

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Subcommittee on Contracting and Workforce

From: Committee Staff

Date: March 15, 2015

Re: Hearing: "Contracting and the Industrial Base III: Reverse Auctions, Verification and the SBA's Role in Rulemaking"

On Thursday, March 19, 2015, at 10:00 am, in Room 2360 of the Rayburn House Office Building, the Subcommittee on Contracting and Workforce of the Committee on Small Business will meet for the purpose of receiving testimony on barriers to the maximum practicable utilization of small businesses to support the industrial base. This is one in a series of hearings expected to explore this topic. The March 19, 2015 hearing will focus on: 1) reverse auctions other than those auctions for construction services; 2) the Small Business Administration's (SBA) and Department of Veterans Affairs (VA) contracting programs for service-disabled veteran owned small businesses (SDVOSBs); and 3) SBA's ability to implement and enforce its statutory functions with regards to the small business contracting.

I. Reverse Auctions in Federal Acquisitions

a. Introduction

A reverse auction is a contracting process in which a buyer solicits bids from multiple sellers, in contrast to a standard auction where a seller solicits bids from multiple buyers. While the full Committee explored the use of reverse auctions for construction services contracts on February 12, 2015, this memorandum will look at systemic challenges with reverse auctions regardless of the good or service being purchased.¹ This Subcommittee previously looked at the misuse of reverse auctions during a December 11, 2013 joint hearing with the House Veterans' Affairs Committee (HVAC) Subcommittee on Oversight and Investigations (O&I).² That hearing

¹ Memorandum from Committee Staff to the Small Business Committee re: *Contracting and the Industrial Base; Hearing Before the Small Business Committee*, 114th Cong. (Feb. 12, 2015) (hereinafter "*Contracting and the Industrial Base I* Memorandum"), available at http://smallbusiness.house.gov/uploadedfiles/2-12-2015_hearing_memo.pdf (last visited Feb. 27, 2015).

² *Contracting Away Accountability – Reverse Auctions in Federal Agency Acquisitions; Hearing Before the House Veterans' Affairs Committee Subcommittee on Oversight and Investigations and the House Small Business Committee Subcommittee on Contracting and the Workforce*, 113th Cong. (Dec. 5, 2013).

explored the finding of a Government Accountability Office (GAO) report issued December 9, 2013.³

Reverse auctions first gained popularity in the late 1990s, as Internet-based technologies allowed potential vendors to underbid each other in real time. Since then, they have grown to account for nearly one percent of federal prime contract dollars awarded each fiscal year.⁴ While the Office of Federal Procurement Policy (OFPP) has been promising guidance on the use of reverse auction procurements since 2000, to date no guidance or regulations have been forthcoming, meaning that over \$828 million in procurements are awarded using a methodology never mentioned in the Federal Acquisition Regulation (FAR) or in statute.⁵ Instead, OFPP and the Office of Management and Budget (OMB) have encouraged the use of reverse auctions without offering guidance on how to best use this methodology.⁶ OFPP most recently agreed to issue guidance fifteen months ago, in response to the GAO report.⁷ On December 4, 2014, this Committee and HVAC sent a letter the OFPP Administrator encouraging action,⁸ but OFPP has not responded.

Since the 2013 Subcommittee hearing, the House Armed Services Committee included language in the National Defense Authorization Act (NDAA) for Fiscal Year 2015 (FY 2015) that sought to restrict the use of reverse auctions, both for construction services contracts and instances where the awards were noncompetitive.⁹ Ultimately, the President signed into law a provision that only affects the use of reverse auctions at the Department of Defense (DoD).¹⁰ While this bill limits the use of sole source contracts at DoD and requires that contracting officers receive training, it does not define reverse auctions or deal with many of the documented abuses of reverse auctions.¹¹ This memorandum will first look at issues reverse auctions pose for competition, and therefore the industrial base, and then will look at issues specific to the use of

³ GAO, REVERSE AUCTIONS, GUIDANCE IS NEEDED TO MAXIMIZE COMPETITION AND ACHIEVE COST SAVINGS (hereinafter GAO REVERSE AUCTIONS) GAO-14-108 (2013).

⁴ GAO, REVERSE AUCTIONS at 2.

⁵ Colleen O'Hara, "Reverse Auctions Move Forward," FEDERAL COMPUTER WEEK (Aug. 3, 2000) *available at* <http://fcw.com/articles/2000/08/03/reverse-auctions-move-forward.aspx> (last visited Feb. 27, 2015), quoting the OFPP Administrator as planning to "issue guidance to sharpen up the Federal Acquisition Regulation regarding reverse auctions."

⁶ See Robert Burton, Acting OFPP Administrator, "Utilization of Commercially Available Online Procurement Services" (May 12, 2004), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/procurement/publications/online_procurement_051204.pdf (last visited Feb. 27, 2015); Paul Denett, OFPP Administrator, "Effective Practices for Enhancing Competition" (Jul. 18, 2008), *available at* http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/enhancing_competition_071808.pdf (last visited Feb. 27, 2015); Jeffrey Zients, Deputy Director, OMB, "The Accountable Government Initiative" (Sept. 14, 2010) *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/AccountableGovernmentInitiative_09142010.pdf (last visited Feb. 27, 2015).

⁷ GAO, REVERSE AUCTIONS at 30.

⁸ Letter from Jeff Miller, Chairman, Committee on Veterans Affairs, and Sam Graves, Chairman, Committee on Small Business, to Anne Rung (Dec. 4, 2014), *available at* http://www.federalnewsradio.com/pdfs/joint_letter_with_HVAC.pdf (last visited Feb. 27, 2015).

⁹ Section 815 of H.R. 4435, 113th Congress (2014).

¹⁰ Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 § 824 (2014).

