

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6515

To: Members, Small Business Committee's Subcommittee on Contracting and Workforce
From: Committee Staff
Re: Hearing: "Action Delayed, Small Business Opportunities Denied: Implementation of Contracting Reforms in the FY 2013 NDAA."
Date: July 11, 2014

On July 15, 2014, the Small Business Committee Subcommittee on Contracting and Workforce will hold an oversight hearing titled "Action Delayed, Small Business Opportunities Denied: Implementation of Contracting Reforms in the FY 2013 NDAA." The hearing will begin at 1:00 PM in Room 2360 of the Rayburn House Office Building.

The purpose of this hearing will be to address implementation of the numerous small business procurement reforms included in the National Defense Authorization Act for Fiscal Year 2013 (FY 2013 NDAA).¹ While the President signed the FY 2013 NDAA into law on January 2, 2013, over 18 months later little progress has been made on the implementation of these reforms. Given that most procurement regulations affecting small businesses must undergo a two-step regulatory process; first being promulgated by the Small Business Administration (SBA), and then promulgated by the Federal Acquisition Council, these delays make it unlikely that the reforms will be fully implemented before the next President takes office in 2017. The hearing will examine the status of implementation at the SBA, and the effect of SBA's delays on small businesses.

I. Summary of Provisions in FY 13 NDAA Requiring SBA Action

To convey the contents of the FY 2013 NDAA and the status of implementation in a concise manner, the following charts are intended to act as guides. They are further divided by subject matter. This is not an exhaustive list of all the contracting reforms in the FY 2013 NDAA, but focuses only on those requiring SBA action. The results have been color coded, with green indicating compliance, yellow indicating partial compliance, and red denoting a failure to comply.

¹ Pub. L. No. 112-239, 126 Stat. 1632 (2013).

a. Procurement Center Representatives (PCRs)²

Section³	Substance	Status
§ 1621(c)	<ul style="list-style-type: none"> Updates the responsibilities of PCRs to allow them to focus on contracting first and foremost, and authorize their involvement in consolidation. 	SBA updated the standard operating procedures (SOP) for PCRs
§ 1621(g)	<ul style="list-style-type: none"> Redefines the term “major acquisition center” to allow SBA to assign PCRs on the basis of commercial and noncommercial purchases by federal agencies. Previously, only noncommercial purchases could be considered. 	While the SOP reflects the change in terminology, no PCRs have been reassigned ⁴

b. Education and Training⁵

Section	Substance	Status
§ 1621(f)	<ul style="list-style-type: none"> Requires that PCRs obtain the highest level of certification available to contracting officers, so they will have the skill set necessary to perform their duties. 	SBA has updated the position descriptions.
§ 1622(a)	<ul style="list-style-type: none"> Requires that the Defense Acquisition University and Federal Acquisition Institute develop a class for contracting officers on small business programs within one year of enactment. 	A 2.5 hour online training class should be online by late summer. ⁶
§ 1622(b)	<ul style="list-style-type: none"> Requires that all contracting officers take a course in small business contracting. 	The course is required only for new contracting officers.
§ 1622(c)	<ul style="list-style-type: none"> Requires that SBA business opportunity specialists – the district office staff tasked with admitting contracts into the 8(a) program – obtain at least an introductory certification in contracting. 	The position description has been updated.
§ 1633(a)	<ul style="list-style-type: none"> Requires that Senior Executive (SES) training programs include training on small business contracting. 	Office of Personnel Management (OPM) has no materials to reflect this change.

² PCRs are SBA employees located at major acquisition centers. They are responsible for reviewing acquisitions to make sure that small businesses have the maximum practicable opportunity to compete. For more information on PCRs, see Committee Memorandum, *Helping Small Businesses Compete: Challenges within Programs Designed to Assist Small Contractors* 6-13 (2012) [hereinafter *Helping Small Businesses Compete*] available at http://smallbusiness.house.gov/uploadedfiles/memo_9.15.11.pdf; H. REP. NO. 112-722 (2012).

