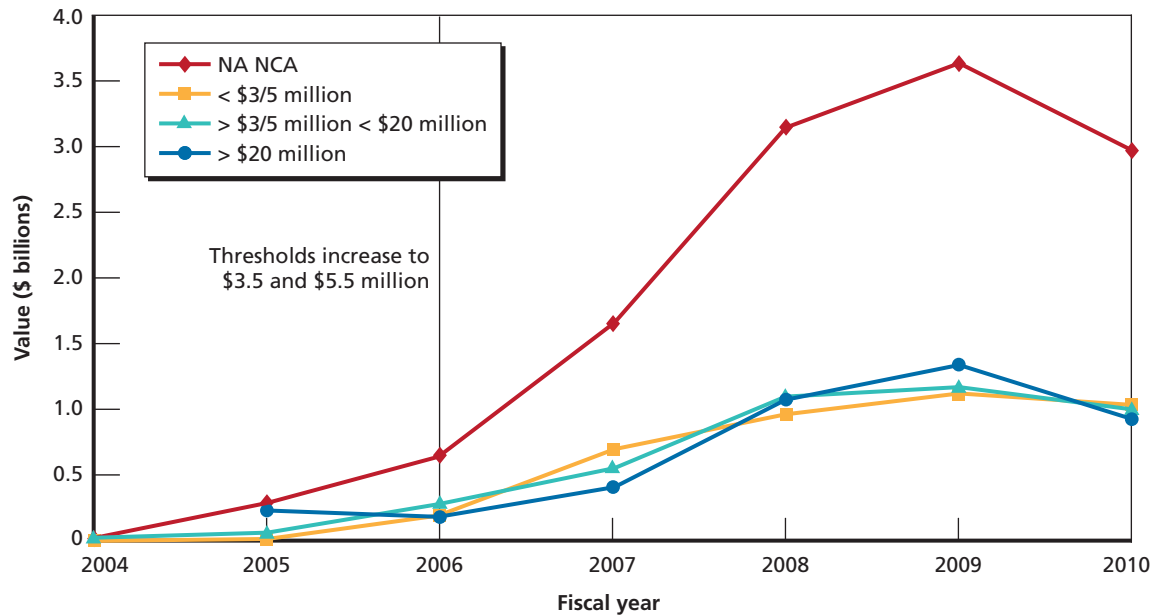
As Figure 3.11 shows, Native American–owned firms have seen a more equal distribution of their recent 8(a) NCA value by threshold category, with about a third of the aggregate NCA value split between those under the thresholds for which sole-source contracting is permitted for all 8(a) firms, those above the thresholds but below the proposed \$20 million threshold for the J&A requirement, and those above the \$20 million threshold. (For the corresponding numbers of contracts for these groups, see Appendix F.)

Similarly, as Figure 3.12 shows, DoD sole-source 8(a) NCAs to Native American–owned firms are fairly evenly split between the three categories we consider. In FY 2010, 35 percent of the aggregate value of such contract awards was above \$20 million, and 61 percent was above the thresholds for which Native Group–owned 8(a) firms, but generally not other 8(a) firms, are eligible to receive sole-source awards.

We identified all the Alaska Native Corporation firms in the FPDS data using their unique Data Universal Numbering System numbers and then compared their sole-source contracts to those for all Native American–owned firms identified in the data.⁵ We found that Alaska Native Corporations receive most of the 8(a) sole-source dollars that go to Native American–owned companies. As Figure 3.13 shows, ANC 8(a) firms have received at least 67

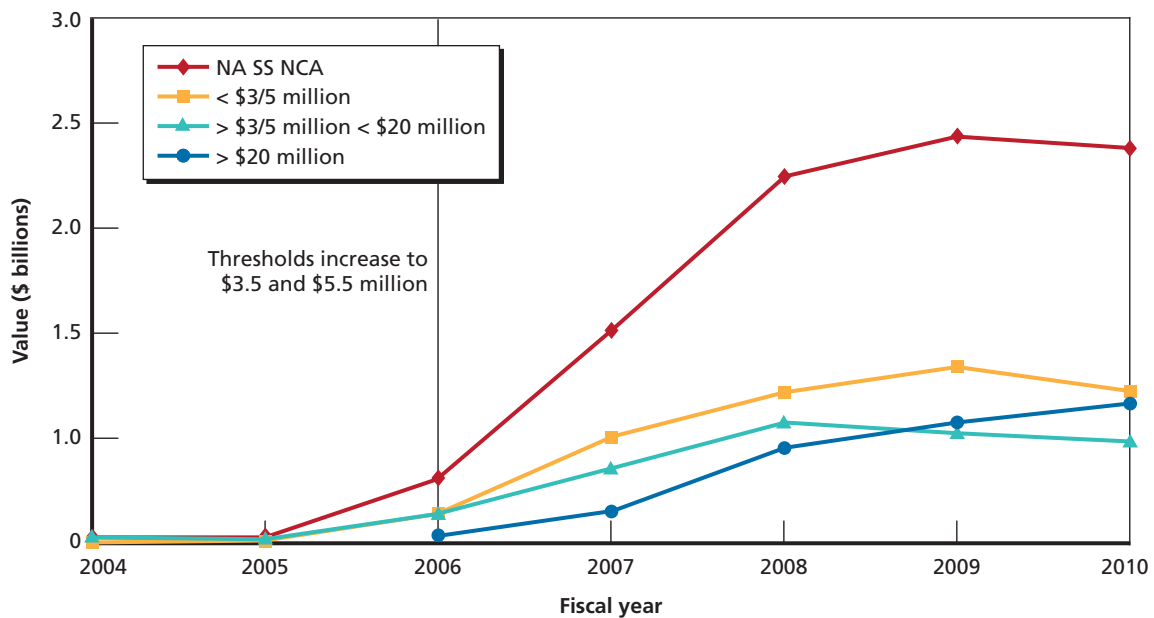
⁵ Note that the data in Figures 3.13 and 3.14 refer to all DoD goaling dollars received by a firm in a given year (i.e., the dollars from new contract awards plus the dollars that year from earlier contract awards). For this reason, the dollars and the number of contracts are higher than in earlier figures showing only new contract awards.

