



Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

DOD Small Business Contracting:

Use of Sole-Source 8(a) Contracts over \$20 Million Continues to Decline

GAO -16-557

June 8, 2016

By: Christine V. Williams

Introduction

The GAO released a report on the decline of sole-source contracts to SBA's Program Section 8(a) firms (8(a)) owned by tribes and Alaska Native Corporations. While the stark decline of the numbers is predictable and continuous because of a midnight amendment in Congress, the language and approach of the GAO is somewhat dismaying because of its total dismissal of the harm done to indigenous groups as well as the lack of comparison to other noncompetitive awards through non-8(a) Programs, which vastly outweigh 8(a) awards made to indigenous groups.

Executive Summary

The Government Accountability Office ("GAO") issued a report on the decline of sole sourcing 8(a) contracts to firms in the 8(a) Program; specifically, the decline of contracts to Alaska Native Corporations ("ANC") and tribes. In Section 811 of the National Defense Authorization Act ("NDAA") for 2011, a midnight amendment was made that required the head of an agency (or a very select designee) to authorize any contract over \$20 million that was sole-sourced to an ANC or tribe through a Justification and Approval ("J&A") memorandum. (That limit is now \$22 million adjusted for inflation.) While some categorized this as an onerous, laborious, and unfamiliar approval requirement going far beyond the Competition in Contracting justification memorandum, which contracting officers are far more familiar with, the midnight amendment pushed ahead with the restrictions aimed at curbing these awards to tribes and ANCs.

In this current report, the GAO summarizes the chilling and very predictable effect that Section 811 had on sole sourcing contracts to firms owned by indigenous peoples. While statistics will be quoted later in this analysis, the *language* the GAO has chosen in this report is interesting in that it (1) characterizes the onerous memorandum as just a "justification," rather than a somewhat convoluted process for an agency to use, which the GAO is compelled to come back and later scrutinize; (2) it quotes one agency on one contract as saying the "justification" is not that bad to have to do; and (3) the decline in sole-source awards may be attributed to a more competitive environment. Missing from that analysis is the intense scrutiny facing anyone using ANC and tribally owned firms, thereby making it much "less palatable in this current

Christine V. Williams
 1221 West 11th Avenue, Suite 2
 Anchorage, Alaska 99501
 (907) 258-2200 office
 (907) 301-7273 mobile
 christinewilliams@outlooklaw.com

environment.” This “less palatable environment” could be, of course, based in part because agencies had faced “increased scrutiny due to [unproven] allegations of fraud.” In a nutshell, sole-sourcing large dollar 8(a) contracts have taken a nose dive (absolutely no comparison is done to non-8(a) sole-source awards, which is stark) because of increased scrutiny, which has ultimately resulted in recommendations of more oversight but no instances of actual fraud given by the GAO.

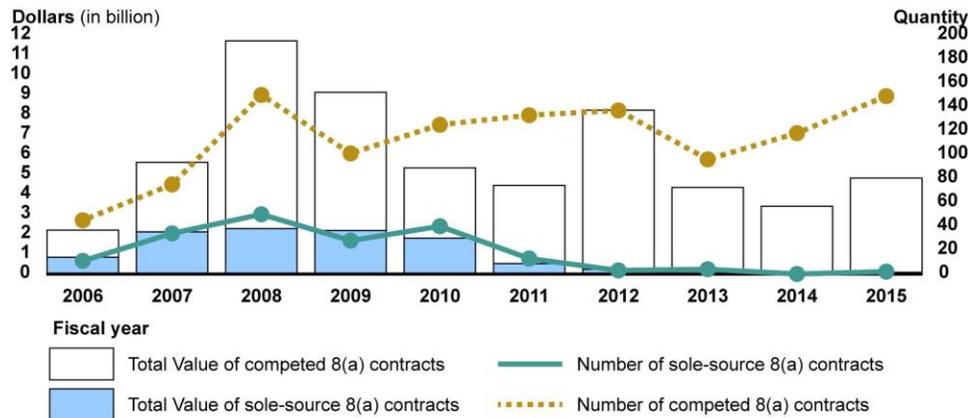
Facts and Figures and the Omissions of the GAO

What is missing from the GAO Report is figures from its previous reports that document how much money is spent on noncompetitive awards that are not through the 8(a) Program that overwhelm the money and need for oversight in the 8(a) Program. For instance, in March of 2014, the GAO estimated that in 2013 alone, the Federal Government obligated over \$459 billion to procure goods and services, of which approximately \$164 **billion** or roughly 36 percent, was noncompetitive. “Noncompetitive Contracting” at 1. <http://www.gao.gov/products/GAO-14-304>.

In contrast, between April 1, 2012, and June 19, 2014, five noncompetitive contracts worth over \$20 **million** were awarded to all Native American owned 8(a) firms. “DOD Sole-Source Contracts” at 3. <http://www.gao.gov/assets/670/665640.pdf>.

Keeping that in mind, the GAO examined a total of **14** sole-sourced 8(a) contracts in its current report. Here is what they found:

“The number of sole-source contracts over \$20 million that the Department of Defense (DOD) awards to small businesses under the 8(a) program has been steadily declining since 2011 when the new requirement for a written justification for these contracts went into effect.”



Source: GAO analysis of Federal Procurement Data System - Next Generation. | GAO-16-557

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

“Between GAO’s last report on this topic in September 2014 and the end of fiscal year 2015, DOD awarded two sole-source 8(a) contracts over \$20 million—one for vehicle maintenance and repair and one for engineering services. The contracting officer for the vehicle repair contract told GAO that the service will not be needed in the future, while the contracting officer for engineering services stated that he intends to competitively award the next contract for these services.”

Conclusion

The figures for noncompetitive awards, even though a firm must certify, and the Government must attest to obtaining the best value for the Government, are not surprising. It has even become less surprising that the GAO has devoted such time and energy to examining **14** contracts in contrast to the billions in noncompetitive awards through non-8(a) Programs. If one were to indulge, it would seem that the indigenous groups may be somewhat targeted for intense scrutiny while others simply walk through the gate.