³ All section numbers are for the FY 2013 NDAA.

⁴ SBA states that the PCRs were realigned in 2012 without regard to whether a facility purchased primarily commercial or noncommercial goods and services. Thus, while this methodology violated the law in place at the time, it would mean that they are now complying.

⁵ See H. REP. NO. 112-721(2012); H. REP. NO. 112-722.

⁶ In contrast, the next shortest class is 12 hours, and most courses range from 20 hours to 40 hours.

http://icatalog.dau.mil/onlinecatalog/courses.aspx?crs_id=148.

c. Acquisition Planning⁷

Section	Substance	Status
§ 1623	<ul style="list-style-type: none"> Requires that agencies provide opportunities for the participation of small business concerns during all stages of the acquisition process. 	No new guidance or regulations have been issued.
§ 1623	<ul style="list-style-type: none"> Requires that agencies include the participation of the Offices of Small and Disadvantaged Business Utilization (OSDBU) at all levels of acquisition planning.⁸ 	No new guidance or regulations have been issued. ⁹

d. Goals¹⁰

Section	Substance	Status
§ 1631(a)	<ul style="list-style-type: none"> Requires that the combined agency specific prime contracting goals result in a government-wide goal of at least 23 percent. 	Goals appear to meet these criteria, but it isn't reflected in any public documents or processes.
§ 1631(b)	<ul style="list-style-type: none"> Requires that agency goals make “a consistent effort to annually expand participation by small business concerns from each industry category in procurement contracts and subcontracts of such agency.” 	No new guidance or regulations have been issued.
§ 1631(c)	<ul style="list-style-type: none"> Requires that, within 180 days of enactment, SBA revise its prime contracting goals to remove exclusions from the goaling base. 	No new guidance or regulations have been issued. SBA states that this will not apply until after FY 2015, due to necessary changes to the reporting systems.

⁷ For more information on acquisition planning as it relates to small business contracting, see H. REP. NO. 112-722 at 6-7, 10-11.

⁸ OSDBUs are agency officials responsible for ensuring that small businesses have the opportunity to compete for federal contracts. While legislation pertaining to the OSDBUs will be discussed in greater detail later, for more information on the OSDBU program, see *Helping Small Businesses Compete*, at 14.

⁹ SBA states that the rule has been submitted to the Office of Intergovernmental and Regulatory Affairs (OIRA).

¹⁰ For more information on goals, see Committee Memorandum, *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; H. REP. NO. 112-720 (2012).

§ 1631(c)	<ul style="list-style-type: none"> Requires that, within 180 days of enactment, SBA revise its subcontracting goaling process to ensure that subcontracting goals are based on maximum practicable opportunity, not prior year performance. 	No new guidance or regulations have been issued.
§ 1631(c)	<ul style="list-style-type: none"> Requires that SBA document the decision and rationale for allowing an agency to have a goal lower than the government-wide goal. 	No action taken by SBA. SBA states that this will apply to the FY 15 data.
§ 1631(d)	<ul style="list-style-type: none"> Requires that the Office of Advocacy at SBA study whether the goals should be raised. 	Delivered June 5, 2014.
§ 1632	<ul style="list-style-type: none"> Requires that agencies report to SBA at the end of the fiscal year (FY) on their achievements meeting the goals during that FY, including an explanation for a failure to meet the goals. 	No action.
§ 1632	<ul style="list-style-type: none"> Requires that SBA report within 60 days of the end of the fiscal year on government-wide use of small businesses during the prior fiscal year. 	The FY 12 goaling report was released in July 2013, the FY 13 report has not been released as of 6/8/2014.
§ 1632	<ul style="list-style-type: none"> Requires that the goaling report focus on the manner of competition, not simply the total dollar value. 	The FY 12 report did not meet these requirements, and there is no FY 13 report.
§ 1632	<ul style="list-style-type: none"> Requires that SBA report on the industry distribution of prime and subcontracts. 	The FY 12 report did not meet these requirements, and there is no FY 13 report. ¹¹
§ 1633(b)	<ul style="list-style-type: none"> Requires that all SES and officials be held accountable for meeting small businesses goals as part of their performance plans. 	While some agencies are independently implementing this policy, the revised OPM SES performance plan does not mention small business goals.

