Native American Contractors Association

WHITE PAPER: Amend Section 811
Justification and Approval (J&A) for Direct Award Contracts

NACA Policy: NACA strongly contends that the J&A mandated in Federal Acquisition Regulation (FAR) 6.303-2(d)(3) has been misinterpreted in policy to require that any 8(a) sole-sole contract award over $22M requires review and approval by the head of the agency. This policy severely restricts the use of this award option by contracting officers to any qualified and capable firm – especially Native community-owned enterprises.

Ask: Standardize J&A review and approval requirements consistent with existing statute FAR 6.304, so that the level of review and approval is commensurate with contract risk and value. A coalition of NACA, NCAI, ANCSA Regional Association, and the ANVCA has agreed to compromise legislation to meet this request.

Abstract: The implementation of a J&A process mandated by Section 811 in the 2010 National Defense Authorization Act (NDAA), resulted in a significant decline in the number of direct, sole-source contract awards to Native-owned entities. This decline negatively impacted Native communities and their ability to grow their economies. The central issue is that the review and approval of J&As for 8(a) sole source awards over $22M has been elevated to the head of agency through policy, inconsistent with existing and governing statute.

Background: Relevant GAO reports released since the provisions of Section 811 were incorporated into statute have concluded that the number of 8(a) sole-source awards over $22M has declined. These same reports stop short of clearly specifying that the 8(a) J&A or which of its provisions were responsible for the decline. While additional factors outside the J&A may have contributed to the decline, the correlation of the negative impacts of the J&A cannot be dismissed. NACA believes the issues that have arisen from the J&A have less to do with the actual J&A, but rather a lack of clarity during implementation. Without clear guidance, agencies and their contracting officers have interpreted the regulations to the best of their ability, resulting in a lack of uniformity, and extensive effort on the part of agencies to achieve uniformity.

One result of this lack of uniformity is that contracting officers have shied away from awarding sole-source contracts that exceed $22M to otherwise qualified and capable Native firms. Instead of being a threshold for requiring an approval, $22M has served as cap.

Moreover, elevating all sole source awards over $22M to review and approval by the head of agency would cause steep delays in the awarding of the contract. Such contracts are issued in part because an agency has a need that must be filled expeditiously. Given the mission need, contracting officers were seeking alternative means to satisfy their requirements.

Any J&A process required for small businesses should be given careful consideration so that it is not discriminatory against any class of business owner, but rather to promote effective and efficient federal procurement system. As a matter of “good government,” NACA maintains that the 5-step J&A for 8(a) contracts – which NACA helped to author -- is very much preferred over the 12-step J&A mandated by the Competition in Contracting Act (CICA). The 12-step J&A isaimed at the large original equipment manufacturer (OEM) firms, whereas the 5-step was designed with smaller 8(a) firms in mind.

Update: Engagement on Capitol Hill has been tabled until future consideration by the NACA Board.