

GAO

Report to the Chairman, Subcommittee
on Contracting Oversight, Committee
on Homeland Security and
Governmental Affairs, U.S. Senate

December 2012

FEDERAL CONTRACTING

Slow Start to Implementation of Justifications for 8 (a) Sole-Source Contracts



Highlights of [GAO-13-118](#), a report to the Chairman, Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, United States Senate

Why GAO Did This Study

SBA's 8(a) program is the government's primary means of developing small businesses owned by socially and economically disadvantaged individuals, including firms owned by Alaska Native Corporations and Indian tribes. The NDAA for Fiscal Year 2010, enacted on October 28, 2009, called for revisions to the FAR to provide for a written justification for sole-source 8(a) contracts over \$20 million, where previously justifications were not required. GAO determined (1) the timeliness with which this new justification requirement was incorporated in the FAR; (2) the number of 8(a) sole-source contracts valued over \$20 million that have been awarded since October 2009 and trends over time; and (3) the extent to which agencies have implemented this new justification requirement. GAO analyzed federal procurement data, reviewed the 14 contracts subject to the requirement across five federal agencies, and interviewed officials from OFPP, SBA, the Department of Defense, and other agencies.

What GAO Recommends

GAO recommends that OFPP issue guidance to clarify the circumstances in which an 8(a) justification is required. GAO also recommends that the General Services Administration—which operates FPDS-NG—implement controls in FPDS-NG to help ensure that contract values are accurately recorded, and that SBA take steps to ensure that its staff confirm the presence of justifications. OFPP and GSA generally agreed with the recommendations. SBA indicated it would take some actions but did not fully address the recommendations.

View [GAO-13-118](#). For more information, contact Michele Mackin at (202) 512-4841 or mackinm@gao.gov.

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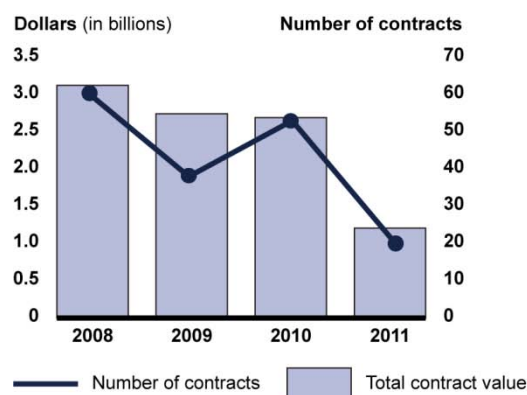
Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts

What GAO Found

The National Defense Authorization Act (NDAA) for Fiscal Year 2010 required that the Federal Acquisition Regulation (FAR) be amended within 180 days after enactment to require justifications for 8(a) sole-source contracts over \$20 million. These justifications bring more attention to large 8(a) sole source contracts. The FAR Council, which updates the FAR, missed this mandatory deadline by almost 325 days. During this delay, based on data in the Federal Procurement Data System-Next Generation (FPDS-NG), 42 sole-source 8(a) contracts with reported values over \$20 million, totaling over \$2.3 billion, were awarded without being subject to a justification. Office of Federal Procurement Policy (OFPP) representatives involved with the FAR Council's implementation of this rule attributed the delay primarily to the time required to establish a process for consulting with Indian Tribes and Alaska Native Corporations.

From October 28, 2009, through March 31, 2012, agencies reported awarding 72 sole-source 8(a) contracts over \$20 million. GAO also analyzed trend information in FPDS-NG from fiscal year 2008 through fiscal year 2011 (the most current available information), which showed that the number and value of these contracts declined significantly in 2011. While GAO determined that FPDS-NG data was sufficiently reliable for the purposes of this review, GAO found errors, such as contracts with an implausible reported value of zero.

Number and Value of New 8(a) Sole-Source Contracts with Reported Values over \$20 Million in Fiscal Years 2008 through 2011



Source: GAO analysis of FPDS-NG data.

GAO found a slow start to implementation of the new justification requirement. Of the 14 sole-source 8(a) contracts awarded since the FAR was revised, only three included an 8(a) justification. The agencies awarding the remaining 11 contracts did not comply, either because contracting officials were not aware of the justification requirement or because they were confused about what the FAR required. For example, contracting officials were confused in one instance where another justification was already in place that covered multiple contracts. Further, the Small Business Administration (SBA) cannot accept a contract over \$20 million for negotiation under the 8(a) program unless the procuring agency has completed a justification, but GAO found that SBA did not have a process in place to confirm the presence of a justification.

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Abbreviations

ANC	Alaska Native Corporation
CICA	Competition in Contracting Act
DEA	Drug Enforcement Administration
DOD	Department of Defense
FAR	Federal Acquisition Regulation
FPDS-NG	Federal Procurement Data System-Next Generation
GSA	U.S. General Services Administration
IDIQ	indefinite delivery / indefinite quantity
NDAA	National Defense Authorization Act
OFPP	Office of Federal Procurement Policy
SBA	Small Business Administration

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United States Government Accountability Office
Washington, DC 20548

December 12, 2012

The Honorable Claire McCaskill
Chairman
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs
United States Senate

The federal government obligates hundreds of billions of dollars in contracts for goods and services each year—\$537 billion in fiscal year 2011. That year, \$16.7 billion was obligated to firms participating in the Small Business Administration's (SBA) 8(a) program—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. For example, since 1986, Congress has authorized 8(a) firms owned by Alaska Native Corporations (ANC) and Indian tribes to receive sole-source contracts for any amount.¹ Over the last several fiscal years, the majority of large-dollar sole-source 8(a) contracts have been awarded to firms owned by these entities. More recently, Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010—enacted in October 2009 and later implemented in the Federal Acquisition Regulation (FAR)—required a written justification of sole-source 8(a) awards over \$20 million. Previously, no justification was required for sole-source 8(a) awards of any amount. This new justification requirement brings more attention to large-dollar-value, sole-source contracts awarded through the 8(a) program.

You asked us to review how this new justification requirement is being implemented across the federal government. In response to your request, we determined (1) the timeliness of actions taken to implement the justification requirement in the FAR, (2) the number of sole source 8(a) contracts over \$20 million that have been awarded since October 2009

¹For more details on tribal 8(a) contracting, see GAO, *Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention*, [GAO-12-84](#) (Washington, D.C.: Jan. 31, 2012); and *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight*, [GAO-06-399](#) (Washington, D.C.: Apr. 27, 2006).

and trends over time, and (3) the extent to which agencies have implemented the new justification requirement.

