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February 8, 2013

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

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

Subject: *DOD's Implementation of Justifications for 8(a) Sole-Source Contracts*

The conference report accompanying the National Defense Authorization Act (NDAA) for Fiscal Year 2012 directed GAO to assess the Department of Defense's (DOD) implementation of a new requirement for written justifications of sole-source contracts over \$20 million awarded under the Small Business Administration's 8(a) program.¹ The 8(a) 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. For example, DOD may award 8(a) sole source contracts to firms owned by Alaska Native Corporations and Indian tribes.

Section 811 of the 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 sole-source 8(a) awards over \$20 million. The requirement was implemented in the FAR on March 16, 2011. Previously, no justification was required for sole-source 8(a) awards of any amount. 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.

GAO's assessment of DOD's implementation of the justification requirement was to be provided no later than 90 days after DOD submitted a March 1, 2012, report to Congress on the subject. DOD did not meet the March date, issuing the report on November 12, 2012.

¹H.R. Rep. No. 112-329 (2011), at 675-676 (Conf. Rep.). See *Under Secretary of Defense for Acquisition, Technology and Logistics, Report to Congress on the Implementation of Section 811 of the National Defense Authorization Act for Fiscal Year 2010* (Washington, D.C.: Nov. 12, 2012).

In December 2012, we issued a report that reviewed government-wide implementation of this new justification requirement, including DOD's implementation activities.² Our findings on DOD's implementation, discussed below, are drawn from this recently completed review. As agreed with your staff, this report addresses (1) the number of sole source 8(a) contracts over \$20 million DOD has awarded in the period since the justification requirement was enacted in October 2009, and (2) the extent to which DOD has implemented the new justification requirement since it was incorporated into the FAR in March 2011.

To address these objectives, we drew on audit work conducted at DOD during our government-wide review. To determine the number of 8(a) sole-source contracts over \$20 million awarded by DOD since enactment of the justification requirement, we obtained and analyzed data from the Federal Procurement Data System-Next Generation (FPDS-NG) from October 28, 2009 to September 30, 2012 to identify relevant contracts. 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 data for this period were sufficiently reliable to identify contracts that were subject to the 8(a) justification requirements. To assess the extent to which DOD has implemented the justification requirement, we used the results of contract file reviews conducted at DOD during our government-wide review. For that report, we primarily used FPDS-NG data to identify all reported sole-source 8(a) contracts over \$20 million awarded by DOD between the implementation of the justification requirement in the FAR on March 16, 2011 and March 31, 2012, the most recent data available at the time we conducted our government-wide 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. For further details on our scope and methodology, see appendix I of our December 2012 report.³

We conducted this performance audit from December 2012 to February 2013 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.

In summary, we found that DOD awarded 51 sole source 8(a) contracts over \$20 million between October 2009 and September 2012. As we reported in our December 2012 government-wide review, DOD awarded eight sole-source 8(a) contracts worth over \$20 million from March 16, 2011, when the requirement was implemented in the FAR, through March 31, 2012, the most recent data available at the time of our review. Of the eight, six contracts did not meet the new justification requirement because contracting officials were not aware of the requirement or because they were confused about the type of justification to complete.

²GAO, *Federal Contracting: Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts*, GAO-13-118 (Washington, D.C.: Dec. 12, 2012).

³GAO-13-118.

DOD Awarded 51 Sole-Source 8(a) Contracts over \$20 Million between October 2009 and September 2012

According to FPDS-NG data, DOD awarded 51 contracts that had a reported value of more than \$20 million in the period from the October 28, 2009, the enactment date of the statute requiring the 8(a) justification requirement, through September 30, 2012.⁴ As shown in table 1, the Army awarded the majority of the contracts, which also represent the majority of dollars.