¹¹ *Id.*

third-party reverse auction providers and their relevance to the industrial base. Finally, the memorandum will discuss possible legislative solutions.

b. Competition

In FY 2012, the last year for which federal data is available, federal agencies awarded \$828 million in contracts using reverse auctions.¹² However, FedBid reports that it conducted \$425 million in transactions for the Department of Defense (DoD) in FY 2013.¹³ Likewise, another \$1.1 billion in reverse auctions were conducted by FedBid for civilian agencies in FY 2013.¹⁴ While this does not account for reverse auctions conducted by the General Services Administration (GSA) or by other third party providers, it indicates that the amount of reverse auctions dollars nearly doubled in one year to over \$1.525 billion. As such, it is clear that reverse auctions are increasingly important to how the government buys, and from whom those purchases are made.

While competition itself would reasonably be expected to reduce the price paid by the government – this is the foundation of our procurement system – competition is frequently absent or not meaningful in many reverse auctions. In FY 2012, over one-third of reverse auctions conducted for federal agencies had no interactive bidding, defined by GAO as “where vendors engage in multiple rounds of bidding against each other to drive prices lower.”¹⁵ In 27 percent of auctions, there was only one bidder and that bidder received the award.¹⁶ In contrast, the DoD policy in place at that time required that before issuing a contract when only a single bid was received, “[w]hen a solicitation is open for less than 30 days and only a single bid is received, the contracting officer should cancel and re-advertise the solicitation for a minimum of 30 additional days unless a waiver is obtained from the head of the contracting activity. When a solicitation is open for at least 30 days or has been re-advertised and only a single bid is received, the contracting officer should conduct negotiations with the offeror, unless a waiver is obtained by the head of the contracting activity.”¹⁷ No such competitive procedures were followed.

¹² GAO, REVERSE AUCTIONS at 6. GAO reported that 99% were conducted by the same contractor, FedBid. FedBid is a Virginia company founded by Ali Saadat in 1999. In 2012, it secured “significant investment from Revolution Growth, a venture capital fund created by Steve Case, Ted Leonsis and Donn Davis.”

<http://www.fedbid.com/about/directors/> (last visited Feb. 27, 2015). Messrs. Case and Leonsis were the cofounders of AOL, and Mr. Leonsis is the owner of the Washington Wizards and Capitals. FedBid’s Board of Directors includes General George Casey, Jr., former Army Chief of Staff, Mr. Leonsis, and Susan Bostrom, former CMO of Cisco. *Id.* Their list of advisors includes former political appointees of Presidents Clinton and George W. Bush, generals, admirals, and Members of Congress. <http://www.fedbid.com/about/advisors/> (last visited Feb. 27, 2015). The current CEO is a former OFPP Administrator.

¹³ <http://www.fedbid.com/buyers/departement-of-defense/> (last visited Feb. 27, 2015). It states that 85 percent of these awards are to small businesses. *Id.*

¹⁴ <http://www.fedbid.com/buyers/federal-civilian> (last visited Feb. 27, 2015).

¹⁵ GAO, REVERSE AUCTIONS at 16.

¹⁶ *Id.* at 16-17.

¹⁷ Memorandum from Shay Assad, Director Defense Procurement and Acquisition Policy “Improving Competition in Defense Procurements” (2011) available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf> (last visited Feb. 27, 2015).

However, additional problems were found with the competition of these awards. In eight percent of awards there were multiple bidders but only one round of offers – essentially, this was a sealed bid procurement.¹⁸ However, agencies paid \$3.9 million in fees for these procurement services.¹⁹ Perhaps even more problematic is the fact that for over 3,600 reverse auctions, \$1.7 million in fees was paid even though only one offer was received from one bidder – thus, in addition to lacking competition for the actual award, the government paid extra to award a sole source contract.

Approximately 80 percent of the dollars awarded using reverse auctions were under \$150,000, and 86 percent of the contracts were awarded to small businesses.²⁰ According to the Small Business Act, all contracts between \$3,000 and \$150,000 are exclusively reserved for small businesses, provided that there are two or more small businesses able to provide the good or service at a fair and reasonable price.²¹ Further, in cases where the contract exceeds \$150,000, if two or more small businesses are able to compete for the contract, it is to be set aside for small business. Therefore, the lack of adequate competition on these contracts was most likely to harm small businesses. Furthermore, given that items purchased using reverse auctions are supposed to be commercially available and not complex, one question is, why are all of these procurements not reserved for small businesses? Indeed, the Chief Counsel for Advocacy of the Small Business Administration (SBA Advocacy) sent a letter to OFPP stating that “some Federal agencies using reverse auctions may not be complying with the simplified acquisition threshold requirements for contracts to be reserved for small businesses.”²² Thus, the inappropriate use of reverse auctions is harming the small business industrial base.

c. The Use of Third Party Providers

The inappropriate use of third party providers may also pose a challenge to the industrial base. Before proceeding with this discussion, it is important to note that it is the federal government, and ultimately the contracting officer, that is responsible for the conduct of a third party reverse auction provider under its direction. As the largest third party provider of reverse auctions, FedBid has come under scrutiny as of late. However, while allegations have been made regarding FedBid’s conduct, the actions the company took in the award of contracts were permitted by the contracting agency, so this memorandum will focus on what the federal contracting agency permits.

Because the federal procurement system is complex and involves obligating the federal government, under the Federal Acquisition Regulation (FAR), an action should be undertaken only by a federal employee if it could “[b]ind the United States to take or not to take some action by contract,” “[d]etermine, protect, and advance United States . . . interests by contract management,” or “[e]xert ultimate control over the acquisition, use, or disposition” of property or funds.²³ While third party providers do not award contracts, the third party is in a position of

¹⁸ GAO, REVERSE AUCTIONS at 16-17.

¹⁹ *Id.*

²⁰ *Contracting and the Industrial Base* Memorandum

²¹ Section 15(j)(1).

²² Winslow Sargeant, *Impact of Reverse Auctions on Small Businesses* (2012), available at <http://www.sba.gov/advocacy/816/42071> (last visited Feb. 27, 2015).

