WHITE PAPER: Restore Follow-On Sole-Source Contacts
Providing Contracting Officers Contracting Options

NACA Policy: NACA strongly contends that the current 15 CFR 124.109 limitation prohibiting a follow-on contract to another 8(a) Participant owned by the same tribe, hurts the Government as well as tribes, by not allowing contracting officers, working with the Small Business Administration (SBA), to use firms which understand and are meeting the contracting agency's performance requirements and mission needs.

Ask: NACA requests SBA amend 13 CFR 124.109(c)(3)(ii) to allow tribally-owned firms to receive an 8(a)-sole source contract that is a follow-on contract to an 8(a) contract that was performed previously by another participant owned by the same Tribe.

Abstract: Because of the need for more competitive awards, the establishment and expectation of meeting small business contracting goals, and the appropriations uncertainties that result from ongoing Continuing Resolutions that are now the "norm," new procurement strategies have established a changed landscape. Large sole source awards above the $22M threshold established in FAR Part 6 for 8(a) firms are extremely rare, if non-existent. Instead, smaller sole source awards are being awarded, and the larger sole source contracts are being awarded using other FAR Part 6 justifications to qualified and capable firms. The SBA stated in a February 2011 commentary that Congress had specifically authorized Tribal and ANC ownership of multiple firms in the SBA 8(a) Business Development program because "such ownership serves a broader purpose than mere business development." NACA believes that the regulation regarding follow-on contracts has restricted tribes in their mission to their citizens/shareholders and restricted agencies from fully meeting their performance requirements and mission needs.

When SBA updated 13 CFR 124 in 2011, it was the first significant change to the SBA regulations in 10 years. It reflected, in significant part, Congress' concern over the additional advantages that had been granted to Tribal and Alaska Native Corporation (ANC) firms in statute during that time, brought to light by real and perceived abuses of those additional advantages.

That period also saw the beginning of a stress on securing more contracts through competition, and clamping down on sole source awards that had been prevalent and widely used by contracting officers. Section 811, of the 2010 National Defense Authorization Act (NDAA), has stood as "Mile Marker 0" to Native Corporations of the significant downturn of sole source awards over $20 (now $22) million. FPDS data shows the decline in overall sole source awards to Native companies continues to decline, from a total of $1.1B in 2013, to only $403.2M in 2016. However, when sole source awards were in their "prime" in the late '90s to early 2000's, it was not unusual to see sole source awards of $100M or more.

Given those conditions, Congress held numerous hearings, GAO was tasked with several reports, and the media published critical articles questioning the benefit realized by ANC shareholders given these large contract awards. Questions arose about the ease that large 8(a) sole source awards rolled over from one sister subsidiary to another within a parent corporation, and how that unfairly limited business development opportunities across the broad spectrum of qualified Native 8(a) firms.

Because of the need for more competitive awards, the establishment and expectation of meeting small business contracting goals, and the appropriations uncertainties that result from ongoing Continuing Resolutions now the norm, new procurement strategies have established a new landscape. Large sole source awards above the $22M threshold established in FAR Part 6 for 8(a) firms are extremely rare, if non-existent. Instead, smaller sole source awards are being awarded and the larger awards once the norm for Native firms (for requirements which NACA maintains the need still exists), are likely being awarded under other FAR Part 6 justifications to qualified and capable firms.

Native companies have adjusted and data will show that they are receiving competitive awards – 8(a) set aside, total small business, and even full-and-open -- as testimony to their capabilities and past

performance. As a result, NACA strongly contends that the current 15 CFR 124.109 limitation now hurts the contracting agency in not allowing the contracting officer, in working with SBA, to use a firm which understands and is meeting the agency's performance requirements and mission needs. Moreover, the sole source process allows for a quick negotiation of a contract, to include labor rates, to meet a need in a timelier fashion, reducing the acquisition costs associated with securing a new contract. Also, given the present Administration's direction to reduce the federal workforce, the present hiring freeze is projected to impact timely acquisition and procurement given personnel shortfalls as departments adjust their priorities. Finally, a sister subsidiary can take advantage of lessons learned from an incumbent subsidiary, to continue not only to the level of performance expected, but of impact to the Tribe/ANC, allow them to sustain a qualified workforce particularly where that workforce is composed largely of Tribal citizens or ANC shareholders.