Figure 3.11
Aggregate Value of New DoD 8(a) Contract Awards to Native American–Owned Firms, by Value of Contract, FY 2004 to FY 2010



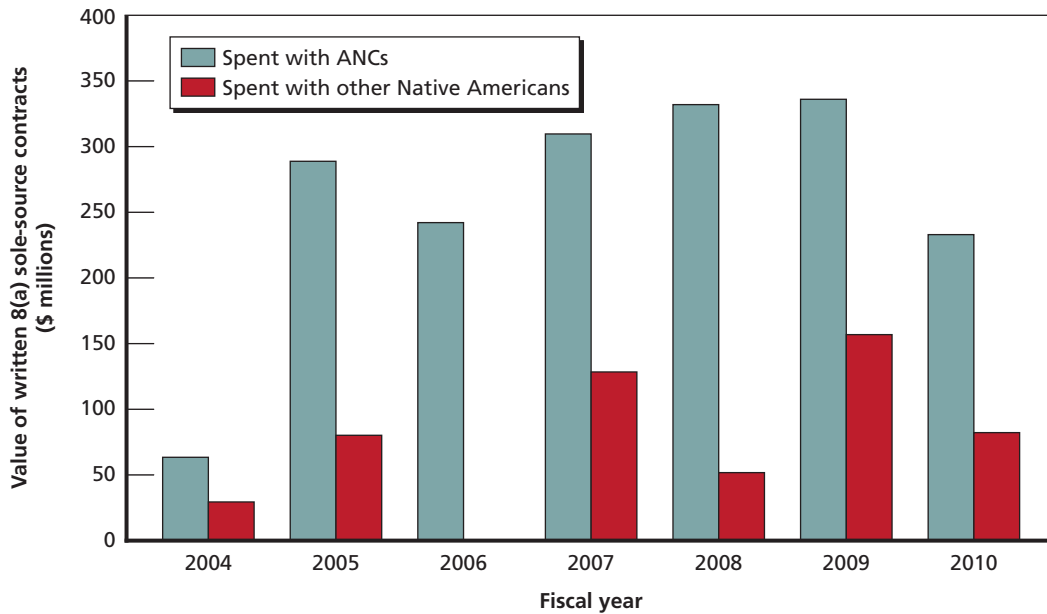
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Figure 3.12
Aggregate Value of New DoD 8(a) Sole-Source Contract Awards to Native American–Owned Firms, by Value of Contract, FY 2004 to FY 2010



RAND TR1011-3.12

Figure 3.13
Value of New DoD 8(a) Sole-Source Contract Awards to Native American–Owned Firms and to ANC-Owned Firms, FY 2004 to FY 2010



RAND TR1011-3.13

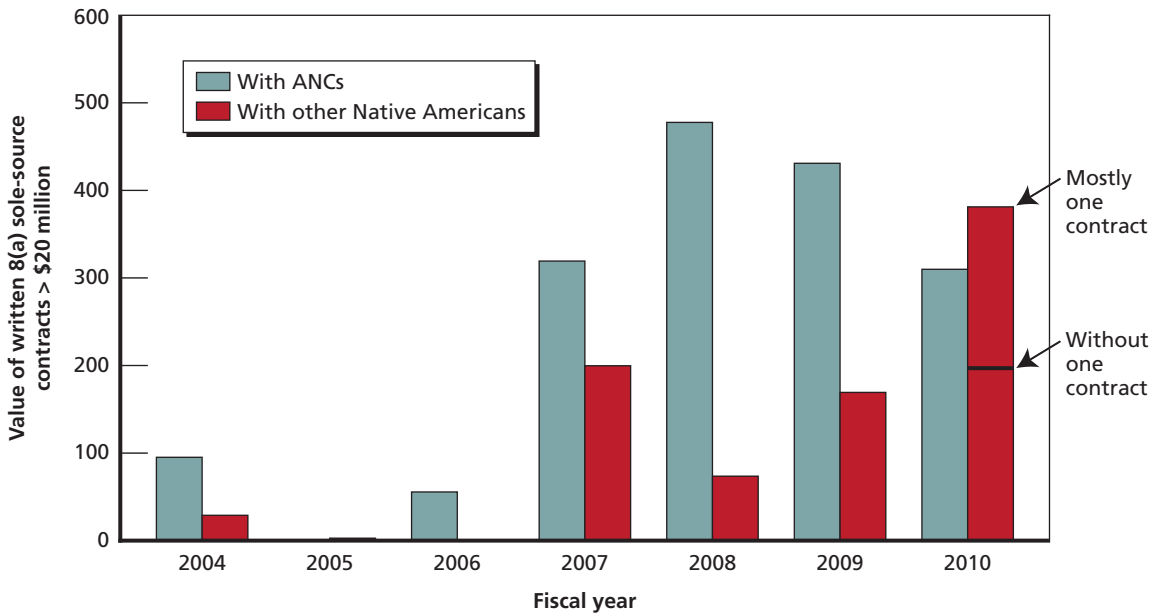
percent of the sole-source dollars that have gone to Native American–owned firms in every year since 2004.

ANC-owned firms also received more large (i.e., greater than \$20 million) 8(a) sole-source contract dollars than other Native American–owned firms. As Figure 3.14 shows, from FY 2006 to FY 2009, ANCs received more dollars in large contract awards than did other Native American–owned firms. Excepting one large contract to a non-ANC 8(a) firm, they would have done so in FY 2010 as well.

Given the difference in these dollar values, it is not surprising that ANCs also had more of these contracts as well. Table 3.6 shows the number of 8(a) sole-source contracts over \$20 million received by ANCs and by other Native American–owned firms. Between 2004 and 2010, ANC-owned firms received at least twice as many contracts as other Native American–owned firms each year. Although the total number of these large sole-source contracts is not great (there were only 16 in 2010), the number rose substantially in 2007 and has not fallen since then.

There is a peculiar time pattern to the awarding of large 8(a) sole-source contracts. As Figure 3.15 shows, these contracts are more common toward the end of the fiscal year, especially in September of recent years. Between FY 2007 and FY 2010, DoD wrote 63 large sole-source 8(a) contracts—21 in September and 37 in the last third of the given fiscal year. Because of the federal government’s yearly budget cycle, funds not spent by the end of a given fiscal year (i.e., September 30) are often no longer available in the next fiscal year. This creates an incentive to use a sole-source 8(a) contract, which is more streamlined than an open competition, when the budget deadline is tight. We will explore this issue further in the next chapter as we discuss the findings from interviews with key stakeholders.

Figure 3.14
Value of New DoD 8(a) Sole-Source Contract Awards over \$20 Million to Native American–Owned Firms and to ANC-Owned Firms, FY 2004 to FY 2010



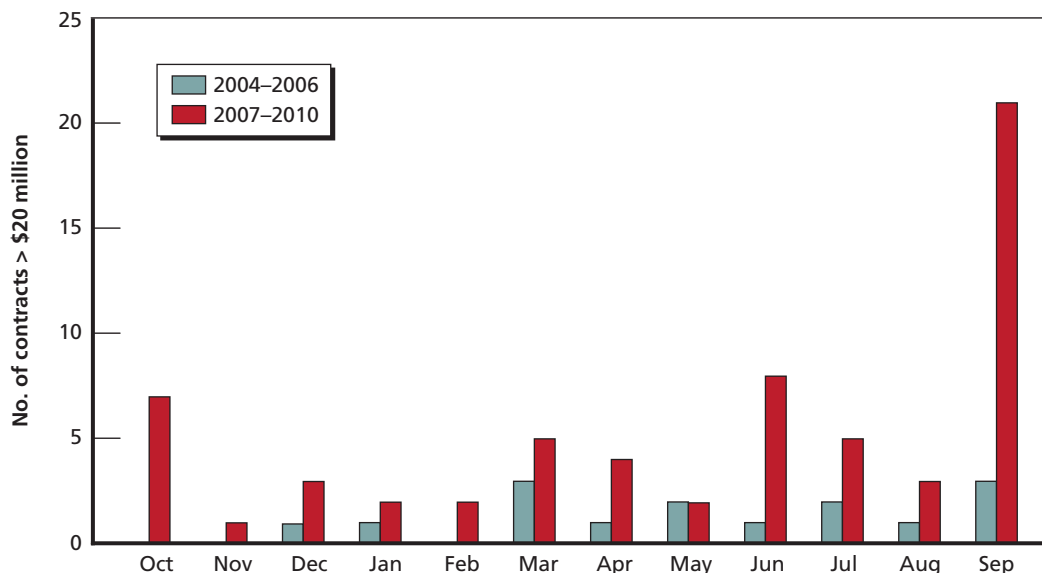
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Table 3.6
Most of the Large 8(a) Sole-Source Contracts Going to Native American–Owned Firms Go to ANC-Owned Firms