²³ FAR § 2.101; see also FAR § 7.5.

exercising functions closely associated with inherently governmental activities. For example, according to discussions with FedBid, any questions a vendor may wish to pose to a contracting officer must be submitted through FedBid. Likewise, FedBid states that it keeps independent past performance records on vendors, including information regarding their creditworthiness, which it shares with the government but does not share with the vendors.²⁴ FedBid also reports that agencies allow it to bar a vendor from receiving an award if FedBid and the vendor are in a dispute over fees the vendor allegedly owes to FedBid.²⁵ Finally, FedBid states that agencies permit it to tell an offeror that its offer is lagging in order to induce a lower bid, when in fact there is no lower bid.²⁶

Each of these statements poses a challenge to the industrial base permitted by the contracting agency. Requiring that vendors speak to contractors rather than the government means that the information they receive regarding the government's needs is filtered, and that the contracting officer may not learn about the needs of the vendor community. Keeping separate performance and financial responsibility files excludes companies from successfully competing for offers. Barring a company over a private dispute again limits competition on merely the assertion of a contractor. Misleading a vendor over pricing builds distrust in the vendor community and causes businesses to opt out of the federal marketplace. All of these items ultimately harm the industrial base. The fact that the actual award is signed by a contracting officer may not mitigate the private sector intrusion into all of the inherently governmental aspects of the process.

d. Potential Legislative Solutions

Before the Subcommittee is draft legislation that seeks to remedy the harms unfettered reverse auctions may cause to the industrial base. The legislation provides a definition of reverse auctions and outlines restrictions on when reverse auctions may be used. The Subcommittee welcomes testimony on this legislation.

II. Challenges for Service-Disabled Veteran-Owned Small Businesses

a. Introduction

SDVOSBs received over \$12 billion in federal prime contracts in fiscal year 2013.²⁷ Over a quarter of those dollars were awarded by the VA.²⁸ However, lest this be seen as only a VA issue, it is worth noting that over \$6 billion in SDVOSB prime contracts were awarded by DoD.²⁹ Therefore, the government needs to ensure that these dollars are spent with eligible

²⁴ FAR § 15.306. Further, if a contracting officer determines that a small business's past performance make it unsuitable for award, it should refer that business to the Small Business Administration for review. FAR § 19.6.

²⁵ Committee staff conversations with Joe Jordan, CEO of Fed Bid, on November 6, 2014. The Committee has since received documentation of this statement from a third party whose bid was not allowed.

²⁶ Committee staff conversations with Joe Jordan, CEO of Fed Bid, on November 6, 2014.

²⁷ https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf (last visited Feb. 27, 2015).

²⁸ https://www.sba.gov/sites/default/files/files/FY13_VA_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf (last visited Feb. 27, 2015).

²⁹ https://www.sba.gov/sites/default/files/files/FY13_DoD_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf (last visited Feb. 27, 2015).

firms, and that the benefit of the SDVOSB contracting programs is enjoyed by legitimate service-disabled veterans (SDVs). This is crucial to attracting SDVOSBs to the federal marketplace in order to strengthen the industrial base.

To that end, both the SBA and the VA operate procurement programs for SDVOSBs. The SBA program applies to procurements at all agencies other than VA, whereas the VA program applies only to VA contracts. While both programs apply nearly identical statutory definitions of a SDVOSB, during a March 19, 2013 hearing, this Subcommittee and the Subcommittee on Oversight and Investigation of the House Committee on Veterans' Affairs received testimony that the statutory discrepancy of the definitions and resultant implementation at each agency is resulting in disparate decisions on program eligibility.³⁰ While this memorandum will briefly discuss the statutory differences between the programs as well as the regulatory and interpretative differences between the programs, it will not go into the same level of detail as the March 12, 2013 joint memorandum.³¹ Instead, it will focus on proposed legislative solutions to the problem.

b. Statutory Differences in the SDVOSB Contracting Programs

The Veterans Benefits Act of 2003 (VBA) amended the Small Business Act to create a government-wide procurement program for small businesses,³² while the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBHCITA) created the SDVOSB contracting program at VA.³³ The statutory foundations of the two SDVOSB programs vary in three principal ways. First, the definition of a SDVOSB is slightly different. Second, the scope of the contracts to be awarded differs. Finally, the relationship between the SDVOSB program and other small business contracting programs is different.

With a few important exceptions, the VBA and the VBHCITA use the same definitions, relying on the VA's definitions of veteran or service-disabled veteran (SDV) to determine whether an individual qualifies for the program, and using the Small Business Act definitions of small business.³⁴ This is eminently sensible, as it entrusts to each agency that which the agency has the most experience defining. The only difference occurs when the two concepts are combined in an attempt to define SDVOSBs. Both statutes agree that the term means a small business concern that is at least 51 percent owned by one or more SDVs or, in the case of any publicly owned

³⁰ *Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses, Hearing Before the Committee on Small Business Subcommittee on Contracting and Workforce*, 113th Cong. (Mar. 19, 2013).

³¹ Memorandum from Committee Staff to the Subcommittee on Contracting and Workforce, Committee on Small Business, Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs re: *Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses*, 113th Cong. (Mar. 12, 2013), (hereinafter "*Consistently Inconsistent Hearing Memorandum*"), available at http://smallbusiness.house.gov/uploadedfiles/3-19-2013_jt_hearing_revised_memo.pdf (last visited Feb. 27, 2015).

³² Pub. L. No. 108-183, Title III, § 308, 117 STAT. 2662 (2003) (codified at 15 U.S.C. §657f).

³³ Pub. L. No. 109-461, 120 STAT. 3431 (2006) (codified at 38 U.S.C. §§8127-8128). The VBHCITA also create a set-aside program for Veteran-Owned Small Businesses (VOSBs). While there is only a subcontracting goal for VOSBs under the Small Business Act, the certification issues described herein are generally applicable to VOSBs except for the lack of a prime contracting certification process at SBA.