To address these objectives, we analyzed federal procurement data, reviewed contract files, and interviewed agency officials. Specifically, to assess the timeliness of the actions taken to incorporate the new justification requirement into the FAR, we reviewed the relevant interim and final rules published in the *Federal Register*. We also interviewed officials from the Office of Federal Procurement Policy (OFPP), as the Administrator of OFPP serves as chair of the Federal Acquisition Regulatory Council, which implements changes to the FAR. To identify trends in 8(a) sole-source contracts over \$20 million, we analyzed data from the Federal Procurement Data System-Next Generation (FPDS-NG) from fiscal year 2008 through March 31, 2012, the latest date we could obtain complete information at the time of our review. We used the *Base and All Options* data element in FPDS-NG to identify relevant contracts awarded during this period.² We took several steps to assess data reliability, including reviewing seven contracts identified as valued between \$19.5 million and \$20 million to confirm that they were not subject to the new justification requirement. We determined that the federal procurement data for this period was sufficiently reliable to identify contracts that exceeded the \$20 million threshold. To assess agencies' implementation of the new justification requirements, we reviewed all 14 sole-source 8(a) contracts over \$20 million awarded since the FAR incorporated the new justification requirements in March 2011. Eleven of these contracts were identified using the *Base and All Options* field in FPDS-NG. To compensate for any errors in these data, we also calculated cumulative obligations for all 8(a) sole-source contracts awarded during this period and identified one additional contract that had an anticipated value of over \$20 million at the time of award. Two additional contracts were identified in the course of our review. Eight of the 14 contracts were awarded by the Department of Defense (DOD), and the remaining six were awarded by the General Services Administration and the Departments of the Interior, Justice, and State. We reviewed contract files and spoke with contracting and policy officials at the locations where we conducted our review. Finally, we interviewed SBA officials to understand that agency's role in implementing this new

²The *Base and All Options* data element in FPDS-NG is defined as the total contract value agreed upon by the government and the firm performing the contract, including the value of any contract options.

requirement. Appendix I contains more information on our scope and methodology.

We conducted this performance audit from April 2012 to December 2012 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.

Background

The Competition in Contracting Act (CICA) of 1984 requires agencies to obtain full and open competition through the use of competitive procedures in their procurement activities unless otherwise authorized by law.³ However, Congress also recognized that in certain situations contracts may need to be awarded noncompetitively—that is, without full and open competition. Generally, these contracts must be supported by written justifications and approvals that contain sufficient facts and rationale to justify the use of a specific exception to full and open competition, such as when the contractor is the only source capable of performing the work.⁴ Sole-source contracts awarded under the 8(a) program fall under one of these exceptions but were not previously required to include a justification.

With enactment of Section 811 of the NDAA for Fiscal Year 2010, Congress created a requirement for a new type of justification for sole-source 8(a) contracts over \$20 million.⁵ For the purposes of this report, we use the term “CICA justification” to refer to the justification required when a non-8(a) contract is awarded under one of the exceptions to competition under CICA, and the term “8(a) justification” to refer to the new justification required for these 8(a) contracts. While some elements of the justifications are similar, there are some differences, as shown in

³Pub. L. No. 98-369, § 2701. Contracts awarded using full and open competition means that all responsible sources—or prospective contractors that meet certain criteria—are permitted to submit proposals.

⁴FAR § 6.303-2.

⁵Pub. L. No. 111-84, § 811 (2009).

table 1, which compares the required elements of CICA and 8(a) justifications for sole-source contracts.

Table 1: Elements of CICA and 8(a) Justifications Required by the FAR

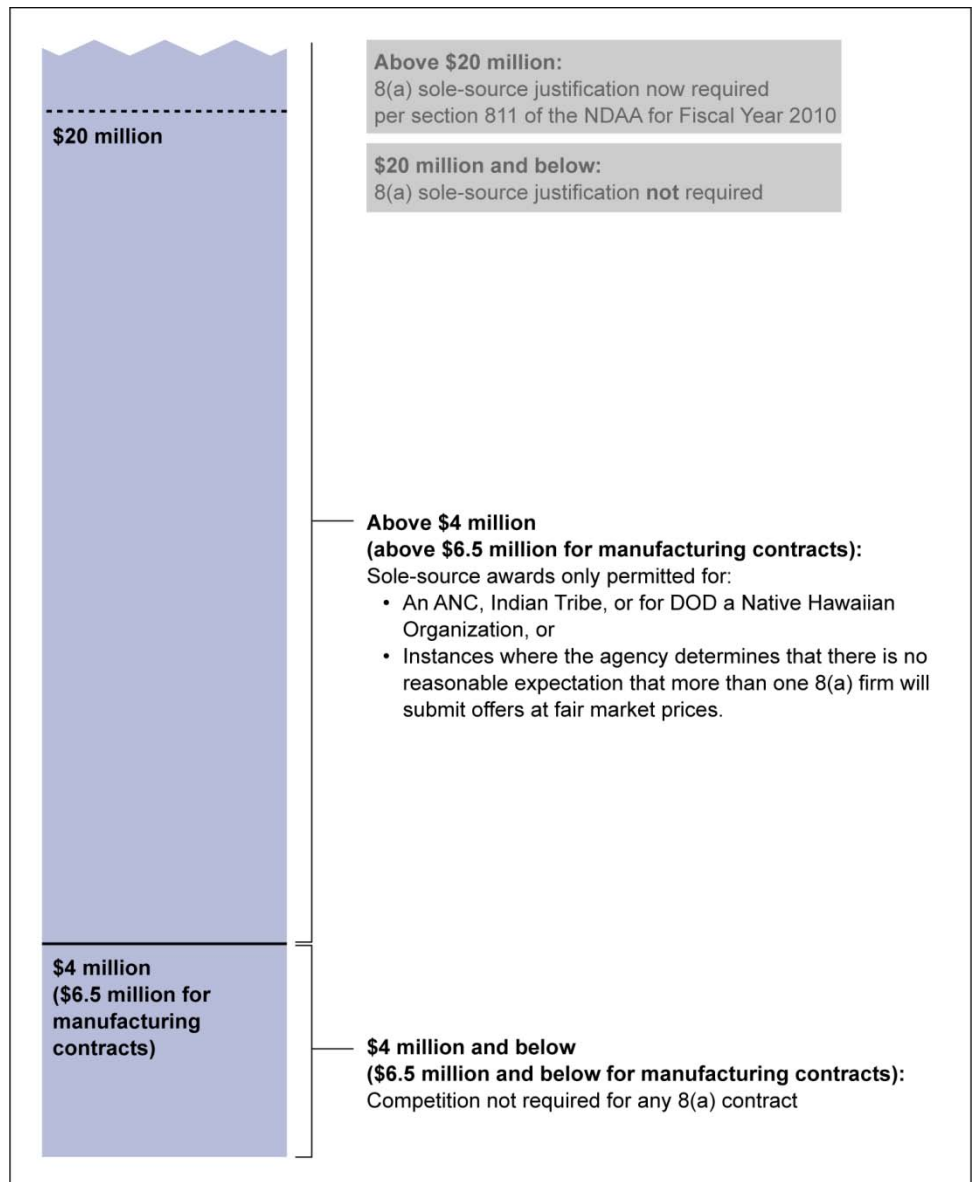
Elements of a CICA justification	Elements of an 8(a) justification
Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for other than full and open competition."	
Nature and/or description of the action being approved.	A description of the needs of the agency concerned for the matters covered by the contract.
A description of the supplies or services required to meet the agency's needs, including the estimated value.	
An identification of the statutory authority permitting other than full and open competition.	A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract.
A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited.	
Description of efforts made to ensure that offers are solicited from as many potential sources as is practicable, including whether a notice was or will be publicized and, if not, which exception applies.	
A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.	A determination that the anticipated cost of the contract will be fair and reasonable.
A description of the market research conducted and the results or a statement of the reason market research was not conducted.	
Any other facts supporting the use of other than full and open competition, such as an explanation of why technical data packages, engineering descriptions, or statements of work suitable for full and open competition have not been developed or are not available.	Such other matters as the head of the agency concerned shall specify for purposes of this section.
A listing of the sources, if any, that expressed, in writing, an interest in the acquisition.	
A statement of the actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required.	
Contracting officer certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.	
	A determination that the use of a sole-source contract is in the best interest of the agency concerned.

