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September 9, 2014

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Chairman
The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Howard P. “Buck” McKeon
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

Contract Management: DOD’s Implementation of Justifications for 8(a) Sole-Source Contracts

In fiscal year 2013, the Department of Defense (DOD) obligated about $8.7 billion to contracts awarded through the Small Business Administration’s (SBA) 8(a) Business Development program. This program is one of the federal government’s primary means for developing small businesses owned by socially and economically disadvantaged individuals. Contract awards under this program may be competed among eligible 8(a) firms or awarded on a sole-source basis to 8(a) firms in certain instances, such as when the firm is owned by an Alaska Native Corporation or an Indian tribe. The National Defense Authorization Act (NDAA) for Fiscal Year 2010, enacted on October 28, 2009, required the Federal Acquisition Regulation (FAR) to be amended to include a new requirement for a written justification of 8(a) sole-source awards over $20 million.[1] The requirement was implemented in the FAR on March 16, 2011. Previously, no justification was required for 8(a) sole-source awards of any amount. This justification requirement brings more attention to large-dollar-value, sole-source contracts awarded through the 8(a) program, and our prior work has found that the number and value of these contracts at DOD and other federal agencies have declined since enactment of the requirement.[2]

The conference report accompanying the NDAA for Fiscal Year 2012 required, among other things, DOD to submit a report on its use of 8(a) sole-source contracts over $20 million no later than March 1, 2013, and GAO to assess DOD’s implementation of the justification requirement no later than 90 days after DOD submitted its report to the Senate and House Committees on

[1]Pub. L. No. 111-84, § 811 (2009).

[2]GAO, *Federal Contracting: Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts,* GAO-13-118 (Washington, D.C.: Dec. 12, 2012); *DOD’s Implementation of Justifications for 8(a) Sole-Source Contracts*, GAO-13-308R (Washington, D.C.: Feb. 8, 2013).

Armed Services. DOD issued the report on May 16, 2014, over a year late.[3] DOD's report described, among other things, the characteristics of 8(a) sole-source contracts over $20 million awarded in fiscal year 2013 and the types of guidance issued to contracting offices on implementation of the justification requirement. Our report (1) identifies the trends in 8(a) sole-source contract awards over $20 million at DOD from fiscal years 2009 to 2013, (2) assesses the extent to which DOD has implemented the justification requirement since April 2012, and (3) identifies the factors DOD used to determine whether the sole-source contracts were awarded in the best interest of the government.

To identify trends in 8(a) sole-source contract awards over $20 million at DOD since enactment of the justification requirement, we obtained and analyzed data from the Federal Procurement Data System-Next Generation (FPDS-NG) from fiscal years 2009 to 2013. In our prior work, we assessed the reliability of the data from fiscal years 2009 to 2012 and determined that the data for this period were sufficiently reliable to identify contracts that were subject to the 8(a) justification requirement.[4] For this report, we assessed the reliability of the data in FPDS-NG from fiscal year 2013 by comparing it to contract documentation and verifying the list of 8(a) sole-source contracts over $20 million with DOD officials. We made corrections where necessary. For example, we identified one contract in FPDS-NG as being awarded through the 8(a) program, but our review of the contract documentation found that the contract was not awarded through the program. We determined that the corrected data for this fiscal year were sufficiently reliable to identify relevant contracts. To assess the extent to which DOD has implemented the justification requirement and to identify the factors DOD used to determine whether relevant contracts were awarded in the best interest of the government, we reviewed all five 8(a) sole-source contracts over $20 million awarded by DOD from April 1, 2012, through June 19, 2014. Three of the five contracts were identified using FPDS-NG, and two additional contracts were identified in the course of our review through discussions with DOD officials.[5] We chose April 1, 2012, because we previously assessed DOD's implementation of the 8(a) justification requirement by reviewing relevant contracts awarded through March 31, 2012.[6] We used June 19, 2014, as our end date because it was the most recent data available at the time of our review. For each contract identified, we obtained and reviewed the justification and other relevant contract documents, and interviewed contracting officials to supplement information obtained from our review of contract documents.