³⁴ Section 3(q) of the Small Business Act defines "veteran" in accordance with 38 U.S.C. § 101(2) and service-disabled veteran is defined per 38 U.S.C. § 101(16). VBHCITA adds the definition of small business found in Section 3(a) of the Small Business Act to 38 U.S.C. § 8127(k)(1).

business, not less than 51 percent of the stock of which is owned by one or more SDVs.³⁵ However, there are three critical differences. First, the VBA, but not the VBHCITA, explicitly extends benefits “in the case of a veteran with permanent and severe disability, [to] the spouse or permanent caregiver of such veteran.”³⁶ The discrepancy regarding permanent caregivers is addressed by VA in its regulations, which extends rights to these individuals.³⁷ Second, the VBHCITA, but not the VBA, allows the surviving spouse of a veteran to continue participating as a SDVOSB for up to ten years if, after the death of a veteran, the surviving spouse of such veteran acquires ownership rights.³⁸ Third, and perhaps most importantly for the scope of this hearing, the VBA permits self-certification by SDVOSBs, subject to protests, while the VBHCITA requires that VA maintain a database of SDVOSBs that are certified as such by the VA.³⁹

In addition to the differences in the applicable definitions, the scope of contracting authority between the two programs is slightly different. The VBA allows any federal agency to restrict competition to SDVOSB companies “if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by [SDVs] will submit offers and that the award can be made at a fair market price.”⁴⁰ If the contracting officer does not have a reasonable expectation that at least two SDVOSBs will submit offers, but the contracting officer believes that the award may be made to a responsible SDVOSB for a fair and reasonable price that does not exceed \$6.5 million in the case of a manufacturing contract or \$4 million for all other contracts, the contracting officer may award a sole source contract.⁴¹ Any company receiving a contract pursuant to this authority is limited in the amount that they can subcontract, so that a SDVOSB does not win the contract only to subcontract all of the work to a non-SDVOSB.⁴² The VBHCITA allows set-aside contracts under the same circumstances as the VBA, but does not restrict subcontracting and only allows sole source contract up to \$5 million.⁴³

Finally, the relationship between the SDVOSB contracting program and other contracting authorities differ between the government-wide program created by the VBA and the VA program created by the VBHCITA. The government-wide program treats each of the small business contracting programs as equal, and allows the contracting officer to choose the most appropriate program for any given contract.⁴⁴ However, VBHCITA gives preference to SDVOSBs before awarding contracts pursuant to the other contracting programs.⁴⁵

³⁵ Small Business Act, § 3(q)(2)(A); 38 U.S.C. § 8127(k)(2). *c.f.*, The VBHCITA actually requires that the service disabled veterans “are unable to manage the daily business operations of such concern,” but in regulation this has been interpreted to require the management of the daily business operations. 38 C.F.R. § 74.1.

³⁶ Small Business Act, § 3(q)(2)(B).

³⁷ 38 C.F.R. § 74.1.

³⁸ 38 U.S.C. § 8127(h).

³⁹ Small Business Act, § 36(q)(2)(B), 38 U.S.C. § 8127(f).

⁴⁰ 15 U.S.C. § 657f(b).

⁴¹ 15 U.S.C. § 657f(b). The statute provides dollar thresholds of \$5 million and \$3 million, respectively, but these have been adjusted for inflation pursuant to 41 U.S.C. § 1908.

⁴² Small Business Act, § 46.

⁴³ 38 U.S.C. § 8127(c)-(d).

⁴⁴ 15 U.S.C. § 637 note; *see* Committee on Small Business, “Small Business Act Programs for Small Federal Contractors” (2013) *available at*

http://smallbusiness.house.gov/uploadedfiles/small_business_act_programs_for_small_federal_contractors.pdf (*last*

While these three types of differences may seem minor, the result is that a firm may qualify as a SDVOSB at VA but not for a contract at another agency, or vice versa. As will now be discussed, this statutory divergence is only magnified through regulatory differences.

c. Regulatory and Interpretative Differences

The March 2013 memorandum provides a very detailed explanation of the regulatory and interpretative differences between the two SDVOSB programs, which exceed the differences that would be expected given the statutory discrepancies.⁴⁶ VA asserts that there are only three differences between the regulations: (1) VA allows surviving spouses to inherit limited benefits; (2) VA requires change of ownership notification; and (3) VA has a program for veteran-owned small businesses (VOSB).⁴⁷ Furthermore, VA stated that they were aware of only one interpretive difference in the application of the regulations, and that concerned a question of whether SDVs control a company with a three-person board if one SDV and one non-SDV could align against a second SDV.⁴⁸ Based on this, the conflict would appear minimal at best. However, SBA has stated “while it is true that the wording of the regulations pertaining to the VA’s and SBA’s eligibly [sic] requirements is similar, there are some key differences in interpretations.”⁴⁹

Rather than belabor these points, which are explained in the earlier memorandum, all of the differences appear to result from one key divergence between the programs.⁵⁰ Whereas VA looks for bright-line tests to determine eligibility, SBA adopts a more nuanced approach to cases that deviate from the norm. For example, VA will deny SDVOSB status if ownership in the entity carries with it the requirement that a right of first refusal to purchase the SDV’s ownership interest will be offered to another owner or third party.⁵¹ While SBA does consider agreements regarding transfer of ownership, it looks at each agreement to determine whether its terms mean that the SDV does not unconditionally control the company. Similarly, VA requires that at least one SDV who “manage[s] the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business.”⁵² SBA does not require this, as long as SDVs can prove actual ownership and control over day-to-day decisions.

Indeed, the regulatory and interpretive differences are being borne out by case law. Within SBA, any appeal regarding a firm’s size or status is heard by the Office of Hearings and Appeals

visited Feb. 27, 2015) [hereinafter “Small Business Act Programs”] for information on the other federal contracting programs.

⁴⁵ 38 U.S.C. § 8127(i).

⁴⁶ *Consistently Inconsistent* Hearing Memorandum 4.

⁴⁷ Comments of Tom Leney, Executive Director of the Veterans and Small Business Programs for VA, to VET-Force (Feb. 12, 2013).

⁴⁸ *Id.*

⁴⁹ GAO, VETERAN-OWNED SMALL BUSINESSES: PLANNING AND DATA SYSTEM FOR VA’S VERIFICATION PROGRAM NEED IMPROVEMENT 56 (2013) (GAO-13-95) [hereinafter PLANNING AND DATA].