Year	Number of Contracts	
	ANC-Owned Firms	Other Native American–Owned Firms
2004	2	1
2005	4	2
2006	6	0
2007	10	5
2008	15	2
2009	10	5
2010	12	4

Overall, our analyses show significant growth in all DoD, small-business, 8(a), and Native American total and sole-source contract action goaling dollars from FY 2000 to FY 2010. Although the absolute contract action dollar growth was higher for each category we analyzed than each subsequent subset, the opposite was true for percentage growth, with total and sole-source Native American–owned firms having the highest percentage growth, followed by 8(a), small business, and all DoD. That is, total contract action dollars for all categories of DoD spending we analyzed grew, but they grew the fastest for Native American–owned firms.

Figure 3.15
Many Large DoD 8(a) Sole-Source Contracts Were Written at the End of the Fiscal Year



RAND TR1011-3.15

The vast majority of 8(a) contract action dollars are spent on sole-source contracts, with Native American–owned firms having a somewhat lower percentage of sole-source contracts. Most Native American–owned firms’ contract action dollars are categorized as small business, with a somewhat lesser percentage categorized as 8(a). Whereas a little over a half of Native American–owned firms contract action dollars are spent on sole-source contracts, the vast majority of them are 8(a). About a third of Native American–owned award dollars are below the 8(a) threshold for competition and another third is above the new \$20 million threshold for requiring a J&A.

ANCs received the majority of 8(a) sole-source contract action dollars going to Native American–owned firms. They also typically received the majority of Native American–owned firms’ 8(a) contract action dollars over \$20 million. Many recent 8(a) sole-source contracts over \$20 million were written near the end of the fiscal year.

The number of contracts to which the J&A requirement would have applied during the past four years ranges between 12 and 15, which is 14 to 16 percent of all 8(a) sole-source contracts over the competition threshold, less than a half a percent of all 8(a) contracts, and a much smaller proportion of all contracts written. Thus, although complying with the J&A requirement will take time and effort by contracting personnel, it is not likely to be significant relative to their total contracting workload.

Findings from Qualitative Analyses

To deepen our understanding of the effect of J&As on large 8(a) sole-source contracts, we sought the perspective of three groups of key stakeholders. First, we sought the views of Native Groups eligible for these contracts on how this requirement might affect them. Second, we sought how these requirements might affect potential business competitors who are not eligible for the contracts, including whether placing these requirements on Native Group firms would lead to more competitive opportunities for them. Third, we asked federal staff who administer these contracts for insight into the contracting process and the potential effect of J&As on it. The experiences of these three groups can shed light on whether and how the J&A provision may affect the contracting process generally and Native American companies specifically.

Native Groups

We collected the views of Native Groups from the oral and written testimony that they submitted to the Tribal Consultation Meetings for Justification and Approval of Sole Source 8(a) Contracts (Defense Procurement and Acquisition Policy, 2010). The FAR Council held these meetings in October 2010 in Washington, D.C.; Albuquerque, New Mexico; and Fairbanks, Alaska. Many groups submitted written comments to the meetings ahead of time, and many others testified in person. In total, 30 ANCs, NHOs, and other Native Groups expressed views about the new J&A provision at the meetings.

The testimony was largely uniform across these groups. The primary concern was that the J&A requirement would increase the time and work involved in executing a large 8(a) sole-source contract and that, as a result, fewer such contracts would be written. Some representatives of Native contractors claimed that the \$20 million threshold was being interpreted as a cap on total contract value and expressed concern that some federal agencies were reluctant to give contracts to them before the rule was implemented and clarified. Because the hearings occurred before the J&A requirement was implemented, evidence of whether these concerns bore out was not yet available.

Several Native Groups acknowledged that an underlying reason for the new requirement was concern about possible corruption. Nevertheless, they objected that problems with a few firms could effect a change that would reduce the benefits to all Native Group businesses.

Finally, many of the groups reported that their companies provide numerous benefits to their communities and that these would decrease should federal contracting with them decrease. Such benefits, as noted above, can include employment of members of the Native Group, dividends, scholarships, and preservation of cultural heritage.

Potential Competitors

We also sought the views of firms that compete with Native Group businesses to see if they might be affected by the new J&A requirement. We found that competing firms had been negatively affected by the increase in federal contracting with Native Group businesses long before the J&A requirement.

We sought out competing businesses through several means. First, we tried to identify competing firms through the FPDS. However, the FPDS lacks data on applicants (i.e., which other firms competed for a contract that an ANC eventually obtained). We examined the industries in which ANCs had obtained contracts, but there was an enormous number of other firms registered in those same industries. Lacking any way to determine which of the firms might be competitors, we could not interview them all.

We then conducted a literature and news search for firms that had described difficulty in competing for the work. However, the articles we found were several years old, and we could not find the few firms named. The search did yield an article that described how other businesses had stopped trying to compete with ANCs, which were favored by the sole-source rules. We interviewed a small-business lobbyist who had worked with these firms, hoping we could get business names from him. The lobbyist confirmed that as Native Groups have become eligible for 8(a) sole-source contracts of any size, other firms had stopped competing with them for federal contracts.

Potential competitors' inability to compete with Native Group firms stems from several reasons. First, the evolution of federal policy means that Native Groups' businesses are eligible for sole-source contracts of any size, whereas other groups have limits on the size of contracts and 8(a) program participation. Second, federal policy limits the circumstances under which competitors can challenge 8(a) contracts, which handicaps potential competitors' ability to protest (see Luckey and Manuel, 2009). Third, potential competitors outside the 8(a) program would not be eligible for 8(a) sole-source contracts. Federal contract staff confirmed these reasons in our discussions with them, adding that protests against large 8(a) sole-source contracts with Native Groups were rare. The lobbyist also reported that some competitors have remained in the business as subcontractors to Native Group businesses, and others have moved to industries where Native Groups do not yet compete.