We conducted this performance audit from June 2014 to September 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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[3]H.R. Rep. No. 112-329, at 675-676 (2011) (Conf. Rep.). See Under Secretary of Defense for Acquisition, Technology, and Logistics, *Report to Congress on Implementation of Section 811 of the National Defense Authorization Act for Fiscal Year 2010* (Washington, D.C.: May 16, 2014).

[4]GAO-13-118 and GAO-13-308R.

[5]These two contracts were miscoded in FPDS-NG as not being awarded through the 8(a) program.

[6]GAO-13-308R.

Results in Brief

We found that the number and value of 8(a) sole-source contracts over $20 million awarded by DOD remained low in fiscal year 2013 after a significant decrease from fiscal years 2009 through 2012. DOD awarded 27 such contracts, valued at over $2 billion, in fiscal year 2009 and 4 contracts, valued at about $221 million, in fiscal year 2013. Regarding DOD's implementation of the justification requirement since our last assessment, DOD awarded five 8(a) sole-source contracts over $20 million between April 1, 2012, and June 19, 2014. All five contained justifications, but three did not fully meet requirements. For example, one justification was signed by the approving official after the contract was awarded. Contracting officers often cited limited time frames as a primary factor when determining that an 8(a) sole-source contract award was in the best interest of the government.

Background

The justification for an 8(a) sole-source contract over $20 million must address five specific elements—including a determination that the use of a sole-source contract is in the best interest of the agency—and generally be approved by the head of the procuring activity or the senior procurement executive depending on the dollar value of the contract.[7] Agencies were not required to implement the justification requirement until it was incorporated into the FAR, which occurred in March 2011.

Our prior work has found that DOD and other federal agencies were slow to implement the new justification requirement, even after it had been incorporated into the FAR. In December 2012, we reported that of the 14 8(a) sole-source contracts over $20 million awarded by DOD and other federal agencies from March 2011 through March 2012, only 3 included an 8(a) justification.[8] We found that contracting officials were not aware of the requirement or completed the wrong type of justification. We recommended that the Administrator of the Office of Federal Procurement Policy (OFPP) promulgate guidance to clarify circumstances in which an 8(a) justification is required. OFPP generally agreed with our recommendations and in response has started the process to amend the FAR.[9] In February 2013, pursuant to a mandate in the conference report accompanying the NDAA for Fiscal Year 2012, we reported on DOD's implementation of the requirement, primarily drawing on the findings from our December 2012 report.[10] Of the eight contracts we reviewed at DOD, only two met the justification requirement.

DOD 8(a) Sole-Source Contract Awards over $20 Million Remain Low

From fiscal years 2009 to 2012, the number and value of 8(a) sole-source contracts over $20 million at DOD decreased significantly. The number and value of these contracts remained low

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[7]The other four elements of an 8(a) justification include (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 anticipated cost of the contract will be fair and reasonable; and (4) such other matters as the head of the agency concerned shall specify for purposes of this section.

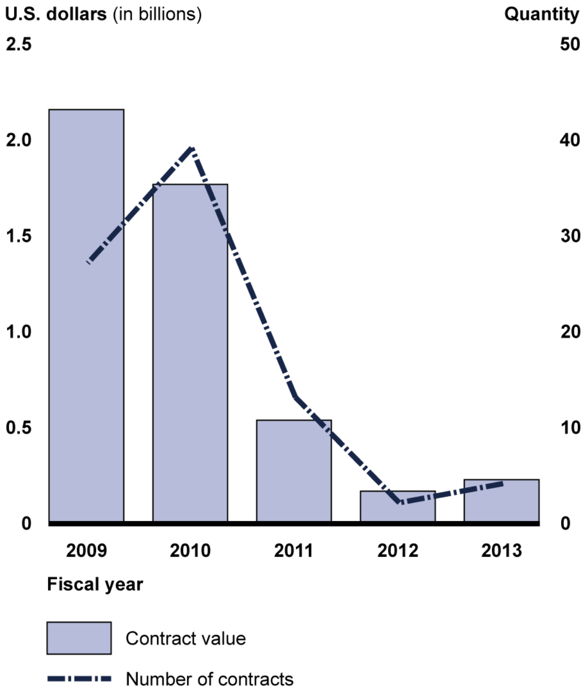
[8]GAO-13-118.