⁵⁰ *Consistently Inconsistent* Hearing Memorandum 3-5.

⁵¹ VA, Verification Assistance Brief – Transfer Restrictions *available at* <http://www.va.gov/osdbu/veteran/transferRestrictionsBrief.asp> (last visited Feb. 27, 2015).

⁵² 38 C.F.R. § 74.4(c)(4).

(OHA), a body of administrative judges that provides final agency action through published decisions. Recently, OHA identified fourteen cases:

in connection with SDVO set-asides where (1) OHA determined the subject business concern was not small and thus was ineligible for the contract at issue, and (2) had the [VA regulations] been the sole governing rules, the business concern would have been eligible for the contract. In each of these 14 cases, the different outcome is owed to the operation of SBA's affiliation rule at 13 C.F.R. § 121.103. The affiliation rule, an integral part of small business size analysis, is not a part of the DVA's SDVO status regulations.⁵³

These cases should not be seen as an exhaustive list, since OHA does not have the ability to review cases that VA denies, nor does OHA see each case that VA approves. However, it does illustrate how different applications of regulations by even the most well-intentioned parties can lead to regulatory and interpretive discrepancies.

d. Operational Issues

Both SBA and VA processes for certifying SDVOSBs are imperfect. As previously mentioned, SBA relies upon a process of self-certification. If a contracting officer, SBA, or an interested party believes that the firm does not qualify, they may raise a protest to the SBA Director of the Office of Government Contracting (DGC).⁵⁴ The DGC then has 15 days to investigate and issue a decision.⁵⁵ Appeals of the DGC's decision are heard by OHA and decided in 15 days, at which time a published decision is made publicly available.⁵⁶ While this process has the advantage of allowing nearly 14,890 SDVOSBs to quickly begin competing for contracts, it also leaves open the door for fraud.⁵⁷ Indeed, GAO previously recommended that the relevant parties expand "the use of the VA VetBiz 'verified' database governmentwide for purposes of validating all SDVOSB eligible firms for contracting."⁵⁸ However, VA has previously stated that such a program would cost nearly \$100 million annually, and GAO more recently tempered the

⁵³ Email from SBA to Committee Staff, "OHA decisions on Service-Disabled Veteran-Owned Status and Size Cases," (Feb. 12, 2013). The cases are: Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5394 (2012); Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5344 (2012); Size Appeal of EarthCare Solutions, Inc., SBA No. SIZ-5183 (2011); Size Appeal of Specialized Veterans, LLC, SBA No. SIZ-5138 (2010); Size Appeal of A1 Procurement, LLC, SBA No. SIZ-5121 (2010); Size Appeal of J.M. Waller Associates, Inc., SBA No. SIZ-5108 (2010); Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5086 (2009); Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5085 (2009); Size Appeal of Blue Cord Construction, Inc., SBA No. SIZ-5077 (2009); Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-5049 (2009); Size Appeal of Heritage of America, LLC, SBA No. SIZ-5017 (2008); Size Appeal of Mission Solutions, Inc., SBA No. SIZ-4828 (2006); Size Appeal of B & M Construction, Inc., SBA No. SIZ-4805 (2006) Size Appeal of Catapult Technology, Ltd., SBA No. SIZ-4795 (2006).

⁵⁴ 13 C.F.R. § 125.24-25.

⁵⁵ 13 C.F.R. § 125.25-27.

⁵⁶ 13 C.F.R. § 134-514.

⁵⁷ SDVOSB numbers are taken from the SBA's Dynamic Small Business Search tool, *available at* www.dsbs.sba.gov; for information on fraud, *see, e.g.* GAO, CASE STUDIES SHOW FRAUD AND ABUSE ALLOWED INELIGIBLE FIRMS TO OBTAIN MILLIONS OF DOLLARS IN CONTRACTS (2009)(GAO-10-108) [hereinafter CASE STUDIES].

⁵⁸ CASE STUDIES at 21.

recommendation, stating that “an expansion of VA’s authority to address government-wide program problems should not be undertaken until VA demonstrates that its process is successful in reducing its own SDVOSB program’s vulnerability to fraud and abuse.”⁵⁹

In contrast, VA’s SDVOSB program has 5,615 SDVOSBs currently certified in its database, each of which must be certified yearly.⁶⁰ Additionally, in fiscal year 2012, VA received 4,900 new initial applications for both the SDVOSB and VOSB programs.⁶¹ VA uses over 200 full time equivalents and spends over \$33 million a year running its approval process. In contrast with SBA’s process where appeals are decided by independent judges “where the standard of review is whether the determination of eligibility was based on a clear error of fact or law or whether the decision was arbitrary, capricious or contrary to law . . . [VA] has no such appellate procedure.”⁶² VA’s decisions are not published, and do not represent legal precedent.

GAO and the federal courts have taken issue with VA’s process. GAO found that while “VA has made progress toward reducing its vulnerability to fraud and abuse,” the agency’s strategic planning and data capabilities necessary to prevent that fraud remain inadequate.⁶³ The Court of Federal Claims (COFC), when examining transfer restrictions and appeals under the VA process, found that VA’s appeals process does not allow “basic procedural due process” and that the examination “contravened the minimal requirements for informal adjudication set forth in Section 555 of the [Administrative Procedures Act (APA)].”⁶⁴ While the GAO finding highlighted the lack of long term planning and data systems that allow VA to monitor applications and processes to ensure consistence, the COFC holdings go to a more crucial question – whether the verification system is able to address the tension between providing due process to SDVO firms and preventing fraudulent contracting.

e. Issues Before the Subcommittee

Failure to attract sufficient SDVOSB to the federal marketplace limits competition on contracts restricted to SDVOSB concerns. Worse, allowing fraudulent companies to claims SDVOSB status places legitimate firms at a competitive disadvantage. However, subjecting SDVOSBs to two disparate processes before they can compete for work acts as a barrier to entry for these firms, and further damages the industrial base.