Federal Contract Staff

We interviewed seven civilian contract officers from across DoD who had between seven and 36 years of federal contracting experience (19 years on average). All had experience with Native Group 8(a) sole-source contracts, with 8(a) sole-source contracts valued at over \$20 million, and with J&As. We asked them about each of these topics, as well as about the likely effect of J&As on large 8(a) sole-source contracts and about small-business goals and 8(a) sole-source contracts. (Appendix G includes our interview protocol.)

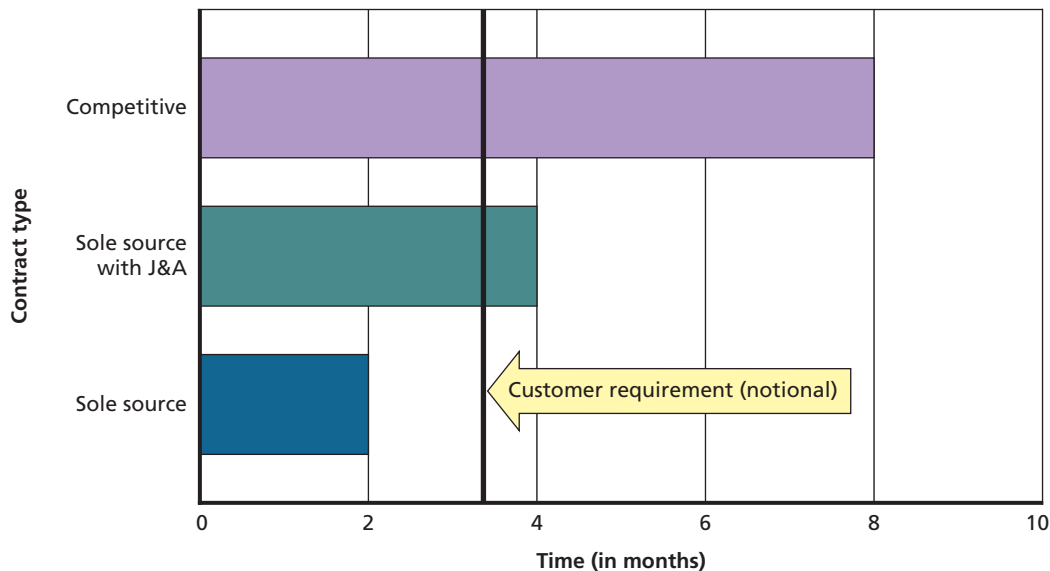
We learned that contract staff prefer competition as the primary means for awarding a contract. The recent increase in 8(a) sole-source contracts does not mean that competition is no longer the primary contracting medium. In FY 2010, only 15.5 percent of DoD contracts with small businesses and 19.5 percent of all DoD contracts were sole source. Even among the contract staff we interviewed who had used large 8(a) sole-source contracts, competition is their

preferred and more common approach. At the same time, these staff members reported that there were times when 8(a) sole-source contracts were needed and that they would continue to use them, whether or not a J&A was required. The main reason they cited for using an 8(a) sole-source contract was the need to meet time constraints for an urgent customer requirement. A J&A would slow the process down but not enough to prefer a competitive contract when time is of the essence. See Figure 4.1 for a notional example of this.¹

Current FAR policy does include urgent contracting processes “to acquire goods and services in emergency situations” (U.S. Department of Transportation, 2006). However, available methods and processes vary by the dollar amount of the procurement. Those for emergency situations in which the acquisition costs more than \$100,000 (i.e., those where large Native Group contracts can occur) have significant “complexities and variations” in thresholds (U.S. Department of Transportation, 2006). For example, the “Special Emergency Procurement Authority,” of the Services Acquisition Reform Act applies only “for support of a contingency operation; or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attacks against the United States” (U.S. Department of Transportation, 2006).

Contract staff reported multiple advantages and disadvantages to using 8(a) sole-source contracts. Benefits include their greater speed, their contribution to an office’s small-business goals, the ability they offer to capitalize on relationships with current strong suppliers, and the reduced administrative work that they require. Drawbacks include less power to negotiate price, crowding out of other small businesses, and the possibility that such contracts serve merely as “pass-through” contracts for large subcontractors. These factors help explain why

Figure 4.1
Competitive Contract Awards Can Take Four Times Longer Than a Sole-Source Award



RAND TR1011-4.1

¹ The U.S. Army Corps of Engineers has laid out guidelines for the length of time that the approval portion of this process is supposed to take; see U.S. Army Corps of Engineers (2010).

competitive contracts remain the norm and why completing a J&A is likely to have little effect on the number of 8(a) sole-source contracts.

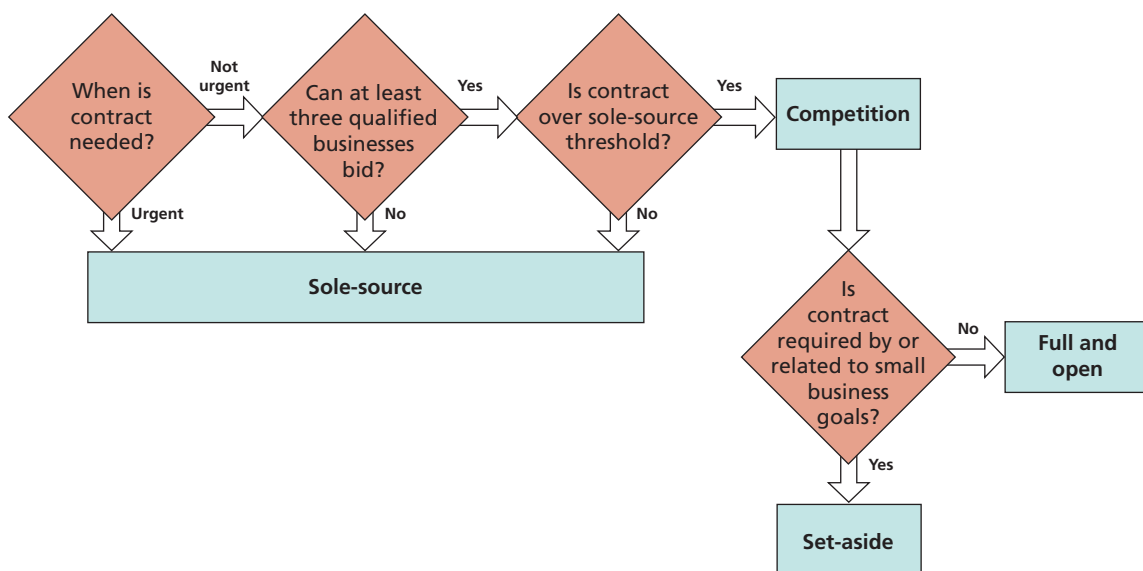
Contracting staff use a few questions to help determine whether a contract should be awarded as sole source, as a competition set-aside for certain businesses (e.g., small businesses or those in the 8(a) program), or as a competition that is open to all businesses. These are

1. When is the contract needed?
2. Can at least three qualified businesses bid?
3. Is the contract large, calling for competition?