Source: GAO analysis of FAR.

While the required elements of 8(a) and CICA justifications differ, both types of justifications are generally required to be published on the federal government's web site for announcing contract opportunities and the

agency website after the contract award is made. In addition, the official who must approve an 8(a) justification for a contract over \$20 million would be the same official who must approve a CICA justification of the same amount. This official is determined by the estimated total dollar value of the proposed contract, as outlined in the FAR. The head of the procuring activity or the agency's senior procurement executive generally approves 8(a) justifications. Figure 1 shows the competition thresholds and current sole-source justification requirements under the 8(a) program.

Figure 1: Competition and Sole-Source Justification Requirements in 8(a) Contracting



Source: GAO analysis of FAR.

Prior to awarding an 8(a) contract, whether sole-source or competitive, agencies are required to submit an offer letter to SBA identifying the requirement—that is, what goods or services are being procured—as well

as any procurement history for the requirement, the estimated dollar amount, and the name of the particular 8(a) firm if intending to award the contract on a sole-source basis. A business opportunity specialist within an 8(a) program district office is to respond with a letter stating whether SBA has accepted the procurement into the 8(a) program after confirming the firm's eligibility to receive the contract and considering factors that could prohibit SBA's acceptance of the procurement. SBA assesses a firm's eligibility based on a number of criteria, including the firm's size and whether the procurement is consistent with the firm's business plan.⁶ Under the new 8(a) justification requirement, SBA may not accept a sole-source contract over \$20 million for negotiation under the 8(a) program unless the procuring agency has completed an 8(a) justification in accordance with the FAR. Partnership agreements between the procuring agencies and SBA outline the responsibilities of both parties in the 8(a) contracting process. These agreements generally delegate SBA's contract execution function to the agencies after SBA has completed initial acceptance of the procurement into the program.

The FAR Council oversees development and maintenance of the FAR. Its membership consists of the OFPP Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the General Services Administration. The FAR Council issues rules to implement changes to the FAR that are mandated by law. Typically, the first step is a proposed rule, which presents the proposed text in the *Federal Register* and seeks written comments. In some cases, interim rules are used to implement immediate changes to the FAR and include the text of the revision. Proposed and interim rules can be amended by final rules, which make changes to the FAR after consideration of public comments.

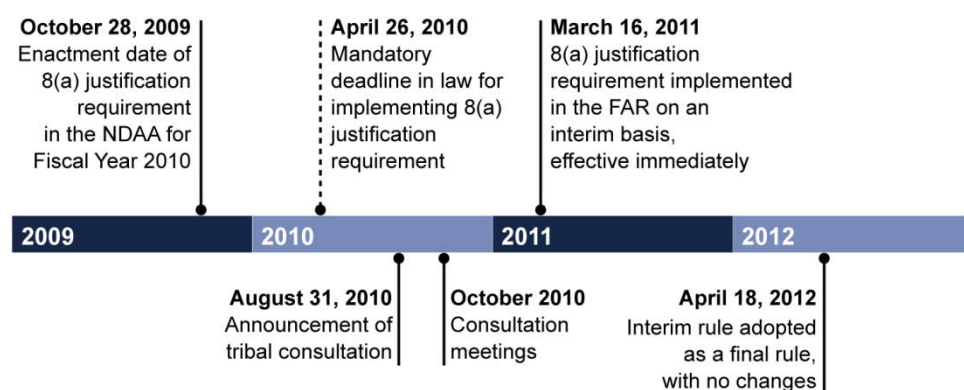
⁶13 C.F.R. § 124.503(c)(1)(i) and (iii). Firms in the 8(a) program must have a business plan that outlines, among other things, business targets, objectives, and goals. 13 C.F.R. § 124.402

Statutory Deadline for Incorporation of New Justification into FAR Was Not Met, Which Delayed Implementation

The FAR Council did not implement the new 8(a) justification requirement in the FAR by the mandatory deadline set in law. Section 811 of the NDAA for Fiscal Year 2010 required that the FAR be amended within 180 days of the statute's enactment date to require justifications for 8(a) sole-source contracts over \$20 million. Instead, 504 days elapsed between the enactment of the law on October 28, 2009, and the FAR change to implement it on March 16, 2011.

In August 2010, almost 1 year after enactment of section 811, the FAR Council issued a notice announcing plans to hold three tribal consultation meetings to obtain comments on implementation of this section from the tribal communities. The council held public meetings during October 2010 in Washington, D.C.; Albuquerque, New Mexico; and Fairbanks, Alaska. After receiving comments, the FAR Council published the rule addressing the 8(a) justification requirements as an interim rule, rather than proposed, because the statutory date for issuance of regulations had already passed. OFPP officials who were involved in the implementation of this rule explained that the primary reason for the FAR Council's delay was establishing a process for, and holding, tribal consultations. According to the OFPP officials, the FAR Council did not have previous experience conducting such consultations, and developing a process for this delayed the announcement of the meetings. Figure 2 shows key dates in the enactment and implementation of this provision.

Figure 2: Key Dates in Implementation of 8(a) Justification Requirement



Source: GAO analysis of law and Federal Register.

