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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

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Prepared for the Office of the Secretary of Defense

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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.