

New Rule Will Likely Decrease Sole-Source Awards for Alaska Native Corporations and Indian Tribes and Increase Opportunities for Other 8(a) Contractors

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A new rule will make large sole-source awards to 8(a) businesses more difficult and will increase competitive set-aside awards, negatively impacting Alaska Native Corporations (ANCs) and Native American (Tribal) concerns, while increasing opportunities for other small businesses qualifying under the 8(a) program. The new rule requires federal agencies to issue a Justification and Approval (J&A) prior to the award of 8(a) sole-source contracts over \$20 million. The regulation was issued as an interim rule and went into effect on March 16, 2011.

The interim rule implements Section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), which requires federal agencies to issue a J&A prior to awarding a sole-source contract over \$20 million under the 8(a) program. Prior to the enactment of section 811, a sole-source award of a new contract made using the 8(a) contracting authority did not require a J&A, regardless of the dollar value. Under the interim rule, the J&A must document the reasons for making a sole-source award rather than a competitive award under the 8(a) program. Specifically, the J&A must include a description of the needs of the contracting agency and identify the statutory provision under which the contracting agency is exempting the award from competition. The J&A must also include a determination that use of a sole-source contract is in the best interest of the agency, and that the anticipated cost of the contract will be fair and reasonable. The J&A must be approved by an appropriate official (as currently defined by FAR 6.304) and made public after

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award of the contract. The rule institutes no new requirements for sole-source 8(a) awards less than or equal to \$20 million.

Sole-source awards are the easiest method by which agencies can satisfy the 8(a) program goals negotiated with the Small Business Administration (SBA). As the new rule makes awarding major sole-source contracts under the 8(a) program more difficult without reducing the 8(a) program goals for contracting agencies, the likely effect will be an increase in 8(a) set-aside competitions. A shift from sole-source awards to set-aside competitions will have the greatest impact on ANC and Tribal 8(a) concerns, as they are the only 8(a) businesses permitted to receive sole-source awards in excess of \$4 million for services and \$6.5 million for manufacturing.

This new limitation on awards to ANCs comes amid increasing pressure from Congress to eliminate various contracting preferences for ANCs. On March 30, 2011, Sen. Claire McCaskill (D-MO) introduced an amendment to the 2011 Small Business Innovation Research/Small Business Technology Transfer Reauthorization Act (S.493) that seeks to remove several exceptions for ANCs from the normal 8(a) program rules. In conjunction with the new rule, the amendment would require contracting officers to issue written J&As when issuing sole-source awards over \$20 million to ANCs. Sen. McCaskill proposed similar legislation in November 2010 (S.3959).

The new rule also reflects a policy of increasing competitive set-asides for all small businesses. As a result of the Small Business Jobs Act passed in September 2010, the SBA is considering permitting and possibly mandating the use of small business set-asides on certain task orders under the General Services Administration's (GSA) multiple-award and indefinite delivery-indefinite quantity (IDIQ) contracts. The SBA is planning to meet with hundreds of business owners to help determine whether the use of small business set-asides on multiple award and IDIQ contracts should be mandatory or discretionary. The introduction of small business set-asides in these GSA contracts could increase opportunities for all small businesses and help the federal government reach its stated goal of awarding 23 percent of all contract spending to small business.

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