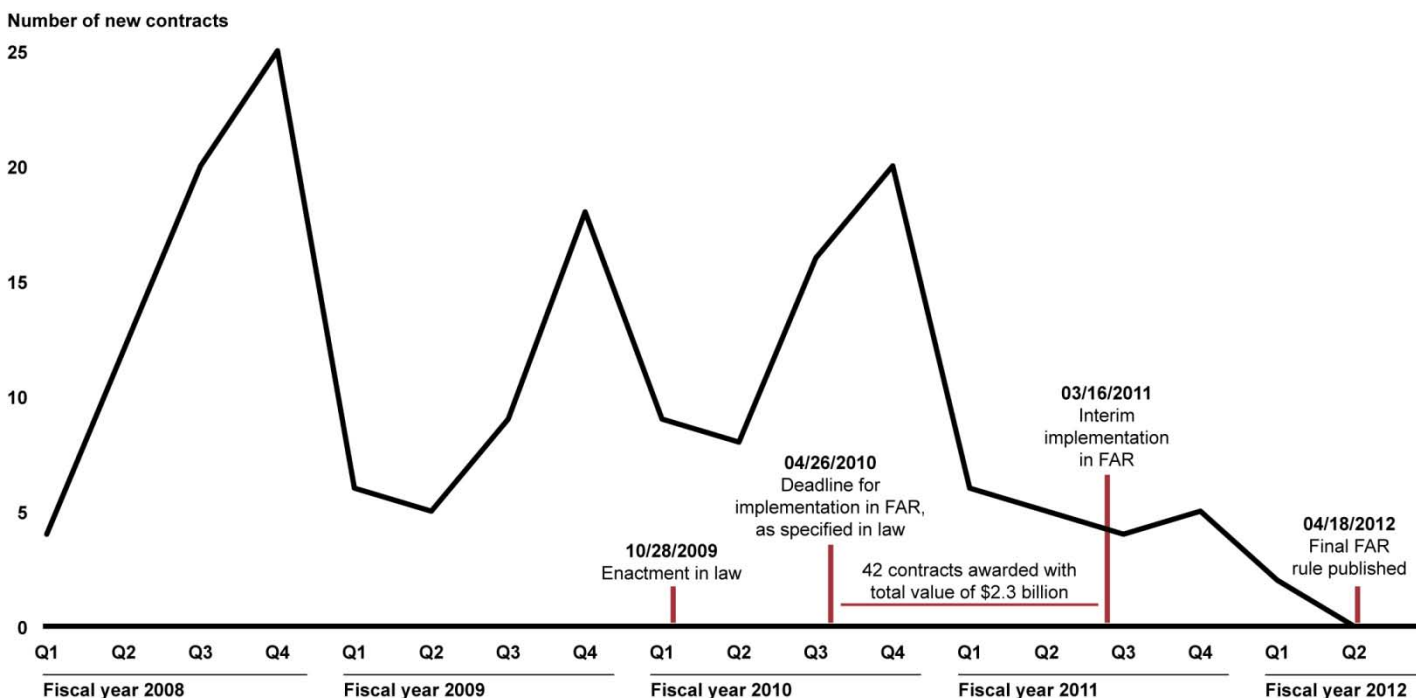
In its announcement of the planned tribal consultation meetings, the Council cited an executive order that directs certain executive federal agencies to consult with Indian tribes on policies that have tribal

implications.⁷ The Council noted that the consultations provided for in the order are a critical component of a sound and productive federal-tribal relationship.

Section 811 of the NDAA for Fiscal Year 2010 did not require agencies to implement the new justification requirement until it was implemented in the FAR through an interim or final rule, and contracting and policy officials from the agencies involved in our review confirmed that they waited for the FAR revision. Almost 325 days elapsed between the 180-day mandatory deadline after enactment (April 26, 2010) and FAR implementation on March 16, 2011. During this period, according to FPDS-NG data, agencies awarded 42 sole-source 8(a) contracts with anticipated values over \$20 million—with a total value of over \$2.3 billion—that would have been subject to the new justification requirement if the FAR Council had implemented the change by the statutory deadline. Figure 3 illustrates the number of such contracts awarded per fiscal year quarter in the last 4 years and key dates in the implementation of the new justification requirement.

⁷Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, Nov. 6, 2000.

Figure 3: New 8(a) Sole-Source Contracts over \$20 Million and Key Dates in Enactment and Implementation of the 8(a) Justification Requirement



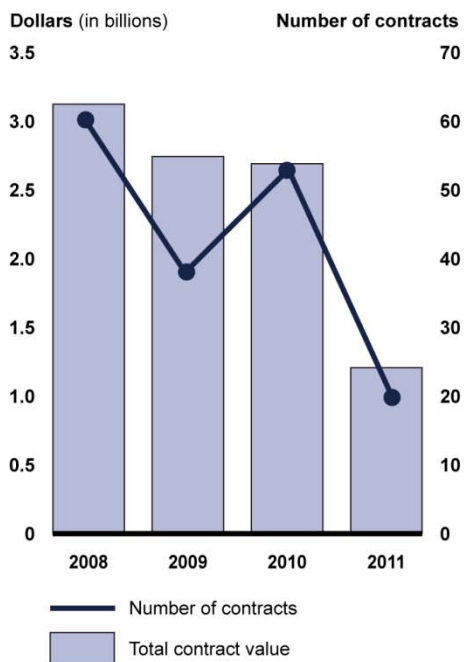
Source: GAO analysis of FPDS-NG data, law, and regulations.

Agencies Report Awarding 72 Relevant Contracts Since Enactment, and Such Awards Have Recently Decreased

According to FPDS-NG data, 72 contracts had a reported value of more than \$20 million in the period from the October 28, 2009, enactment of the statute requiring the 8(a) justification requirement through March 31, 2012. (See appendix II for the number and value of contracts by agency.) However, we found inaccuracies in the data on reported contract value.

To understand the trends in award of 8(a) sole-source contracts with reported values greater than \$20 million, we also analyzed FPDS-NG data from fiscal year 2008 through the last full year of data available, fiscal year 2011. Compared to fiscal years 2008 through 2010, the number and value of these contracts declined significantly in fiscal year 2011, when only 20 were awarded, as shown in figure 4.

Figure 4: Number and Value of New 8(a) Sole-Source Contracts with Reported Values over \$20 Million in Fiscal Years 2008 through 2011



Source: GAO analysis of FPDS-NG data.