¹¹ Indeed, the FY 12 report did not even comply with the pre-existing requirement to report dollar achievements.

e. Mentor-Protégé Programs¹²

Section	Substance	Status
§ 1641	<ul style="list-style-type: none"> SBA is authorized to create a small business mentor-protégé program.¹³ 	No new guidance or regulations have been issued.
§ 1641	<ul style="list-style-type: none"> SBA was required to issue regulations governing all mentor-protégé programs operated by other agencies (except the Department of Defense) within 270 days. 	No new guidance or regulations have been issued.

f. Limitations on Subcontracting¹⁴

Section	Substance	Status
§ 1651	<ul style="list-style-type: none"> The Small Business Act previously required that when a prime contractor was awarded a contract set aside for small business or a subcategory thereof, the prime contractor had to perform at least 50 percent of the cost of contract performance incurred for personnel with its own employees. Likewise, a similar rule applied to manufacturing contracts. . This provision changed the limitation on subcontracting calculations to state that the small business could only subcontract 50 percent of the dollars received, unless the work was subcontracted to another small business. 	No regulations issued, which means that the current regulations and contract clauses contradict the Small Business Act requirements.
§ 1652	<ul style="list-style-type: none"> Imposed penalties on those businesses subcontracting more than permitted. SBA was required to issue regulations governing all mentor-protégé programs operated by other agencies (except the Department of Defense) within 270 days. 	No regulations issued, so compliance cannot be enforced.
§ 1652	<ul style="list-style-type: none"> Required SBA to modify existing subcontracting systems to track compliance with limitation on subcontracting rules. 	Systems have not been modified.

¹² For more information on mentor protégé programs, see *Helping Small Businesses Compete* at 2-5; H. REP. NO. 112-722.

¹³ The Small Business Jobs Act authorized mentor-protégé programs for women-owned small businesses, service disabled veteran-owned small businesses, and HUBZone small businesses. These programs have not been implemented either. Small Business Jobs Act of 2010, Pub. Law No. 111-240, §1245, 124 Stat. § 2504, 2546 (2010) [hereinafter Jobs Act].

¹⁴ For more information on limitations on subcontracting, see Committee Memorandum, *Subpar Subcontracting: Challenges for Small Business Contractors* 1-5 (2012) [hereinafter *Subpar Subcontracting*] available at http://smallbusiness.house.gov/uploadedfiles/10-6_hearing_memo.pdf; H. REP. NO. 112-731 (2012).

g. Contract Bundling¹⁵

Section	Substance	Status
§ 1671(a)	<ul style="list-style-type: none"> Revises definition of bundling for construction contracts. 	No regulations issued.
§ 1671 (b)-(c)	<ul style="list-style-type: none"> Applies a \$2 million review threshold to all contracts for purposes of bundling and consolidation. 	Change implemented by SBA, but not in the Federal Acquisition Regulation (FAR).