Therefore, the Subcommittee seeks testimony on a variety of issues intended to reduce this barrier. First, the Subcommittee seeks suggestions on how to reconcile the two statutory definitions. Next, the Subcommittee requests testimony on how the regulatory and interpretive discrepancies may be resolved, recognizing that even with the exact same statutory language the two agencies are likely to take different regulatory approaches. Third, the Subcommittee seeks

⁵⁹ GAO, SDVOSB PROGRAM: VULNERABILITY TO FRAUD AND ABUSE REMAINS 2 (2012) (GAO-12-697).

⁶⁰ www.vip.vetbiz.gov (last visited Feb. 27, 2015); 38 C.F.R. § 74.15; *c.f.* <http://www.va.gov/osdbu/faqs/verification.asp> (last visited Feb. 27, 2015) (recertification is required every two years).

⁶¹ PLANNING AND DATA at 44.

⁶² *Id.* at 56.

⁶³ *Id.* at 33-34.

⁶⁴ *Miles Construction, LLC v. United States*, No. 12-597C 13, 25 (Fed. Cl. 2013); *see also K WV, Inc. v. United States*, No. 12-882C (Fed. Cl. 2013).

testimony on how SDVOSB applications should be administered, principally whether VA or SBA should control the VA verification process, and whether VA or SBA should hear appeals on verification decisions.

III. Challenges to Full Implementation of Small Business Reforms

a. Introduction

Attracting qualified small businesses to the federal procurement marketplace is challenging, since federal contracting entails significant regulatory burdens not found in the commercial sector. Indeed, the number of small businesses seeking to contract with the federal government has dropped by over 100,000 – more than 25 percent – since 2012.⁶⁵ While this Committee has been actively working to address barriers to entry, as discussed at two prior hearings this Congress, the industrial base is at risk.⁶⁶

This risk is exacerbated when small businesses face a situation where the rules are in flux over a long period of time. In such cases, they simply cannot make long term plans. Thus, the delay in implementing regulations for statutory changes over the last five years is not only distressing, it may be causing long term harm to the industrial base. This memorandum will briefly examine the lag in implementation for four pieces of legislation: (1) the Small Business Jobs Act of 2010 (Jobs Act), enacted into law on September 27, 2010;⁶⁷ (2) The National Defense Authorization Act (NDAA) for Fiscal Year 2013 (FY 13), enacted on January 2, 2013;⁶⁸ (3) the FY 14 NDAA, enacted on December 26, 2013;⁶⁹ and the FY 15 NDAA, enacted on December 19, 2014.⁷⁰ All four statutes contain provisions that must be implemented by the SBA and the Federal Acquisition Regulatory Council (FAR Council).⁷¹ To date, many sections of these statutes have not been implemented. This section of the memorandum will discuss those delays.

⁶⁵ Data retrieved from the System for Award Management available at www.sam.gov (last accessed January 28, 2015). This number is down by over 100,000 small businesses from 2012, when DSBS reported a 382,092 active small businesses.

⁶⁶ *Contracting and the Industrial Base; Hearing Before the Small Business Committee*, 114th Cong. (Feb. 12, 2015); *Contracting and the Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals, Hearing Before the Small Business Committee Subcommittee on Contracting and the Workforce*, 114th Cong. (Mar 17, 2015).

⁶⁷ Pub. L. No. 111-240, 124 STAT. 2504 (Sept. 27, 2010).

⁶⁸ Pub. L. No. 112-239, 126 STAT. 1632 (Jan. 2, 2013).

⁶⁹ Pub. L. No. 113-66.

⁷⁰ Pub. L. No. 113-291.

⁷¹ The FAR Council has members from DoD, GSA, and the National Aeronautics and Space Administration. SBA is not a member of the FAR Council.

b. Jobs Act

As shown below, Sections 1311-1347 of the Jobs Act deal specifically with small business contracting.⁷² Of these 18 provisions, ten required a change to the FAR and nine required a change to the SBA regulations. After 1,633 days, the FAR Council has issued only one final rule and three interim final rules, but has not even published proposed regulations on the remaining six items. In contrast, there were nearly 60 provisions in the FY 11 NDAA addressing acquisition.⁷³ The FY11 NDAA was signed into law 112 days after the Jobs Act, and while not all of these provisions required regulations, there are no pending FAR cases left to implement the FY 11 NDAA.

SBA has fared better at implementing its nine provisions of the Jobs Act. It has issued eight final rules and one proposed rule, and it took an average of about three years to issue each final rule. As a result, small businesses do not have a consistent set of regulations addressing multiple award contracts, joint venturing, teaming, contract bundling, subcontracting, recertification and fraud. Even when SBA has implemented a provision, the lack of a companion FAR regulation means that contracting officers are not implementing these provisions, and small businesses are not benefitting from the provisions.

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1311. Small Business Act (adds definition of multiple award contract)	Proposed rule still in development. ⁷⁴ (1,633 days and counting)	No action required
Sec. 1312. Leadership and oversight. (requires policies on bundling, teaming, and joint venturing)	Proposed rule not listed as in development on DoD FAR website. ⁷⁵ (1,633 days and counting)	Final Rule ⁷⁶ (1,100 days)
Sec. 1313. Consolidation of contract requirements.	Proposed rule still in development. ⁷⁷ (1,633 days and counting)	Final Rule ⁷⁸ (1,100 days)

⁷² See Pub. L. No. 111-240, Title I, Subtitle C, 124 STAT. 2504, 2536-47 (Sept. 27, 2010).

⁷³ See Pub. L. No. 111-383, Title VIII (Jan. 7, 2011).

⁷⁴ See FAR Case 2014-002. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015) (DoD tasked Acquisition Small Business Team to consider revisions to draft proposed FAR rule).

⁷⁵ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015)

⁷⁶ 78 Fed. Reg. 61,114 (Oct. 2, 2013).

⁷⁷ See FAR Case 2014-015. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015) (DoD to re-draft proposed FAR rule).

⁷⁸ 78 Fed. Reg. 61,114 (Oct. 2, 2013).