Although we found the FPDS-NG data on total contract value overall to be sufficiently reliable to use for our analysis, we found several cases where the *Base and All Options* data element had been inaccurately reported by the agencies as being much lower than the actual value of the contract. For instance, the Army had awarded a contract worth about \$84 million according to contract documents, but its reported value in FPDS-NG was only \$24 million. This data element is intended to reflect the total contract value at the time of award, including all options. For indefinite delivery indefinite quantity (IDIQ) contracts, the FPDS-NG data dictionary stipulates that this element is the estimated value for all orders expected to be placed against the contract.⁸ Although this is a required field in FPDS-NG for all awards, we found five awarded since October 28,

⁸IDIQ contracts, also known as task order (services) or delivery order (supply) contracts, do not procure or specify a firm quantity (other than a minimum or maximum) and provide for the issuance of orders during the contract period. FAR § 16.501-1.

2009, that implausibly listed a total value of zero. For example, two related Army contracts were both listed as having a value of zero, but when we reviewed the contract files, we found that their total anticipated value was actually \$350 million. GSA officials who are responsible for managing the FPDS-NG data system told us that there should not be any instances in which a contract award would have a value of zero. The errors in this data element make it difficult to accurately determine the extent to which agencies are awarding sole source 8(a) contracts valued over \$20 million.

Most Agencies Did Not Meet the New Justification Requirement Following the FAR Change

From March 16, 2011, through March 31, 2012, 14 sole-source 8(a) contracts worth over \$20 million were awarded by five agencies. Only three of those contracts—two awarded by the Air Force and the other by the State Department—included 8(a) justifications. The agencies awarding the remaining 11 contracts did not comply with the new justification requirement, either because they were not aware of the requirement and did not prepare a justification, or because they were confused and incorrectly used a CICA justification, as summarized in Figure 5.

Figure 5: Compliance among agencies awarding contracts subject to the 8(a) justification requirement



Source: GAO analysis of contract files.

Some Contracting Officials Were Unaware of the New Justification Requirement

Contracting officials are required to ensure that all requirements of law and regulation are met before awarding any contract, and as a result, they should keep abreast of changes to the FAR. Yet, for five of the 11

contracts, contracting officials did not comply with the new justification requirement because they were not aware of it.

- A GSA regional office awarded a sole-source contract for support services to an 8(a) firm in October 2011, with an anticipated value of \$40 million. No justification was completed. According to GSA officials, the contracting officer was unaware of the justification requirement at the time of award. As a result of our inquiry, GSA officials stated that they will not exercise options on the contract and are planning to award a replacement contract through an 8(a) competitive process. The regional office also plans to issue guidance to acquisition staff regarding the justification requirement.
- The Naval Sea Systems Command awarded a contract for information technology services worth about \$40.5 million, but did not prepare an 8(a) justification. According to Command contracting officials, they were unaware of the requirement at the time the contract was awarded in July 2011. The Command issued guidance in December 2011 requiring that justifications be prepared not only for 8(a) sole-source contracts above the \$20 million threshold, but also for any such contracts above the 8(a) competition threshold of \$4 million (or \$6.5 million for manufacturing contracts). The contracting officials said that they have begun planning to award the successor contract through a competition among 8(a) firms.
- Officials at a U.S. Army Corps of Engineers contracting office were aware of increased scrutiny of 8(a) sole-source contracts, but were not aware of the justification requirement itself. They had received a January 2011 memorandum from Army acquisition executives noting the forthcoming justification requirement and calling for contracting officials to limit the use of 8(a) sole-source contracts over \$20 million. As a result, when awarding a \$35 million 8(a) sole-source contract award for museum relocation services in May 2011, Army Corps contracting officials prepared a memorandum explaining the decision to exceed the \$20 million threshold, but it did not meet the requirements of an 8(a) justification.
- The Army awarded two sole-source IDIQ contracts for engineering and technical support services in June 2011, each of which had a value over \$20 million, but did not prepare 8(a) justifications for either contract, as required. These contracts were awarded through a single solicitation to two different firms, with a total value of \$350 million. Contracting officials stated that they were not aware of the new justification requirement. Furthermore, we found that these two Army contracts were awarded improperly because SBA had not reviewed the eligibility of the firms and the procurement for the 8(a) program. The contract file documentation states that the contracts were 8(a)

sole-source, yet the agency did not send an offer letter to SBA. The contracting officer had contacted an SBA official outside of the 8(a) program, thinking that this was the proper way to offer the procurement into the 8(a) program. But without an offer letter and subsequent SBA acceptance into the program, there was no way to ensure that the firm was eligible to receive the award or that the procurement was properly accepted into the program. We brought this issue to the attention of SBA headquarters officials, who expressed concern and stated they would look into it.

Even Contracting Officials Who Were Aware Were Often Confused by the Requirement

Even in cases where contracting officials were aware of the new 8(a) justification requirement, they did not always correctly implement it, due to confusion about what the FAR requires. For example, we found four cases where officials, having determined that their contracts were subject to the new justification requirement, prepared CICA justifications rather than 8(a) justifications. According to the contracting officer for one such contract at the State Department, the preparation of the CICA justification was a result of the rush of end-of-fiscal-year work and the fact that 8(a) justifications were a new requirement they had not dealt with previously. Likewise, a contracting officer at the Army Contracting Command, realizing that 8(a) sole-source contracts now require a justification, prepared a CICA justification instead of an 8(a) justification. The command's competition advocate, who reviews justifications for sole-source contracts, initially advised the contracting officer that a justification was not required. According to the contracting officer, he learned shortly before contract award that a justification was in fact required, but he was not aware that the elements required in an 8(a) justification were different from those in a CICA justification.

In one case at the Drug Enforcement Administration (DEA), officials were aware of the justification requirement but decided not to complete one because their acquisition process began before the FAR was amended. SBA had accepted the procurement into the 8(a) program in January 2011, before the 8(a) justification requirement was implemented in the FAR. However, the \$448 million contract, for administrative support services, was awarded on June 14, 2011. A justification was required because the contract was awarded after the FAR implementation date. A memorandum in the contract file dated May 15, 2011, explained DEA's rationale for not preparing a justification, stating that it would not be constructive to revisit the solicitation process in order to prepare a justification because the negotiations with the firm were nearing conclusion.

For one Department of the Interior contract, officials were unsure whether the 8(a) justification requirement applied—in part because of ambiguities in the regulations regarding whether 8(a) justifications should be prepared when class justifications already exist—and thus did not prepare one. A class justification generally covers multiple contracts within a program or sets of programs. This contract was awarded by Interior on behalf of a DOD program office that had a class CICA justification in place, which permitted the award of sole-source contracts to support the program's work. Contracting officials for this contract were unsure whether the class justification would preclude the need for a separate 8(a) justification for this sole-source contract award. The FAR only states that contracting officers must ensure that each contract action taken under the authority of the class justification is within its scope; it does not address whether a separate 8(a) justification would be required in this situation.