h. Subcontracting Plans¹⁶

Section	Substance	Status
§ 1653(a)	<ul style="list-style-type: none"> Companies other than small businesses that are awarded prime contracts are required to negotiate plans for how they will use small businesses and the subcategories thereof in the performance of the contract, and report back on their success in meeting those goals. This requires agencies to ensure that results are collected and accurately reported. 	No new guidance or regulations have been issued.
§ 1653(a)	<ul style="list-style-type: none"> Failure to make a good faith effort to meet the negotiated subcontracting goals shall be considered a material breach of contract, and considered in past performance evaluations. 	No new guidance or regulations have been issued.
§ 1653(a)	<ul style="list-style-type: none"> Large prime contractors are required to notify small businesses if they are being listed as potential subcontractors. 	No new guidance or regulations have been issued.
§ 1653(a)	<ul style="list-style-type: none"> SBA is required to create a reporting mechanism for small businesses that believe a prime is acting fraudulently or in bad faith. 	No new guidance or regulations have been issued.
§ 1653(b)	<ul style="list-style-type: none"> Within a year of enactment, SBA was to modify its subcontracting reporting system to identify firms that fail to report. 	No action taken by SBA.
§ 1653(b)	<ul style="list-style-type: none"> No later than March 31 of each year, SBA is required to report, by agency and by type of goal and subcontracting plan, on failure to file, and failure to meet goals. 	No report has been filed.
§ 1654	<ul style="list-style-type: none"> SBA was to designate an appropriate federal website to replace the Commerce Business Daily (CBD) in order to allow companies to post subcontracting opportunities. The CBD has not existed since 1999. 	No website has been designated.

¹⁵ For more information on contract bundling, see Committee Memorandum, *Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success* (2013), available at http://smallbusiness.house.gov/uploadedfiles/10-10-2013_hearing_memo.doc.pdf; Committee Memorandum, *Construction Contracting: Barriers to Small Business Participation 2* (2012), [hereinafter *Construction Contracting*] available at http://smallbusiness.house.gov/uploadedfiles/2-9_hearing_memo.pdf; H. REP. NO. 112-722.

¹⁶ For more information on subcontracting plans, see *Subpar Subcontracting*, at 6; H. REP. NO. 112-731.

i. Size Standards¹⁷ and Fraud¹⁸

Section	Substance	Status
§ 1661	<ul style="list-style-type: none"> Requires SBA to establish small business size standards pursuant to notice and comment rulemaking. 	SBA is complying, although it has not updated its standard operating procedures or its guidance documents, nor do new proposed rules explain that the law has changed. ¹⁹
§ 1661	<ul style="list-style-type: none"> Prohibits SBA from grouping industries together for the purpose of setting common size standards. 	SBA is complying.
§ 1661	<ul style="list-style-type: none"> Prohibits SBA from limiting the number of size standards established. 	SBA is still limiting the number of size standards.
§ 1681 (a)-(b)	<ul style="list-style-type: none"> Requires SBA to create a safe harbor program of advisory opinions using the Small Business Development Centers and Procurement Technical Assistance Centers within 270 days of enactment. 	SBA issued a proposed regulation on June 25, 2014. ²⁰
§ 1681(c)	<ul style="list-style-type: none"> Requires SBA to issue a compliance guide in accordance with the Small Business Regulatory Enforcement and Fairness Act²¹ to assist small businesses navigating the size standards program. 	No guide has been issued. ²²
§ 1682 (a)-(b)	<ul style="list-style-type: none"> Allows firms misrepresenting their size standard to be suspended or debarred on a basis other than a lack of business integrity. Required that regulations be issued within 270 days. 	No new guidance or regulations have been issued.
§ 1682(c)	<ul style="list-style-type: none"> Required SBA to post the name of the suspension and debarment official on its website within 270 days. 	No name posted.

¹⁷ For more information on size standards, see Committee Memorandum, *Professional Services: Proposed Changes to the Small Business Size Standards* (2011), available at http://smallbusiness.house.gov/uploadedfiles/5-5_hearing_memo.pdf; see also Committee Memorandum, *What is a Small Business for Purposes of Federal Contracting?* (2013), available at http://smallbusiness.house.gov/uploadedfiles/what_is_a_small_business_for_purpose_of_federal_contracting.pdf; H. REP. NO. 112-724.