If the customer requirement is urgent, if there are fewer than three qualified businesses available, and if the dollar value is not large, then it is a good candidate for being a sole-source contract. Alternatively, if the customer requirement is not urgent, if there are many qualified businesses, and if the dollar value is large, then a competition is the more appropriate choice. Among competitive contracts, if the customer requirement is related to small-business goals or if the contract must be filled by a small business, then the competition should be set aside for small businesses. If it is not small-business-related, then the contract becomes a full and open competition. Figure 4.2 presents a decision tree illustrating these questions and the implications of their answers.

Contract staff indicated that the most relevant issue in determining whether to use a sole-source award was the urgency of the customer's needs. For many urgent customer requirements, the quicker process for a sole-source contract was the only way to meet them. Examples of urgent customer requirements include combat needs in theater and post-disaster clean up, such as after Hurricane Katrina. Within this category, needs with dollar values that are larger than the 8(a) threshold become likely candidates for 8(a) sole-source contracts to qualified Native Group businesses.

Figure 4.2
Acquisition Strategy Decision Tree



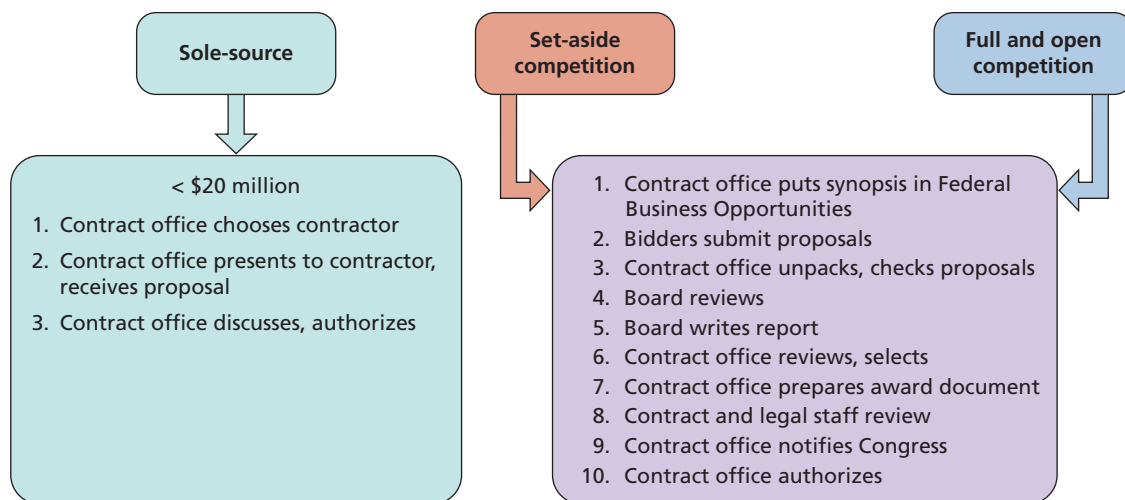
In addition to customer urgency, contract staff were more likely to use a sole-source contract when its faster time was the only way to ensure that allocated funds would not be lost before the end of a fiscal year. This administrative urgency might be the result of a last minute customer request or of unexpected delays in the pre-bidding process.

Contracting officers reported that two other potential reasons for using an 8(a) sole-source contract—the contribution to small-business goals and the reduction of administrative workload—were not normally considered. Although 8(a) sole-source contracts qualify to meet small-business goals, and large contracts can satisfy small-business goals quickly, most contract staff reported little to no difficulty meeting these goals in their offices. Similarly, 8(a) sole-source contracts, especially large ones, do eliminate some of the workload required to complete a contract, but staff descriptions of the contracting process emphasized speed to the exclusion of all other reasons.

Figure 4.3 illuminates the importance of speed in the decision to pursue a sole-source contract or a competitive contract. A typical sole-source competition has three steps: choosing a contractor, presenting the procurement need to the contractor and receiving a proposal in return, and, finally, discussing the details and authorizing the contract. In contrast, a competitive contract, whether set-aside or full and open, involves ten steps:

1. contracting office places a synopsis of the need in Federal Business Opportunities, the official federal government website for procurement needs by government buyers
2. potential contractors submit proposals
3. contracting office unpacks and checks proposals
4. review board schedules a meeting, meets, and reviews proposals
5. review board writes report on proposals
6. contracting office reviews and selects proposal
7. contracting office prepares award document
8. contract and legal staff review

Figure 4.3
Processes for Sole-Source and Competitive Contracts



9. contracting office notifies Congress
10. contracting office authorizes the contract

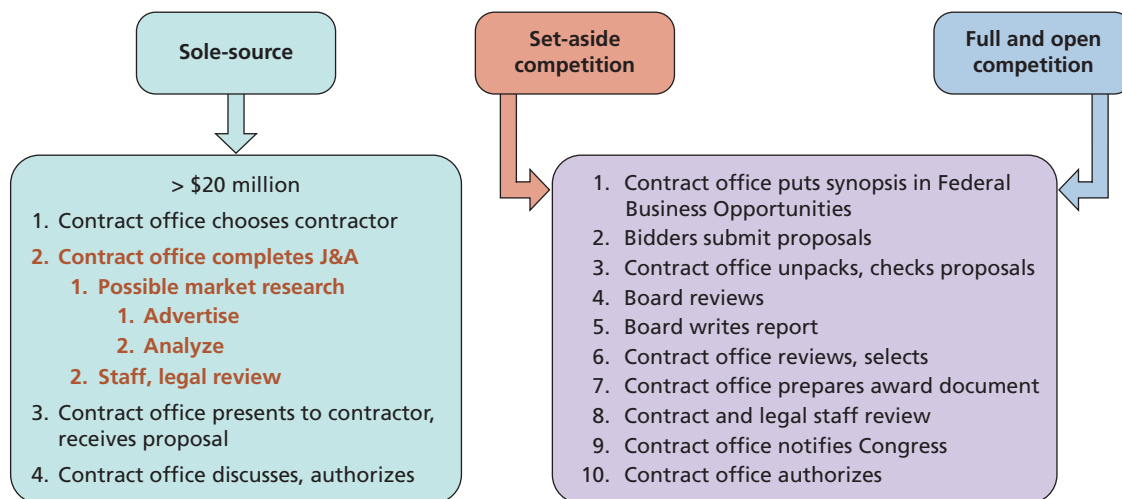
Even with a J&A, the sole-source contracting process remains far simpler, and thus faster, than the process for a competitive contract, as Figure 4.4 shows. The additional J&A steps include possible market research, which itself involves advertising and analyzing the results, and a staff and legal review of the J&A, before presenting the procurement need to the contractor. This lengthens the sole-source contracting process, but it remains shorter than a contract competition process.²

The time needed to process a sole-source contract can still vary, as can the staff work needed to complete each step involved. Nevertheless, staff reported that competitions take anywhere from two to nine times longer than a typical sole-source contract, or four times longer on average. Even with the J&A requirement, a competition takes about twice as long as a sole-source contract with a J&A to process, according to the contract officers we interviewed. As a result, contract staff reported that although the J&A requirement would add administrative workload and slow the process of using 8(a) sole-source contracts, staff would continue to use them when customers require a speedier method than that afforded by a competitive contract.