This contract illustrates another source of confusion—how to proceed when the anticipated value of a contract changes during negotiation, which happens between SBA's acceptance of the procurement and contract award. The FAR requires an 8(a) justification at two points:

- before SBA can accept the contract for negotiation under the 8(a) program, and
- at time of contract award.⁹

The potential for confusion arises because a contract's value can change during the negotiation process, and the FAR does not address scenarios in which anticipated contract values rise above or fall below the \$20 million threshold between SBA's acceptance of the procurement for negotiation and the award of the contract. For the contract awarded by the Department of the Interior, at the time SBA accepted the procurement, the anticipated value was slightly under the \$20 million threshold. However, by the time the contract was awarded, estimated costs had increased to \$21.4 million. We also reviewed a DOD contract that illustrates the opposite situation, but which was not required to have an 8(a) justification because the offer letter was sent before the requirement was implemented in the FAR. At the time the procurement was accepted by SBA under the 8(a) program, its anticipated value was

⁹FAR §§19.808-1(a) and FAR 6.303-1(b).

about \$30 million. The estimated value of the contract dropped to \$18.3 million by the time of award.¹⁰

The FAR also does not address whether the new 8(a) justification is needed when out-of-scope modifications are made on existing 8(a) sole-source contracts. Generally, agencies may not modify contracts to add products or services not anticipated in the original scope without a separate sole-source justification. In some cases, however, agencies have determined that the flexibilities of 8(a) sole-source contracts awarded to firms owned by ANCs or Indian tribes allowed them to make such modifications without preparing a justification. For example, in our 2006 report on 8(a) contracting, we found that the Department of Energy had added a number of new types of work to a contract, nearly tripling the value, and the contracting officer cited the flexibilities of the 8(a) sole-source contract awarded to an ANC-owned firm as the reason he was able to do so.¹¹ We did not identify any such modifications in our present review; however, some contracting officials told us that it was not clear to them if a justification would be required for modifications to 8(a) sole-source contracts. DEA contracting officials cited the ability to make out-of-scope modifications as one of the attractive features of awarding 8(a) sole-source contracts to firms owned by ANCs or Indian tribes, but said they would require a justification for any modification of \$20 million or more.

We also found a case where Army Corps contracting officials at one location misinterpreted information they had received about the 8(a) justification—viewing the \$20 million threshold as a cap on sole source 8(a) contract awards. An Army Corps contracting official at this location stated that it had been their standard practice at the end of the fiscal year to award sole-source IDIQ contracts for construction and maintenance projects with a ceiling price of \$15 million to 8(a) firms owned by ANCs or Indian tribes. However, after receiving an Army-wide memorandum in January 2011 regarding the pending justification requirements for 8(a) sole-source contracts over \$20 million, officials awarded four 8(a) sole-source contracts in August and September 2011 with a ceiling price of

¹⁰We identified this contract for review because it had total obligations of more than \$23 million. However, upon review of the contract file, we determined that it exceeded the \$20 million threshold as a result of modifications after award.

¹¹[GAO-06-399](#).

\$20 million each. Officials stated that they were not aware of the new 8(a) justification requirement at the time they awarded these contracts. These awards were not subject to the 8(a) justification, as it only applies to contracts over \$20 million.¹²

Little Evidence That SBA Ensured 8(a) Justifications Had Been Completed

SBA does not have a process in place to confirm that 8(a) justifications are present. The FAR states that the procuring agency must have completed a justification before SBA can accept for negotiation an 8(a) sole-source contract over \$20 million, but it does not specify what steps SBA should take to confirm the presence of an 8(a) justification. We found that in most cases, SBA did not discuss the new justification requirements in its correspondence to agencies.

During our review, we found a case where an agency had improperly awarded an 8(a) contract, a situation that was not detected by the SBA district official who reviewed the sole-source justification. Army contracting officials told us that an SBA district office business opportunity specialist followed up after receiving an 8(a) offer letter from the Army, to request a sole-source justification. The Army provided SBA with a justification—although it was again a CICA justification, as opposed to an 8(a) justification—and the SBA official noted that the justification requirement had been met. However, the SBA official did not recognize and respond to information showing that the contract was to be awarded to a sister subsidiary owned by the same tribal entity as the incumbent firm—a practice prohibited by SBA's 8(a) regulations.¹³ Specifically, when offering this procurement to the 8(a) program, the Army stated that there was no acquisition history, yet the justification clearly stated that the incumbent and proposed 8(a) firms were owned by the same tribal entity. Hence, this contract was improperly awarded to the sister subsidiary. When we informed SBA headquarters officials of this situation, they

¹²We reviewed a number of 8(a) sole-source contracts with a reported value of \$20 million or less to help assess the reliability of FPDS-NG data on total contract value.

¹³Tribal entities, such as ANCs or Indian tribes, can own multiple subsidiaries in the 8(a) program. SBA's regulations prohibit the award of a follow-on sole-source 8(a) contract to another subsidiary firm owned by the same tribal entity, also called a sister subsidiary. In our recent report on tribal 8(a) contracting, we noted that SBA would have difficulty enforcing this regulation and recommended that SBA take steps to obtain better data and reinforce the requirement to procuring agencies to provide the full acquisition history. See [GAO-12-84](#).

expressed concern and indicated they would follow up with the business opportunity specialist.

To highlight the 8(a) sole source justification requirement, SBA has revised its partnership agreements to reflect that the procuring agency is responsible for completing the justification. However, SBA's district officials also have an important role to play in ensuring that the justifications are properly prepared. SBA officials said they were not sure why the district officials did not confirm the presence of justifications in most of the cases we reviewed, noting that the FAR change is relatively recent and that it may take time for all staff to learn of the requirement. The officials added that they are revising their operating procedures and training curricula to reflect the 8(a) justification requirement. These actions, when implemented, will be useful in highlighting the justification requirement for SBA district officials. However, SBA has yet to convey to its district officials the practical means of how to go about ensuring that the procuring agencies have completed the justification.

Conclusions

Agencies have generally not complied with the justification requirement for 8(a) sole-source contracts. This slow start may be due in part to the relatively recent implementation of the requirement; however, we also found a lack of awareness and confusion among contracting officials and SBA district officials. In some situations the FAR is not clear whether a justification is required. This includes cases where there is a class justification already in place, when the value of a contract rises above or falls below \$20 million during the negotiation process, or when out-of-scope modifications are made to 8(a) sole-source contracts. Clarifying guidance is needed to help ensure that agencies are applying the justification requirement consistently. While agencies are required to prepare justifications in accordance with the FAR, SBA is required, in practice, to confirm that these justifications are in place. SBA does not currently have a process in place to do so. Finally, because of shortcomings in the data agencies are entering into FPDS-NG regarding the total value of contracts at the time of award, agencies lack the information that would allow them to monitor how many sole-source 8(a) contracts are awarded over the \$20 million threshold.