¹⁸ For more information on fraud, contract bundling, see Committee Memorandum, *Misrepresentation and Fraud: Bad Actors in the Small Business Procurement Programs* (2011), available at http://smallbusiness.house.gov/uploadedfiles/10-27_memo.pdf; *Subpar Subcontracting*; and H. REP. NO. 112-725 (2012).

¹⁹ See, e.g. SOP 90 01 4 (2009) available at http://www.sba.gov/sites/default/files/sops/serv_tools_sop_90014.pdf; Small Business Size Standards: Inflation Adjustment to Monetary Based Size Standards, 79 Fed. Reg. 33647 (2014), June 12, 2014

²⁰ Advisory Small Business Size Decisions, 79 Fed. Reg. 35963 (2014).

²¹ Pub. L.No.104-121 (1996) as amended by Pub. L. No. 110-228 (2007).

²² SBA has updated its website on size standards, but it is not a compliance guide in keeping with the statute. <http://www.sba.gov/tools/size-standards-tool?ms=nid4070>; <http://www.sba.gov/content/determining-business-size..>

§ 1682(c)	<ul style="list-style-type: none"> Required SBA to publish its standard operating procedures for suspension and debarment within 270 days. 	SBA issued SOP 00 11 02, which mentions suspension and debarment on p. 29-30. It governs contracting personnel, not the suspension and debarment officials.
§ 1683	<ul style="list-style-type: none"> Requires an annual report on suspensions and debarments, including referrals for prosecution. 	No report submitted.

j. OSDBUs²³

Section	Substance	Status
§ 1691(a)	<ul style="list-style-type: none"> Requires that OSDBUs be placed in specific pay grades to ensure their seniority. 	Not all agencies have implemented the change.
§ 1691(b)	<ul style="list-style-type: none"> Requires that the OSDBU report only to the Secretary or Deputy Secretary of an agency, and that performance appraisals of the OSDBU be conducted by those individuals. 	Not all agencies have implemented the change.
§ 1691(c)	<ul style="list-style-type: none"> Expands and prioritizes the duties of the OSDBU, and requires that they carry out exclusively the functions of the OSDBU. 	Not all agencies have implemented the change.
§ 1691(c)	<ul style="list-style-type: none"> Requires that the OSDBU report annually to the Committee. 	No agency has reported.
§ 1691(d)	<ul style="list-style-type: none"> Requires that the OSDBU meet certain minimum qualifications. 	Agencies continue to advertise without these requirements. ²⁴
§ 1692(a)	<ul style="list-style-type: none"> Requires that SBA organize the OSDBUs to conduct peer reviews of their compliance with the Small Business Act, which should correct the failures enumerated above. 	SBA has not organized the OSDBUs in this fashion.
§ 1692(a)	<ul style="list-style-type: none"> Requires SBA to facilitate regulation comments by the OSDBUs, and report to Committee each year on those comments. 	No comments or reports have been issued.
§ 1692(a)	<ul style="list-style-type: none"> Requires SBA to organize the OSDBUs to establish best practices and report on those best practices to the Committee each year. 	No best practices have been established, nor has a report been filed.

²³ *Helping Small Businesses Compete*, at 14; H. REP. NO. 112-721.

²⁴ *See, e.g.*, Letter from Chairman Sam Graves to Secretary Sally Jewell, Department of Interior (May 12, 2014) (noting that the job opening for OSDBU director published by the Department of Interior does not meet the statutory requirements for the position).

k. Other Matters

Section	Substance	Status
§ 1695 ²⁵	<ul style="list-style-type: none"> Increases the dollar threshold of surety bonds. 	Implemented.
§ 1697 ²⁶	<ul style="list-style-type: none"> Eliminates the dollar caps on competitive awards limited to women-owned small businesses. 	Implemented.
§ 1691(b)	<ul style="list-style-type: none"> Adjusts the definition of HUBZone for certain base closure areas. 	No action.