Conclusions

Our analysis of key stakeholders' views and experiences regarding the J&A requirement for 8(a) sole-source contracts valued at over \$20 million has several important findings. First,

Figure 4.4
Processes for Sole-Source Contracts with J&A and Competitive Contracts



RAND TR1011-4.4

² Correspondence between a RAND researcher and a representative of the U.S. Army Corps of Engineers (August 4, 2010) indicated that justification and approval for a contract between \$11.5 million and \$76.5 million could take 33 days, or a little more than one month.

Native Groups are concerned that the requirement will increase administrative workload in contracting offices and reduce the number of 8(a) sole-source contracts over \$20 million that they receive. Nevertheless, contract staff indicated that the increased workload resulting from a J&A was unlikely to reduce the number of 8(a) sole-source contracts over \$20 million that they executed because customer urgency, not workload, was the primary reason for using an 8(a) sole-source contract.

Second, the lack of competitors suggests that the increase in 8(a) sole-source contracts over \$20 million to Native Groups *may* have crowded out other firms. If this happened, however, it is unlikely that other firms in the 8(a) program or small businesses were the ones crowded out, because they would be less likely to be equipped to compete for such large contracts.

Third, competition remains the primary means by which federal contracts are awarded, according to the contracting officers we interviewed. Large 8(a) sole-source contracts do not appear to be replacing them because competitive contracts carry benefits that sole-source contracts do not.

Fourth, when there is an urgent customer requirement, whether from the customer or to preserve allocated funds, sole-source contracts provide a faster way of executing a contract than competitions. This is true whether or not J&As are required. J&As add administrative workload and are likely to delay the process but not reduce the number of 8(a) sole-source contracts used.

Findings and Recommendations

The requirement that 8(a) sole-source contracts in excess of \$20 million be subject to an additional review through the J&A process is a new requirement. We were asked to

- “. . . [D]etail the impact of the provision on the selection of Native American companies for large dollar contracts;
- Discuss how the provision is affecting the contracting process, whether an excessive administrative burden has been placed on contracting personnel;
- Provide recommendations on how the provision can be amended to mitigate any unintended negative consequences.”

Because the implementation of the new policy was delayed to FY 2011 by required consultation with Native Groups, we are unable to address the first task in this report. In Chapter Four, we summarized Native Groups’ concerns about the *possible* effects of the J&A requirement, but we will not be able to measure its *actual* effect until the requirement has been in place for some period of time. Below, we summarize our findings regarding the second and third tasks.

First, requiring a J&A is unlikely to reverse the growth in federal contracting. Total contract dollars awarded to all groups have increased, including sole-source contracts. The percentage of dollars going to Native Americans has increased at a faster rate, but it started with a much smaller base, compared to all firms receiving an 8(a) contract, to all small businesses, and to all other-than-small businesses.

Second, requiring a J&A will delay the award and create additional administrative labor for contracting personnel on large 8(a) sole-source contracts. Nevertheless, those we interviewed did not consider the administrative burden to be excessive, perhaps because these contracts are still relatively uncommon (there were a total of only 19 across DoD in FY 2010). In addition, J&As are unlikely to reduce the use of large 8(a) sole-source contracts because they are typically faster than a competition. Though competition appears to remain contracting personnel’s preferred method in general, 8(a) sole-source contracts are preferred for the occasions when they satisfy requirements for speed (from customers and spending deadlines) that competition cannot.

Finally, these large 8(a) sole-source contracts also support contracting personnel’s efforts to meet their small-business goals. However, because this appears to be a less important reason for their use, requiring a J&A is unlikely to have much effect on the administrative burden around meeting small-business goals.

Our recommendations focus on the primary reason that large 8(a) sole-source contracts are used—speed. Since some urgent deadlines will always be justified, we recommend that the federal government create new contracting methods that allow urgent requirements to be met faster. One possible way to accelerate justification of large 8(a) sole-source contracts could be to require that customers help justify their short deadlines and otherwise help reduce the burden on contracting personnel for procurements that do not fit currently allowed emergency contracting processes. Another would be to develop a faster, streamlined J&A process.

Other urgent deadlines are the result of administrative budgetary cycles. One way to reduce this need for speed in the contracting process is to institutionalize greater accountability to contracting time lines by relevant stakeholders (e.g., customers and small-business advocates). Even unintentional delays in the contracting process can mean that competition is no longer an option to preserve the funding. Making such delays visible and accountable may provide more incentives to expedite the process so that competition is not precluded because the fiscal year is ending.

Last, to the extent that policymakers believe that Native Group–owned firms have an unfair advantage and are reducing competition for time-sensitive contracts, they could increase competition by expanding the pool of eligible firms. This could be done by raising both small-business thresholds as well as 8(a) thresholds for sole-source contracts, which our research and previous research has shown have not kept up with inflation and may not be keeping up with evolving requirements of scale and scope needed in some industries.

Public Law 111-84, Section 811: Justification and Approval of Sole-Source Contracts

(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to provide that the head of an agency may not award a sole-source contract in a covered procurement for an amount exceeding \$20,000,000 unless—

- (1) the contracting officer for the contract justifies the use of a sole-source contract in writing;
- (2) the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and
- (3) the justification and related information are made public as provided in sections 2304(f)(1)(C) and 2304(l) of title 10, United States Code, or sections 303(f)(1)(C) and 303(j) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(C) and 253(j)), as applicable.

(b) ELEMENTS OF JUSTIFICATION.—The justification of a sole-source contract required pursuant to subsection (a) shall include the following:

- (1) A description of the needs of the agency concerned for the matters covered by the contract.
- (2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract.
- (3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.
- (4) A determination that the anticipated cost of the contract will be fair and reasonable.
- (5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

(c) DEFINITIONS.—In this section:

- (1) COVERED PROCUREMENT.—The term “covered procurement” means either of the following:
 - (A) A procurement described in section 2304(f)(2)(D)(ii) of title 10, United States Code.

(B) A procurement described in section 303(f)(2)(D)(ii) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(2)(D)(ii)).

- (2) HEAD OF AN AGENCY.—The term “head of an agency” —
- (A) in the case of a covered procurement as defined in paragraph (1)(A), has the meaning provided in section 2302(1) of title 10, United States Code; and
 - (B) in the case of a covered procurement as defined in paragraph (1)(B), has the meaning provided the term “agency head” in section 309(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(a)).
- (3) APPROPRIATE OFFICIAL.—The term “appropriate official” means—
- (A) in the case of a covered procurement as defined in paragraph (1)(A), an official designated in section 2304(f)(1)(B) of title 10, United States Code; and
 - (B) in the case of a covered procurement as defined in paragraph (1)(B), an official designated in section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)).