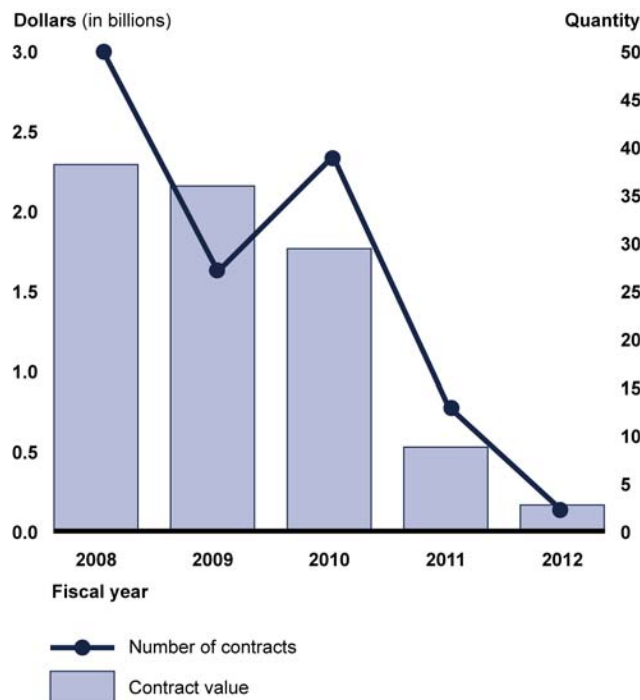
Table 1: 8(a) Sole-Source Contracts over \$20 Million, by DOD Component, Awarded between October 28, 2009, and September 30, 2012

DOD component	Contract value	Number of contracts
Air Force	\$108,844,765	2
Army	1,604,984,859	34
Navy	512,008,819	12
Other DOD	100,350,371	3
Total	\$2,326,188,813	51

Source: GAO analysis of FPDS-NG data

In addition, the number of 8(a) sole source contracts over \$20 million at DOD declined significantly from fiscal year 2008 through fiscal year 2012, as shown in figure 1.

Figure 1: Number and Total Value of DOD 8(a) Sole Source Contracts over \$20 million Awarded From Fiscal Year 2008 through Fiscal Year 2012



Source: GAO analysis of FPDS-NG data.

⁴Many 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.

Six of Eight DOD Contracts Did Not Meet the New Justification Requirement

As we reported in our December 2012 government-wide review, from March 16, 2011, through March 31, 2012, DOD awarded eight sole-source 8(a) contracts worth over \$20 million. Only two of those contracts—both awarded by the Air Force—included the new required 8(a) justifications. The DOD components awarding the remaining six contracts did not comply with the requirement, either because they were not aware of the requirement and did not prepare a justification, or because they were confused and prepared an incorrect type of justification.

- 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.
- Three contracts awarded by the Army also lacked 8(a) justifications because contracting officials were not aware of the justification requirement. In one of these cases, 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.
- In the two remaining cases, contracting officials were aware of the new 8(a) justification requirement, but did not correctly implement it due to confusion about what the FAR requires. For these two contracts, both awarded by the Army, officials determined that their contracts were subject to the new justification requirement, yet they prepared justifications required for sole source contracts awarded under the Competition in Contracting Act of 1984, rather than justifications required for 8(a) contracts over \$20 million. The justifications required for 8(a) contracts must address five specific elements, including a determination that the use of a sole-source contract is in the best interest of the agency.

Prior GAO Recommendations

In our December 2012 report, we made recommendations to the Administrator of the Office of Federal Procurement Policy to promulgate guidance to clarify the circumstances in which an 8(a) justification is required to help mitigate future confusion. We are not making any additional recommendations to DOD.

Agency Comments

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

We are sending copies of this report to the Secretary of Defense and interested congressional committees. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

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; Pamela Davidson; Julia Kennon; Teague Lyons; and Sylvia Schatz.

A handwritten signature in black ink that reads "Michele Mackin". The signature is written in a cursive, flowing style.

Michele Mackin
Acting Director
Acquisition and Sourcing Management

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