II. Consequences of Delayed Implementation

Of the 54 discrete actions identified in the chart above, ten have been fully implemented, four partially implemented, and the remaining 40 items not implemented. This means that SBA has not acted on 75 percent of the items required by the FY 2013 NDAA.²⁷ The failure to act on these statutory provisions should not be viewed simply as a series of delays in a bureaucratic process. These items have real world consequences for small businesses. For brevity's sake, this memorandum will only address four: confusion, uncertainty, fraud, and Congressional intent.

a. Confusion

When the Small Business Act is at odds with the small business regulations and the FAR, it confounds sophisticated government contract lawyers. It is unfair to then expect small businesses and contracting officers to navigate this sea of contradictory mandates. For example, the limitation on subcontracting clause as it exists in the Small Business Act allows small businesses to team together on contracts without penalties. However, the regulations currently in place, and the clauses still being inserted into contracts, tell small businesses that they must limit the amount they subcontract to other small firms. In contrast, since the regulations focus on the cost basis of labor, a firm complying with those regulations may be violating the statutory prohibition on subcontracting more than a set dollar amount. Thus, the actions a small business takes to comply with the regulations currently in place may cause it to violate the underlying statute, while a firm that complies with the Small Business Act risks defaulting on their contract. As firms prepare to go after future work, this also leaves them unsure of which approach they should take, which inhibits their ability to compete.

²⁵ For more information, see Committee Memorandum, *Building America: Challenges for Small Construction Contractors* 4-6 (2013), available at http://smallbusiness.house.gov/uploadedfiles/5.20.2013_final_hearing_memo.pdf; *Construction Contracting* at 7-8; H. REP. NO. 113-462 (2014).

²⁶ For more information, see H. REP. NO. 112-732 (2012).

²⁷ SBA stated in a briefing on June 15, 2014, that the majority of the regulations were pending at OIRA.

b. Uncertainty

When a change to the Small Business Act has occurred but the regulatory changes are still pending, small businesses are left in a state of uncertainty. They do not know what the new regulations will be, so they cannot plan accordingly. However, the small businesses cannot continue on as if no change is coming, so they are loathe to invest in new systems, processes, or arrangements that they know will be subject to change in the foreseeable future. For example, the rules governing mentor-protégé programs will change when SBA issues its new regulations, but no one can predict exactly what form that change will take. Therefore, cautious small and large businesses should hesitate to invest in developing a new mentor-protégé agreement, since as it begins the process of approval at an agency, the entire process and set of requirements may change. Therefore, SBA's failure to act is itself creating barrier to entry for small contractors.

c. Fraud

While confusion and uncertainty create problems for law abiding firms, they create opportunities for those attempting to shirk their responsibilities under the law. SBA's failure to act creates plausible deniability for bad actors. It also means that the systems designed to detect fraud are not in place, and the penalties for fraudulent behavior have not taken affect.

d. Frustrate the Intent of Congress

Finally, SBA's failure to act in a timely manner frustrates the intention of Congress, particularly this Committee. Congress enacted the package of reforms in the FY 2013 NDAA in order to increase opportunities, clarity, and accountability. Unfortunately, SBA has chosen to use its limited resources to pursue unauthorized new initiatives rather than implementing the will on Congress.²⁸ This is an anathema to the Constitutional role envisioned for the executive branch – to first and foremost implement the laws Congress enacts.

III. Conclusion

While the Subcommittee expects the private sector witnesses to provide testimony on the effects of delayed implementation, the Subcommittee also hopes for ideas on ways to encourage speedier compliance by SBA. The Subcommittee expects SBA to provide it with an implementation plan for executing the changes within SBA and with the Federal Acquisition Council.

²⁸ Committee Memorandum, *SBA-created Initiatives: Necessary or Redundant Spending?* (2014), available at http://smallbusiness.house.gov/uploadedfiles/4-30-2014_hearing_memo.pdf. By not pursuing unauthorized initiatives, SBA would save \$39 million.