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1321. Subcontracting misrepresentations.	Proposed rule still in development. ⁷⁹ (1,633 days and counting)	Final Rule ⁸⁰ (991 days)
Sec. 1322. Small business subcontracting improvements.	Proposed rule still in development. ⁸¹ (1,633 days and counting)	Final Rule ⁸² (991 days)
Sec. 1331. Reservation of prime contract awards for small businesses.	Interim Final Rule in part ⁸³ Proposed rule still in development in part. ⁸⁴ (1,633 days and counting)	Final Rule ⁸⁵ (1,100 days)
Sec. 1334. Payment of subcontractors.	Interim FAR case in development. ⁸⁶ (1,633 days and counting)	Final Rule ⁸⁷ (991 days)
Sec. 1335. Repeal of Small Business Competitiveness Demonstration Program.	Final Rule ⁸⁸ (63 days)	No regulatory action required.

⁷⁹ See FAR Case 2014-003. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015) (DoD tasked Acquisition Small Business Team to consider revisions to draft proposed FAR rule).

⁸⁰ 78 Fed. Reg. 42,391 (Jul. 16, 2013).

⁸¹ See FAR Case 2014-003. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015) (DoD tasked Acquisition Small Business Team to consider revisions to draft proposed FAR rule).

⁸² 78 Fed. Reg. 42,391 (Jul. 16, 2013).

⁸³ 76 Fed. Reg. 68,032 (Nov. 2, 2011); see also FAR Case 2014-002.

<http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015) (DoD tasked Acquisition Small Business Team to consider revisions to draft proposed FAR rule).

⁸⁴ 76 Fed. Reg. 68,032 (Nov. 2, 2011); See FAR Case 2014-002.

<http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015) (DoD tasked Acquisition Small Business Team to consider revisions to draft proposed FAR rule).

⁸⁵ 78 Fed. Reg. 61,114 (Oct. 2, 2013).

⁸⁶ See FAR Case 2014-004. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015) (FAR and DAR staff resolving issues).

⁸⁷ 78 Fed. Reg. 42,391 (Jul. 16, 2013).

⁸⁸ Final Rule, 75 Fed. Reg. 82567 (Dec. 30, 2010).

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1341. Policy and presumptions. (presumed loss to the government in cases of fraud).	Proposed rule not listed as in development on DoD FAR website. ⁸⁹ (1,633 days and counting)	Final Rule. ⁹⁰ (973 days)
Sec. 1342. Annual certification.	No regulatory action required.	Final Rule. ⁹¹ (973 days)
Sec. 1347. Small business contracting parity; Mentor Protégé.	Interim Final Rule on parity ⁹² Proposed rule on mentor-protégé not listed as in development on DoD FAR website. ⁹³ (1,633 days)	Proposed rule on mentor-protégé. ⁹⁴ (1,633 days and counting)

c. FY 13 NDAA

The FY 13 NDAA included a myriad of procurement reforms, covering Titles XVIII, XVI, and WVII, although all of the small business provisions were concentrated into Title XVI. As a result, DoD and the FAR Council had responsibility for implementing 28 non-small business provisions. While not all of these sections required rulemaking, there are only three non-small business provisions that have pending rules at the FAR Council.⁹⁵

For the small business provisions, SBA has eleven provisions requiring rulemaking and the FAR Council has seven small business provisions requiring rulemaking. As illustrated below, eight hundred six days after the law was passed, SBA has issued final rules for three provisions, one interim rule, and proposed rules covering six provisions. SBA has not issued a proposed rule on one provision. In contrast, the FAR Council has issued one final rule. It has not even begun working on proposed rules for the remaining six provisions. Thus, these provisions are still several years away from implementation.

⁸⁹ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

⁹⁰ 78 Fed. Reg. 38,881 (Jun. 28, 2013).

⁹¹ 78 Fed. Reg. 38,881 (Jun. 28, 2013).

⁹² Interim Final Rule, 76 Fed. Reg. 14566 (Mar. 16, 2011).

⁹³ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

⁹⁴ 80 Fed. Reg. 6,618 (Feb. 5, 2015).

⁹⁵ The open case log shows that §§ 828, 829 and 852 still have open rulemakings.

<http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1615. Restoration of 1 percent funding for administrative expenses of Commercialization Readiness Program of Department of Defense.	No regulatory action required.	Final Rule. ⁹⁶ (371 days)
Sec. 1621. Procurement center representatives.	Proposed rule not listed as in development on DoD FAR website. ⁹⁷ (806 days and counting)	Proposed Rule. ⁹⁸ (806 days and counting)
Sec. 1641. Mentor-Protégé programs.	Proposed rule not listed as in development on DoD FAR website. ⁹⁹ (806 days and counting)	Proposed rule. ¹⁰⁰ (806 days and counting)
Sec. 1651. Limitations on subcontracting.	Proposed rule not listed as in development on DoD FAR website. ¹⁰¹ (806 days and counting)	Proposed rule. ¹⁰² (806 days and counting)
Sec. 1652. Penalties.	Proposed rule not listed as in development on DoD FAR website. ¹⁰³ (806 days and counting)	Proposed rule. ¹⁰⁴ (806 days and counting)

⁹⁶ 79 Fed. Reg. 1,303 (Jan 8, 2014).

⁹⁷ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

⁹⁸ 79 Fed. Reg. 77,955 (Dec. 29, 2014).

⁹⁹ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

¹⁰⁰ 80 Fed. Reg. 6,618 (Feb. 5, 2015).

¹⁰¹ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

¹⁰² 80 Fed. Reg. 6,618 (Feb. 5, 2015).

¹⁰³ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

¹⁰⁴ 80 Fed. Reg. 6,618 (Feb. 5, 2015).

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1653. Subcontracting plans.	Proposed rule not listed as in development on DoD FAR website. ¹⁰⁵ (806 days and counting)	Proposed rule. ¹⁰⁶ (806 days and counting)
Sec. 1671. Contract bundling.	Proposed rule not listed as in development on DoD FAR website. ¹⁰⁷ (806 days and counting)	Final Rule ¹⁰⁸ (273 days).
Sec. 1681. Safe harbor for good faith compliance efforts.	No regulatory action required.	Proposed rule. ¹⁰⁹ (806 days and counting)
Sec. 1695. Surety bonds.	No regulatory action required.	Final Rule. ¹¹⁰ (376 days).
Sec. 1697. Contracting with small business concerns owned and controlled by women.	Final Rule. ¹¹¹ (535 days).	Interim Rule. ¹¹² (806 days and counting).
Sec. 1698. Small business HUBZones.	No regulatory action required.	Awaiting proposed rule. ¹¹³ (806 days and counting).