[9]Open FAR Cases as of July 25, 2014, FAR Case No. 2013-018.

[10]GAO-13-308R.

in fiscal year 2013, when DOD awarded four contracts worth a total of about $221 million. Figure 1 depicts the trends from fiscal years 2009 through 2013.

Figure 1: Number and Total Value of DOD 8(a) Sole-Source Contracts over $20 million Awarded from Fiscal Years 2009 through 2013



Source: GAO analysis of Federal Procurement Data System – Next Generation data and contracts identified through discussions with DOD officials. I GAO-14-721R

Note: We did not have complete data for fiscal year 2014 at the time of our review.

Overall, DOD awarded 55 8(a) sole-source contracts that had a reported value of more than $20 million in the period from early fiscal year 2010 (the date of enactment of the statute requiring the 8(a) justification was October 28, 2009) through fiscal year 2013.[11] These contracts had a cumulative value of about $2.5 billion. As shown in table 1, the Army awarded the majority of the contracts, which also represent the majority of dollars.

[11]Many of these contracts were not subject to the new justification requirement because they were awarded before the requirement was implemented in the FAR on March 16, 2011.

Table 1: 8(a) Sole-Source Contracts over $20 Million, by DOD Component, Awarded between October 28, 2009, and September 30, 2013

DOD component	Contract value	Number of contracts
Air Force	$108,844,765	2
Army	1,761,789,035	37
Navy	576,266,841	13
Other DOD	100,350,371	3
Total	**$2,547,251,011**	**55**

Source: GAO analysis of Federal Procurement Data System – Next Generation data and contracts identified through discussions with DOD officials. | GAO-14-721R

Note: Numbers may not add due to rounding.

DOD Contracts Contained Justifications but Three Did Not Fully Meet FAR Requirements

Between April 1, 2012, and June 19, 2014, DOD awarded five 8(a) sole-source contracts over $20 million. All five contained justifications, but not all of the justifications fully met FAR requirements. Two justifications—for one contract awarded by the Navy and one awarded by the Army—met all of the requirements. In another case, an Army contracting officer prepared an 8(a) justification, but the head of the procuring activity, who was required to approve the justification, did not sign it until after we requested the documents for our review. The contracting officials stated that the justification was approved at the appropriate time but that the document with the original signature was misplaced.

Contracting officials for the remaining two contracts—both awarded by the Army—completed justifications, but they were the incorrect type. Rather than the specific justification required for 8(a) sole-source contracts over $20 million, they completed the justification for sole-source contracts awarded under one of the other exceptions to full and open competition under the Competition in Contracting Act. While some elements of the justifications are similar, there are some differences. One substantive difference is that an 8(a) justification requires the agency to determine that awarding the contract is in the best interest of the government, while the other justification does not. In one case, the 8(a) justification requirement was implemented in the FAR while the contract was being awarded, and as a result, the contracting official told us that she was not aware of the specific elements required in an 8(a) justification. In the other case, the contracting officer stated that she had completed an 8(a) justification but was instructed during the approval process to prepare the other type of justification. While these two Army justifications did not contain the five specific elements of an 8(a) justification, the narratives generally explained why a sole-source contract was necessary.

Limited Time Frames Often Cited as Primary Reason for Awarding 8(a) Sole-Source Contracts

DOD contracting officials often cited limited time frames as a primary reason for awarding 8(a) sole-source contracts over $20 million. Our prior work has found that contracting officers viewed 8(a) sole-source contracts to tribal 8(a) firms as a way to expedite the federal acquisition process.[12] Contracting officers for three of the five contracts we reviewed cited a limited amount of time to award the contract as a primary factor for determining that the 8(a) sole-source contract awards were in the best interest of the government:

- In one case, the Army contracting officer had a limited amount of time to ensure continuity of health surveillance, analysis, and reporting services. She stated that she planned to award a 1-year contract with four 1-year option periods to the 8(a) firm, but SBA was concerned about awarding this requirement on a sole-source basis for that length of time. As a result, according to the contracting officer, SBA required her to reduce the period of performance to a 1-year contract with only one 1-year option period. The contracting officer stated that she expects to competitively award the follow-on contract through the 8(a) program by the end of the option year and that other 8(a) firms have already expressed interest in performing the work.