Recommendations

To help mitigate future confusion regarding justifications for 8(a) sole-source contracts over \$20 million, we recommend that the Administrator of the Office of Federal Procurement Policy, in consultation with the FAR Council, promulgate guidance to:

-
- Clarify whether an 8(a) justification is required for 8(a) contracts that are subject to a pre-existing CICA class justification.
 - Provide additional information on actions contracting officers should take to comply with the justification requirement when the contract value rises above or falls below \$20 million between SBA's acceptance of the contract for negotiation under the 8(a) program and the contract award.
 - Clarify whether and under what circumstances a separate sole-source justification is necessary for out-of-scope modifications to 8(a) sole-source contracts.

To help ensure that Small Business Administration officials meet FAR requirements for sole source contracts over \$20 million, we recommend that the Administrator of the Small Business Administration take the following two actions when revising operating procedures and training curricula:

- Include instructions to business opportunity specialists on the steps they are to take to confirm whether agencies have met the justification requirement, such as obtaining a copy of the justification from the agency.
- Include instructions to confirm that procuring agencies have prepared an 8(a) justification rather than a CICA justification.

To help ensure that federal procurement data provides accurate and complete information, we recommend that the Administrator of the General Services Administration implement controls in FPDS-NG to preclude agency officials from entering a value of zero dollars for the *Base and All Options* data element when the initial award of a contract is entered into the database.

Agency Comments and Our Evaluation

We provided a draft of this report to SBA, OFPP, GSA, and the departments of Defense, the Interior, Justice, and State. We received written comments from SBA, which are reproduced in appendix III. SBA did not fully address our recommendations. In email responses, OFPP and GSA generally agreed with our recommendations, and OFPP also included additional comments. DOD did not respond. The other agencies responded with no comment.

In its written response, SBA stated that the burden is on the procuring agencies to prepare the appropriate sole-source justification and that SBA would take actions to ensure that the agencies do so. For example, SBA plans to modify its partnership agreements to incorporate a requirement

that the contracting officer certify that the justification has been completed. While these actions may help increase awareness of the justification requirement at the procuring agencies, they do not address SBA's own responsibilities. As we discuss in the report, the FAR states that SBA may not accept for negotiation sole source 8(a) contracts over \$20 million unless the appropriate justification has been completed. SBA states that it is difficult to interpret the FAR as requiring SBA to verify the existence of the justification. We disagree. Logically, to meet the FAR requirement, SBA must confirm the existence of an 8(a) justification. Our recommendations were intended to help SBA's business opportunity specialists understand how to comply with the FAR requirement.

In an email response, OFPP generally agreed with our recommendations and asked that we reflect that the Administrator of OFPP should take the recommended actions in consultation with the FAR Council. We agreed and made that change. OFPP further noted that, when planning the tribal consultations to implement the 8(a) justification requirement, the FAR Council also considered the President's Memorandum of November 5, 2009, which underscores the Administration's commitment to regular and meaningful consultation with tribal officials in policy decisions that have tribal implications.

We are sending copies of this report to the Secretaries of Defense, the Interior, and State; the Attorney General; the Administrators of the Small Business Administration, the General Services Administration, and the Office of Federal Procurement Policy; and interested congressional committees. This report will also be available at no charge on GAO's website at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-4841 or by e-mail at mackinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix IV.



Michele Mackin
Acting Director
Acquisition and Sourcing Management

Appendix I: Objectives, Scope, and Methodology

The objectives of this review were to determine (1) the timeliness of actions taken to implement the 8(a) justification requirement in the Federal Acquisition Regulation (FAR); (2) the number of sole source 8(a) contracts over \$20 million that have been awarded since October 2009 and trends over time; and (3) the extent to which agencies have implemented the new justification requirement.

To assess the timeliness of the actions taken to incorporate the new justification requirement into the FAR, we reviewed the relevant interim and final rules published in the *Federal Register*. We also interviewed officials from the Office of Federal Procurement Policy (OFPP), as the Administrator of OFPP serves as chair of the Federal Acquisition Regulatory Council, which implements changes to the FAR. Additionally, to confirm agency officials' statements to us that they did not include justifications in 8(a) sole-source contracts awarded after the October 29, 2009, enactment of the law but before its March 16, 2011, implementation in the FAR, we selected a judgmental sample of five such contracts. We selected those with the highest reported values in the Federal Procurement Data System-Next Generation (FPDS-NG) at agencies already within the scope of our review, and verified the absence of justifications with agency contracting officials. As stated in the report, Section 811 of the NDAA for Fiscal Year 2010 did not require agencies to implement the new justification requirement until it was implemented in the FAR.

To determine the number of 8(a) sole-source contracts over \$20 million awarded in the last several years, we analyzed contract data from FPDS-NG for contracts awarded from October 1, 2007, through March 31, 2012. We took several measures to assess the reliability of this FPDS-NG data:

- We selected nine additional contracts to review for data reliability purposes. Among the 13 contracts identified in FPDS-NG as having values between \$19.5 million and \$20 million, we selected a judgmental sample of seven to review, including four contracts awarded by one Army Corps of Engineers contracting office worth exactly \$20 million each. For these contracts, we reviewed information in the contract files to determine the anticipated total value of the contract at the time of award, and confirmed that all were equal to or under \$20 million and thus not subject to 8(a) justification requirements.
- In addition, we conducted a statistical analysis of 8(a) sole-source contracts with a total value of less than \$19.5 million, identifying contracts with high levels of correlation with characteristics of high-

value 8(a) sole-source contracts, such as contract type and the type of service provided. Based on this analysis, we selected two additional contracts at entities already included in our review and reviewed relevant contract files to verify their value, and confirmed that both were under the \$20 million threshold.

- We also calculated total obligations as of March 31, 2012, on the contracts in this data set as a further check against inaccuracies in the *Base and All Options* data element in FPDS-NG.¹
- Finally, we checked the data reported in FPDS-NG against information gathered in reviews of contract files for 14 contracts over the \$20 million threshold awarded after March 16, 2011, as discussed below.

We determined that the data for this period was sufficiently reliable to identify contracts that were subject to the 8(a) justification requirements and describe their characteristics.