Congressional Request for a Study of the Effects of J&A Provisions

Section 811 of the National Defense Authorization Act for FY 2010 (Public Law 111-84) included a provision amending federal government contracting procedures for 8(a) Native American sole-source federal contracts. The provision requires that any 8(a) Native American contracts in excess of \$20,000,000 now be subject to an additional level of review through the J&A process. It is not known what effect this additional requirement will have on the efficiency of the contracting process and the competitiveness of Native American companies. Therefore, the Secretary of Defense is directed to submit a report 90 days after the implementation of the new contracting procedures. This report shall detail the effect of the provision on the selection of Native American companies for large dollar contracts; discuss how the provision is affecting the contracting process, whether an excessive administrative burden has been placed on contracting personnel; and provide recommendations for how the provision can be amended to mitigate any unintended negative consequences. (House of Representatives, 2010, p. 105.)

Selected Dates in the Evolution of Small Business Policy

Table C.1
Selected Dates in the Evolution of Small Business Policy

Year	Policy
1958	SBA given subcontracting authority through section 8(a) of the Small Business Act
1971	ANCs created in Alaska Native Claims Settlement Act
1973	SBA defines "disadvantaged persons" as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts"
1978	Small Business Act of 1958 amended to give SBA statutory authority for 8(a) program for minority-owned businesses defined as socially (black, Hispanic, Native American, and other minorities and gave SBA discretion to recognize other groups or individuals) and economically disadvantaged individuals. H.R. Conference Report No. 95-1714 defines Native American as including "American Indians, Eskimos, Aleuts and Native Hawaiians"
1979	SBA recognizes Native Hawaiians as socially disadvantaged
1986	Consolidated Omnibus Reconciliation Act of 1985 recognizes Indian tribes (including Alaska Natives) as socially disadvantaged
1988	Establishment of government-wide goal that 5 percent of all prime-contract dollars for goods and services be spent with small and "disadvantaged" businesses
1988	Contracts set aside for 8(a) participants and exceeding specified thresholds became subject to competition and program participation limited to nine years; ANC-owned corporations exempt from thresholds
1988	ANCSA amended to deem all ANCs as socially disadvantaged
1988	Business Opportunities Development Reform Act recognizes NHOs as socially disadvantaged
1992	ANCSA amended to deem all ANCs as economically disadvantaged
2000	DoD Appropriations Act allows DoD to outsource federal jobs without following the A-76 procedures for contracts awarded to Native American businesses
2004	DoD Appropriations Act clarified that the 2000 A-76 exception included ANCs and allowed DoD to count these conversions towards its competition goals

SOURCES: Luckey and Manuel (2009); Halchin et al. (2009).

Variation in 8(a) Requirements, by Type of Business

Table D.1
Variation in 8(a) Requirements, by Type of Business

Requirements	8(a) Businesses				
	Generally	Subsidiaries of Group			
		Tribally Owned	ANC	NHO	CDC
Small—independently owned and operated; not dominant in field of operations; meets size standards	Yes	Yes	Yes	Yes	Yes
All affiliates count	Yes	No	No	No	No
Business—for-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy	Yes	Yes	Yes ^a	Yes	Yes
Unconditionally owned and controlled—at least 51 percent owned by one or more disadvantaged individuals (or groups) who are U.S. citizens	Yes	Yes	Yes	Yes	Yes
Management and daily business operations must be conducted by one or more disadvantaged individuals	Yes	No ^b	No ^b	NEA ^c	No
“Socially disadvantaged individual”—members of designated groups (or groups) presumed to be socially disadvantaged	Yes	Yes	Yes	Yes	Yes
Other individuals may prove personal disadvantage by preponderance of the evidence	Yes	N/A	N/A	N/A	N/A
“Economically disadvantaged individual”—must show diminished financial capital and credit opportunities	Yes	Yes ^d	No	NEA ^c	No
“Good character”—no criminal conduct or violations of SBA regulations: cannot be debarred or suspended from government	Yes	Yes ^e	Yes ^e	NEA ^f	Yes ^g
“Demonstrates potential for success”—firms must generally have been in business in the primary industry for at least two full years before the date of application to 8(a) program unless SBA grants a waiver	Yes	Yes	Yes	Yes	Yes
Number of conditions on which waiver is based	5 ^h	3 ⁱ	3 ⁱ	3 ⁱ	3 ⁱ
Sole-source awards—contracts valued over \$3.5 million (\$5.5 million for manufacturing) ^j not permissible if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market value	Yes	No	No	No	Yes

Table D.1—Continued

Requirements	8(a) Businesses				
	Generally	Subsidiaries of Group			
		Tribally Owned	ANC	NHO	CDC
One-time eligibility for 8(a) program—applies to disadvantaged firm owners	Yes	No	No	No	No
Disadvantaged firms	Yes	Yes	Yes	Yes	Yes
Limits on majority ownership of 8(a) firms—owners, family members, and firms may not own more than 20 percent of any other 8(a) firm	Yes	No	No	No	No
May not own 51 percent or more of a firm obtaining the majority of its revenue from the same industry in which another group-owned firm currently operates or has operated within the past two years; no limit on the number of group-owned firms that operate in other primary industries or on the ownership of multiple firms in the same secondary industry	N/A	Yes	Yes	Yes	Yes
Limits on the amount of 8(a) contracts that a firm may receive—no source awards possible once the firm has received \$100 million or other applicable value, in 8(a) contracts	Yes	No	No	No	No
Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) program	Yes	Yes	Yes	Yes	Yes

SOURCE: Adapted from Luckey and Manuel (2009).

^a ANCs may be nonprofit, but ANC-owned firms must be for-profit to be eligible for the 8(a) program.

^b Provided SBA determines that such management is necessary to assist the business's development, among other things.

^c Rules governing NHO-owned firms do not address this issue, and although the general rules apply where no "special rules" exist, it seems unlikely that NHO-owned firms are treated differently than tribally or ANC-owned firms in this regard.

^d Must prove economic disadvantage the first time a tribally owned firm applies to the 8(a) program; thereafter, a tribe need only prove economic disadvantage at the request of the SBA.

^e Applies only to officers, directors, and shareholders owning more than a 20 percent interest in the business, not to all members/shareholders.

^f Not explicitly addressed in the regulations to whom requirements apply.

^g Applies to the firm and "all its principals."

^h These criteria include (1) the management experience of the disadvantaged individual(s) on whom eligibility is based, (2) the business's technical experience, (3) the firm's capital, (4) the firm's performance record on prior federal or other contracts in its primary field of operations, and (5) whether the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).

ⁱ These criteria include (1) the technical and managerial experience and competency of the individuals who will manage and control the daily operation of the concern, (2) the financial capacity of the concern, and (3) the concern's performance record on prior federal or other contracts in the firm's primary industry.

^j Thresholds before FY 2006 were \$3.0 million (\$5.0 million for manufacturing). Thresholds were raised to \$4.0 million and \$6.5 million, respectively, in FY 2011.