- In another case, an Army contract for construction services, the contracting officer awarded a sole-source bridge contract to an 8(a) subsidiary owned by the same tribal entity as the incumbent firm.[13] The justification states that the previous contract was rapidly approaching its maximum contract value due to unexpected increases in construction needs, yet the incumbent firm had graduated from the 8(a) program. The contracting officer explained that she needed to award a 1-year bridge contract while the follow-on award was competed and that awarding the contract to the subsidiary would ensure continuity because the incumbent firm's employees would transition to that firm. Generally, SBA regulations prohibit the award of a follow-on sole-source contract to an 8(a) subsidiary owned by the same tribal entity as the incumbent firm.[14] According to the contracting officer, SBA concluded that this contract was not considered a follow-on contract on the basis that certain SBA regulations consider construction contracts to be new requirements.[15] Competition for the next contract for these services was not completed by the time the bridge contract we reviewed was set to expire. The Army extended the performance period of the bridge contract and expects to award the competitive contract in May 2015.

[12]We use the term "tribal 8(a) firm" to refer to a firm that is majority owned by an Alaska Native Corporation, Indian tribe, or Native Hawaiian Organization. GAO, *Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention*, GAO-12-84 (Washington, D.C.: Jan. 31, 2012).

[13]Tribal entities can own multiple subsidiaries in the 8(a) program as long as each of those subsidiaries operates under a different primary industry code. See 13 CFR § 124.109(c)(3)(ii).

[14]In our prior work, we discussed practices that highlight how some tribal entities operate, in effect, like large businesses due to their parent corporation's backing and relationships between their subsidiaries. By prohibiting follow-on 8(a) sole-source contract awards to another 8(a) subsidiary owned by the same tribal entity, SBA's intention was to address a negative perception that businesses could operate in the 8(a) program in perpetuity by changing their structure or form to continue to perform work as they had under previous contracts. GAO-12-84.

[15]The small business regulation stating that "construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements" usually applies in the context of an adverse impact determination. 13 CFR § 124.504(c). Before accepting a requirement into the 8(a) program, SBA determines whether a small business would be adversely affected by SBA's acceptance in order to protect small businesses that are performing government contracts awarded outside of the program. New requirements, such as those for construction services, are excluded from this determination. The small business regulation does not delineate whether construction contracts are considered new requirements in the context of a follow-on sole-source contract award to an 8(a) subsidiary that is owned by the same tribal entity as the incumbent 8(a) contractor.

- In the third instance, another Army contracting officer awarded a sole-source contract for professional medical equipment maintenance and related support services because the previous contract was expiring soon. In reviewing the market research documentation, we found that the contracting officer solicited interest from a number of small businesses. According to the justification, the 8(a) firm awarded the contract was the only capable contractor that responded and could meet the time frames necessary for continuing the existing services. The contracting officer stated that she determined that the sole-source contract was in the best interest of the government because the firm could ensure continuity of service under the expedited time frames.

The contracting officers for the other two contracts cited different factors for determining that the contracts were in the best interest of the government. Under one Army contract, the justification stated that the 8(a) firm self marketed an approach that would augment existing technical, engineering, and program management services used in the manufacturing of military armed vehicles and specialized components. The contracting officer told us that awarding this sole-source contract was in the best interest of the government because the 8(a) firm was uniquely qualified to perform the services, and at that time, she was encouraged to award contracts through the 8(a) program. In the other case, a Navy contract for logistics and maintenance support services associated with a ground surveillance system in Afghanistan, the justification indicated that the contracting officer had initially planned to compete the requirement but that SBA recommended the requirement be reserved for a specific 8(a) firm. The contracting officer stated that awarding the sole-source contract was in the best interest of the government because he determined that the 8(a) firm was capable of performing the work and an 8(a) sole-source contract was an available option.

Agency Comments

We requested comments from DOD on a draft of this report, and Department officials informed us that they had no comments.

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If you or your staff have any questions about this report, please contact me at (202) 512-4841 or mackinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who contributed to this report include Tatiana Winger, Assistant Director; Jared Sippel, Analyst in Charge; Laura Greifner; Julia Kennon; Alexis Olson; and Sylvia Schatz.

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