Background: In February 2011, the SBA issued new and updated existing regulations that were designed to prohibit certain behaviors by businesses participating in the 8(a) program. The updated regulations precluded sister firms from receiving follow-on, sole-source contracts performed immediately previously by a sister subsidiary of the same parent Tribe/ANC (76 Fed Reg 8222, dated Feb 11, 2011). In explaining its position, the SBA noted:

… when SBA certifies two or more firms owned by a Tribe or ANC for participation in the 8(a) BD program, SBA expects that each firm will operate and grow independently. The purpose of the 8(a) BD program is business development. Having one business take over work previously performed by another does not advance the business development of two distinct firms.

The SBA went on to state that it did not (italics added for emphasis):

… believe that a Tribally-owned or ANC-owned firm should be able to perform a specific 8(a) contract for many years and then, when it leaves the 8(a) BD program, to pass that contract on to another 8(a)-firm owned by the Tribe or ANC. In such a case, the negative perception is that one business is operating in the 8(a) BD program in perpetuity by changing its structure or form in order to continue to perform the contracts that it has previously performed. SBA seeks to address this concern without unduly restricting a Participant's ability to grow and diversify.

As a result, 13 CFR 124.109(c)(3)(ii) currently states:

A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard.

SBA Management of Follow-On Contract Awards. GAO-16-113, "Alaska Native Corporations, Oversight Weaknesses Continue to Limit SBA's Ability to Monitor Compliance with 8(a) Program Requirements," dated March 2016, concluded after a review of a sample size of 30 "large-value contracts" (i.e., contracts valued at more than $150,000, which would require SBA notification), they "did not identify any contracts that were also follow-on, sole-source contracts" between the years 2011 through 2014. Further, they were unable to determine, without a more "detailed review" of 102 contracts initially identified in FPDS as potential follow-on, sole source contracts were, in fact, awarded as follow-on contracts to a sister subsidiary.

The GAO found both in this report and past reports that the SBA's ability to enforce this regulation relied on information provided by other federal agencies, which is often incomplete. The report also stated that "GAO's analysis of a selection of contracts for this review found that agencies are not required to directly

identify whether a sole-source contract is also a follow-on contract" in offer letters. And although the SBA has begun to address this limitation, the request to agencies to specifically identify follow-on sole-source awards in the letter has not been broadly adopted.

SBA monitors entity-owned 8(a) companies through their annual updates to determine if the follow-on contracts are being misused. If the follow-on contract results in two Participants owned by the same tribe having the greatest portion of their total revenues in the same NAICS code, then the SBA has a mechanism to manage this disparity.

Acquisition Workforce Shortfall. In a July 29, 2016 report RA 4578, "The Department of Defense Acquisition Workforce: Background, Analysis, and Questions for Congress," the Congressional Research Service found:

The increase in the size of the workforce has not kept pace with increased acquisition spending. Per DOD, from 2001 to 2015, the acquisition workforce increased by some 21%. Over the same period, contract obligations (adjusted for inflation) increased approximately 43%. While this increase in spending does not necessarily argue for increasing the size of the workforce, according to DOD officials, the increased spending has also corresponded to an increase in the workload and complexity of contracting.

Hiring Freeze Impact. The Federal Civilian hiring freeze, instituted by Presidential Memorandum on January 23,2017, will likely impact timely acquisition and procurement given workforce shortfalls as departments adjust their priorities. The anticipated shift in acquisition personnel numbers is expected to exacerbate this overload problem. The sole source process allows for a quick negotiation of a contract, to include labor rates, to meet an agency's need in a timely fashion, reducing the acquisition costs associated with securing a new contract.

Eliminating the unmandated restriction on sole-source contracts would benefit the Government. This will allow contracting officers to determine when a follow-on sole source is in the best interest of the government and meets the procurement needs of the procuring agency.

Update: NACA has consulted with the SBA Counsel to develop a change to 13 CFR 124.109(c)(3)(ii) to allow Tribally-owned firms to receive an 8(a)-sole source contract that is a follow-on contract to an 8(a) contract that was performed previously by another participant owned by the same Tribe when the contracting officer determines it is in the best interest and meets the procurement needs of the procuring agency. The SBA believes this to be possible; however, that the timing under the current SASC leadership would leave NACA politically vulnerable. NACA concurs, and has kept this engagement and discussion "low key" presently.