Provision and Incentives for DoD to Outsource Directly to Native American–Owned Firms

Congress inserted in the FY 2000 Defense Appropriations Act (Public Law 106-79, §8014(3)) a provision that allows DoD to outsource federal jobs without following OMB Circular A-76 procedures¹ if the contract was awarded to a Native American–owned business (U.S. Senate, Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, undated (b)).² The A-76 process

- takes a long time—from three months for a small, streamlined competition to two years or more for standard competitions, particularly those that are large and complex
- is disruptive to organizations because of prospective job losses
- adversely affects the morale of employees (Grasso, 2009, p. 4)
- requires resources (internal personnel or contractors) to execute with average DoD costs per full-time-equivalent (FTE) in 2003 ranging from \$3,802 for a streamlined competition to \$7,367 for a standard competition.

Consequently, minimizing the costs and organizational effects of an A-76 cost competition through a direct conversion was an attractive option for DoD.

In March 2001, OMB set a target calling for federal agencies to subject to competition 5 percent of their commercial activities by the end of FY 2002 and, ultimately, 50 percent, under the provisions of the Federal Activities Inventory Reform Act (General Accounting Office, 2004). Table E.1 shows the number of DoD FTEs that were reported as contracted out (directly or through a cost competition) between 1995 and 2007 from two different sources: the Office of the Secretary of Defense’s Commercial Activities Management Information System database (Gansler and Lucyshyn, 2004, p. 23) and OMB reports on competitive sourcing results (2004–2008). Because the numbers for overlapping years 2002 to 2004 differed considerably, we included both sources. The number of DoD FTEs directly converted peaked in 2001, a year after.

¹ Named after the circular that describes it, A-76 is a process by which federal agencies competitively determine via cost-comparison studies if activities deemed to be commercial (i.e., not inherently governmental and that could be performed by a commercial company) should be performed in-house, by another federal agency, or by the private sector.

² Direct conversions were permitted without a cost comparison study under certain conditions such as for activities involving 10 or fewer civilians until mid-2003 when OMB issued a revised Circular A-76 which no longer allowed direct conversions. Ongoing direct conversions initiated prior to the published revisions were to be converted to streamlined or standard competitions under the revised guidelines. From 2002 to 2003, 3,890 federal FTEs were directly converted, with DoD accounting for 46 percent (OMB, 2004).

Table E.1
DoD FTEs Contracted Out, by Fiscal Year

Year	DoD (Gansler and Lucyshyn, 2004)				DoD (GAO, 2004; OMB, 2005–2008)		
	Direct	Streamlined	Full	Total	Direct	Streamlined/ Full	Total
1995	44	N/A	N/A	44			
1996	106	N/A	204	310			
1997	327	N/A	848	1,175			
1998	936	71	2,143	3,150			
1999	853	378	4,265	5,496			
2000	983	428	8,075	9,486			
2001	1,327	373	14,671	16,371			
2002	342	171	15,695	16,208	1,032	0	6,615
2003	284	298	13,866	14,448	768	0	2,167
2004	37	0	1,534	1,575	750	748	1,498
2005					0	725	725
2006					0	354	354
2007					0	481	481

In July 2003, OMB's government-wide goals were replaced with agency specific plans (GAO, 2004). In March 2009, Congress prohibited the initiation of any new public-private A-76 competitions (Public Law 111-8, the FY 2009 Omnibus Appropriations Bill).

Numbers of Contracts, by Year

Table F.1
Number of Contracts, by Year

Group	2004	2005	2006	2007	2008	2009	2010
8(a)	4,549	5,615	6,989	8,755	9,271	9,108	7,486
8(a) sole-source	3,382	4,478	5,945	7,897	8,437	8,323	6,823
NA	1,417	2,167	2,436	3,627	4,748	4,507	4,276
NA 8(a) sole-source	561	745	969	1,233	1,617	1,723	1,488
NG	0	1	1	10	1,154	1,348	1,225
NG 8(a) sole-source	0	0	0	9	679	790	732
All 8(a) NCA							
< \$3/\$5 million	4,549	5,615	6,989	8,755	9,271	9,108	7,486
> \$3/\$5 million < \$20 million	4,545	5,597	6,892	8,569	9,057	8,920	7,314
> \$20 million	3	13	87	161	191	159	156
All 8(a) SS NCA	3,382	4,478	5,945	7,897	8,437	8,323	6,823
< \$3/\$5 million	3,379	4,474	5,897	7,798	8,327	8,217	6,735
> \$3/\$5 million < \$20 million	2	4	46	87	96	91	76
> \$20 million	1	0	2	12	14	15	12
All NA NCA	1,417	2,167	2,436	3,627	4,748	4,507	4,276
< \$3/\$5 million	1,415	2,156	2,397	3,542	4,593	4,342	4,132
> \$3/\$5 million < \$20 million	2	9	34	76	130	141	125
> \$20 million	0	2	5	9	25	24	19
All NA SS NCA	561	745	969	1,233	1,617	1,723	1,488
< \$3/\$5 million	559	742	952	1,182	1,534	1,637	1,414
> \$3/\$5 million < \$20 million	2	3	16	47	72	73	62
> \$20 million	0	0	1	4	11	13	12

Interview Protocol

**Contract Staff Interview Protocol for RAND Study,
“Assessing the Impact of Requiring Justification and Approval Review for
Sole-Source 8(a) Native American Contracts in Excess of \$20 Million,”
Sponsored by Office of Small Business Programs
Office of the Undersecretary of Defense, Department of Defense**

We have been asked by the Office of Small Business Programs to analyze the justification and approval process now required for all 8(a) sole-source contracts that exceed \$20 million. The purpose of this interview is to identify likely positive and negative consequences to using the justification and approval process for these types of set-aside contracts. We will not reveal the names of persons or companies we interview. Rather, we plan to aggregate our findings across all of our interviews and characterize our findings in a general way.

1. What is your civilian career series or military occupational series (MOS; e.g., 1101, 1102)?
2. How many years have you been in the field of contracting?
3. What experience, if any, do you have with 8(a) sole-source contracts?
 - a) If yes,
 - i) Were any of these 8(a) sole-source contracts awarded to Alaska Native Corporations?
 - ii) Were any of these 8(a) sole-source contracts over \$20 million?
 - b) If no, is there someone else in your office with this experience whom we should talk to?
4. What experience, if any, do you have with justifications and approvals?
5. How might requiring a justification and approval for contracts over \$20 million affect your work?
 - c) Please describe how much time it takes someone in your position to complete a competitive contract, a sole-source contract without a J&A, and a sole-source contract with a J&A. Assume that all of these contracts are for \$25 million.
 - d) Would you award an 8(a) sole-source contract over \$20 million again if you had to complete a J&A to do so?
6. We also want to ask about small business goals.
 - e) Do you have such goals in your office? If yes, what are they?

- f) Do you have any difficulties attaining these goals? Please describe.
 - g) How much does the requirement to use small businesses factor into the decision to award a large 8(a) sole-source contract?
7. Is there anything else about large 8(a) sole-source contracts that you think is relevant?

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