These delays between statutory enactment and regulatory implementation are troubling because they create uncertainty for small business contractors and create barriers to small businesses competition for federal contracts. Of particular concern, though, is the delay in implementing Section 1651. This section simplifies a complicated formula that required contractors and subcontractors to delineate their labor costs at the time they submitted proposals. To remove this undue burden on small businesses, Congress simplified the law. The delay in regulatory implementation is problematic for three reasons: (1) it deprives small business contractors of this

¹⁰⁵ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015).

¹⁰⁶ 80 Fed. Reg. 6,618 (Feb. 5, 2015).

¹⁰⁷ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Feb. 27, 2015)

¹⁰⁸ 78 Fed. Reg. 61,114 (Oct. 2, 2013).

¹⁰⁹ 79 Fed. Reg. 14,337 (Jun. 25, 2014).

¹¹⁰ 79 Fed. Reg. 2,084 (Jan. 13, 2014).

¹¹¹ 79 Fed. Reg. 14,381 (Jun. 24, 2014).

¹¹² 78 Fed. Reg. 26,504 (May 7, 2013).

¹¹³ In its Fall 2013 Semiannual Regulatory Agenda, 79 Fed. Reg. 1,228, 1,231 (Jan. 7, 2014), SBA stated that this provision would be addressed as part of the proposed rule published at 79 Fed. Reg. 77,955 (Dec. 29, 2014). However, the December 29, 2014 proposed rule did not address this provision.

improvement to the law; (2) it makes it easier for bad actors to commit fraud; and (3) it creates confusion as to which law applies.¹¹⁴

d. FY 14 NDAA

There were 21 procurement sections in the FY 14 NDAA, of which five addressed small business contracting. Of those five, two required SBA rulemaking, and three required rulemaking by FAR. The FAR Council has published one proposed rule, and has not begun working on the others. None of SBA’s required rulemakings are even mentioned in the Fall 2014 Semiannual Regulatory Agenda.¹¹⁵ Again, the FAR has fared better with the 16 non-small business provisions have met better success, with only one provision still awaiting a final rule.¹¹⁶

Section (Only sections requiring rulemaking are shown).	FAR Status	SBA Status
Sec. 1611. Advancing small business growth.	Proposed rule not listed as in development on DoD FAR website. ¹¹⁷ (448 days and counting).	No regulatory action required.
Sec. 1614. Credit for certain small business subcontractors.	Proposed rule not listed as in development on DoD FAR website. ¹¹⁸ (448 days and counting).	Awaiting proposed rule.
Sec. 1615. Inapplicability of requirement to review and justify certain contracts.	Proposed Rule. ¹¹⁹ (448 days and counting).	Awaiting proposed rule.

e. FY 15 NDAA

Recognizing that only 90 days have passed since the President signed the FY 15 NDAA, it is too soon to expect final rules on these provisions. However, it is worth noting that while the FAR Council has begun rulemaking to implement seven non-small business procurement provisions, it

¹¹⁴ *Action Delay, Small Business Opportunities Denied, Hearing Before the Small Business Committee Subcommittee on Contracting and the Workforce, 113th Cong. (Jul. 15, 2014).*

¹¹⁵ 79 Fed. Reg. 76,787 (Dec. 22, 2014).

¹¹⁶ The open case log shows that § 811 still has open rulemaking, although a final rule is imminent. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015).

¹¹⁷ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015)

¹¹⁸ <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015)

¹¹⁹ 79 Fed. Reg. 39,361 (Jul. 10, 2014).

has not opened a single case to implement the small business provisions.¹²⁰ This includes the FY 15 NDAA provision that allows for sole source contracts to women-owned small businesses.¹²¹

f. Issues Before the Subcommittee

Both SBA and the FAR Council are slow to implement statutory changes to small business contracting. The FAR Council, however, is much slower, both relative to SBA and relative to other statutory provisions that the FAR Council implements. To address this disparity, the Subcommittee is considering two proposals, although it welcomes others. First, Congress could require SBA and the FAR Council to engage in concurrent rulemaking. Currently, the FAR Council will normally only consider a provision after SBA has promulgated a final rule. As a result, if SBA takes three to four years to issue a final rule and the FAR Council takes two years, six years will have elapsed. Concurrent rulemaking would eliminate the last two years of the process, and because it would simplify the need for interagency review, it could also diminish the amount of time required for the SBA rulemaking. However, SBA has expressed concerns that this approach would result in greater divergence between the two sets of rules.

To address SBA's concern, the other alternative is to make SBA a member of the FAR Council. When SBA promulgates regulations for small business contracting, complementary FAR regulations could be issued concurrently. As a member of the FAR Council, this would allow SBA to keep the two sets of rules consistent. Further, having SBA on the FAR Council could improve the responsiveness of all rulemakings to small business concerns.

In any case, the status quo places an unfair burden on small business. They cannot make strategic decisions about how to structure themselves, form teams, or even decide if participating in a competition makes sense. Instead, they are governed by two divergent sets of laws and regulations for years at a time. This inhibits the participation of small businesses in the industrial base.

IV. Conclusion

The March 19, 2015 hearing should provide testimony necessary for the Subcommittee to shape policies and legislation on reducing impediments to small business participation in the industrial base. By decreasing barriers to entry, confusing and anti-competitive contracting practices, and inconsistent and out of date regulations, greater opportunities will exist for small business success, which in turn should reduce the cost to taxpayers.

¹²⁰ The open case log shows that §§ 814, 815, 836, 841-843 and 857 have open cases. <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, (last visited Feb. 27, 2015).

¹²¹ Pub. L. No. 113-291, § 825.