To determine the extent to which agencies have implemented the new justification requirement, we identified and reviewed all 14 relevant contracts that were awarded between the FAR implementation date of March 16, 2011, and March 31, 2012. We took the following steps to identify these contracts:

- Most of the relevant contracts were identified using the *Base and All Options* data element in FPDS-NG. We initially identified 14 sole-source 8(a) contracts with values over \$20 million.
- During reviews of the contract files, we determined that 3 of the 14 contracts identified in our FPDS-NG analysis did not meet criteria for the justification requirement and eliminated them from our review. One Army contract was eliminated because its reported value of \$99 billion was erroneous, and its actual value was below \$20 million. The Army has taken steps to correct this information. We found that another Army contract was not a new award, but rather an administrative action taken for accounting purposes; the underlying contract was awarded prior to implementation of the justification requirement. We also eliminated an Office of Personnel Management

¹The *Base and All Options* data element in FPDS-NG is defined as the total contract value agreed upon by the government and the firm performing the contract, including the value of any contract options.

contract that was awarded competitively, despite being reported in FPDS-NG as 8(a) sole-source.

- To compensate for any errors in the *Base and All Options* data element, we also calculated cumulative obligations for all 8(a) sole-source contracts awarded during the same period. Based on this analysis, we identified one additional DOD contract, awarded by the Army. A review of the contract file confirmed that its value was over \$20 million.
- Finally, in the course of our review, we identified two additional contracts through other means. One contract was identified by State Department officials when we inquired about 8(a) sole-source contracts over \$20 million. The other, an Army contract, was identified through references to it in a related contract file.

Of the 14 contracts that we identified as meeting the criteria for the justification requirement, 8 were awarded by DOD and the rest by the General Services Administration and the Departments of the Interior, Justice, and State. We reviewed these contract files to determine if justification documents were present and assess whether the justifications complied with FAR requirements. We also reviewed other contract documents, including Small Business Administration (SBA) coordination records, acquisition plans, price negotiation memorandums, and award memorandums. We reviewed policy documents related to implementation of the justification requirement. We also interviewed contracting and policy officials at the relevant organizations regarding acquisition histories of the contracts and policies and practices related to the justification requirement.

In addition, we also reviewed a contract awarded by DOD's Washington Headquarters Service that was not subject to the justification requirement. It was identified for review because it had obligations of more than \$20 million. A review of the contract file revealed that the contract was valued below \$20 million at the time of award, thus it was not included among the 14 contracts discussed above.

The organizations with contracts in our review, including those reviewed for data reliability purposes, were as follows:

- Department of Defense
 - Joint Base Elmendorf-Richardson, Alaska
 - Naval Surface Warfare Center, Dahlgren, Virginia
 - Peterson Air Force Base, Colorado
 - Redstone Arsenal Army Base, Alabama

- Robins Air Force Base, Georgia
- Space and Naval Warfare Systems Command, Systems Center Pacific, San Diego, California
- U.S. Army Corps of Engineers Norfolk District
- U.S. Army Corps of Engineers Sacramento District
- U.S. Army Corps of Engineers Tulsa District
- U.S. Army Contracting Command, Natick, Massachusetts
- Washington Headquarters Service, Washington, D.C.
- General Services Administration, Federal Acquisition Service Region 8, Denver, Colorado
- Department of the Interior, Acquisition Services Directorate, Reston, Virginia
- Department of Justice, Drug Enforcement Administration, Arlington, Virginia
- Department of State, Office of Acquisition Management, Arlington, Virginia

Additionally, we interviewed SBA officials regarding their interpretation of the FAR rule implementing the 8(a) justification requirements and measures the agency has taken or plans to take to comply with this change. We also reviewed SBA 8(a) program regulations.

We conducted this performance audit from April 2012 to December 2012 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.

Appendix II: 8(a) Sole-Source Contracts over \$20 Million, by Agency, Awarded between October 28, 2009, and March 31, 2012

Agency		Number of contracts awarded	Total FPDS-NG base and all options
Department of Defense	Air Force	2	\$108,844,765
	Army	33	\$1,524,984,859
	Navy	12	\$512,008,819
	Other DOD	3	\$100,350,371
Department of Energy		2	\$65,000,000
General Services Administration		3	\$143,548,493
Department of Health and Human Services		4	\$490,000,000
Department of the Interior		5	\$119,278,706
Department of Justice		3	\$661,868,723
Office of Personnel Management		1	\$27,334,361
Department of State		3	\$112,212,480
Department of Transportation		1	\$30,000,000
Total		72	\$3,895,431,576

Source: GAO analysis of FPDS-NG data.

This table summarizes the number of contracts and reported value awarded by agency between October 28, 2009—the date of enactment for the National Defense Authorization Act for Fiscal Year 2010—and March 31, 2012, the date of the most current data available at the time of our review.

Appendix III: Comments from the Small Business Administration



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

December 5, 2012

Ms. Michele Mackin
Acting Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Re: Report on Justifications for 8(a) Sole-Source Contracts

Dear Ms. Mackin:

Thank you for the opportunity to respond to the draft report prepared by the Government Accountability Office (GAO) titled "Federal Contracting: Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts," report number GAO-13-118.

In your report you recommend that SBA include instructions to Business Opportunity Specialists and the steps they are to take to confirm whether agencies have met the justification requirement, such as obtaining a copy of the justification; and, include instructions to confirm that procuring agencies have prepared an 8(a) justification rather than a CICA justification.

In this regard, the FAR states,

6.303-1 Requirements.

(b) The contracting officer shall not award a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$20 million unless—

- (1) The contracting officer justifies the use of a sole-source contract in writing in accordance with 6.303-2;
- (2) The justification is approved by the appropriate official designated at 6.304; and
- (3) The justification and related information are made public after award in accordance with 6.305.

Additionally, Part 19 of the FAR states,

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds \$20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.


Based on the forgoing it is difficult to interpret that the FAR requires SBA to verify the existence of the J&A or the type completed. The burden is on the procuring agency to make sure that the appropriate J&A is in place. If ultimately it is determined that the procuring agency contract file does not contain a J&A then it is the agency's responsibility to address the missing document and explain whether or not it followed the proper procedures.

Appendix III: Comments from the Small
Business Administration

To ensure procuring agency adherence to this requirement, SBA will modify its Partnership Agreements to incorporate a requirement that for any sole source contract exceeding the \$20 million threshold offered to SBA for award under the 8(a) Business Development Program, the Contracting Officer must certify that the required J&A has been completed. In addition, we will also share the new FAR requirement with the Small Business Procurement Advisory Council and the Chief Acquisition Officers Council in our next meetings with them.

We thank you for the opportunity to provide comments to this report.

Sincerely,



A. John Shoraka
Associate Administrator

Office of Government contracting and Business Development

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

Michele Mackin, (202) 512-4841 or mackinm@gao.gov

Staff Acknowledgments

In addition to the person named above, Tatiana Winger, Assistant Director; Pamela Davidson; Danielle Green; Georgeann Higgins; Julia Kennon; Teague Lyons; Kenneth Patton; Dae Park; Jungjin Park; Sylvia Schatz; and Roxanna Sun made key contributions to this report.

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