IT Alliance for Public Sector
A Division of ITI

Testimony of

Eminence Griffin

Counsel and Director, Federal Procurement
Information Technology Alliance for Public Sector (ITAPS)

before a hearing of the

Subcommittee on Contracting and Workforce

of the

U.S. House of Representatives
Small Business Committee

on

“No Man’s Land: Middle-Market Challenges
for Small Business Graduates”

April 26, 2018

Introduction

Chairman Knight, Ranking Member Murphy, and Members of the Committee, thank you for the opportunity to share our perspective on challenges that exist in the federal marketplace for graduated small businesses. It is a great honor to testify before this Committee, which I worked for over six years on topics that impact small businesses and on steps that can be taken to aid in their growth.

At the Information Technology Alliance for Public Sector (ITAPS), we understand some of the difficulties that graduated small businesses face as they seek continued participation in the federal marketplace. We believe the solution in helping businesses face these challenges is to create a more robust and successful small business contracting program.

In 1953, Congress first established the policy that "a fair proportion of the total purchases and contracts for supplies and services" should be awarded to small business concerns in the "interest of mobilizing the Nation's full productive capacity" or "in the interest of war or national defense programs."[1] Since that time, the small business programs were expanded to first, establish the current government-wide 23 percent goal for prime contract dollars to be awarded to small businesses in "a wide variety of industries and from a broad spectrum of small business concerns within each industry,"[2] and then later expanded to include goals at the agency level and government-wide for specific socio-economic categories of small business awards as well as subcontracting dollars awarded to small businesses.

With these goals in place, we have seen increased dollars awarded to small businesses and the government, as well as individual agencies, begin to meet their small business goals. This increase in dollars has resulted in more and more of these businesses graduating out of their size. While these are laudable achievements, we rarely look beyond the awarded dollars. We need to start digging deeper into the programs and determine how the small business contracting programs can be improved to look beyond the money and see what can be done to grow healthier small businesses that have the tools to succeed in the full and open market once they graduate.

Improve Small Business Set-Aside Programs

Currently, only one program, the 8(a) Business Development Program, does continuous monitoring of the contracts and growth of its participants. This monitoring includes tracking of its revenue as well as the types of contracts the business wins throughout its nine-year participation. However, once the business graduates from the program, even if it remains a small business, the Small Business Administration (SBA) ceases to continue its monitoring. To my knowledge, the SBA does not track revenue, growth, or job creation that results from small business contracting outside of this program. Additionally, the agency does not track when individual businesses grow out of the small business size standard and their ability to compete in the open marketplace after such graduation. Furthermore, there is no tracking or analysis of whether small businesses that participated in any of the set-aside programs can successfully compete in the

[1] Pub. L. 86-163.
[2] Pub. L. 105-135.

marketplace after they have exceeded established size standards; whether they continue to do business in the government or commercial marketplace; or if the graduated small businesses fall back into the small business size standard. This information is vital in not only determining how the programs can be developed to promote sustainable growth in its participant small businesses but also the overall success of the programs themselves. With this information, the SBA and its partners, such as Small Business Development Centers and Women's Business Centers, could better counsel businesses as they approach the top end of their size standard and help with the transition.

In addition to better metrics and information, more could be done to ensure fair equity in the distribution of the contracting dollars amongst small businesses to promote sustainable growth. This problem has manifested itself in two ways: first, agencies are looking for easy dollars to award to small businesses in able to meet their goals with many looking to the limited industry North American Industry Classification System (NAICS) codes to do so and second, set-aside contracts have increased in value so much that it sometimes catapults a small business beyond its size in one contract.

On the first point, we have seen agencies set aside increasingly large percentages of their small business dollars to a limited number of NAICS codes. Small business set-asides have been as high as 40 to 60 percent at some agencies in the information technology and other services categories. Agencies are not creating a healthy industrial base with this approach as contracting officers do not look across the spectrum of industries to make awards to small businesses to determine where a gap exists in the base. Additionally, it leaves limited funds and opportunities available for competition among other businesses, particularly middle-market businesses.

The increased size of set-asides has also become increasingly common. Bundling of requirements has been an issue that small businesses have faced for years, but rather than bundling preventing any small businesses from competing, this technique is now used to exclude some small businesses in favor of other small businesses. Because of these larger contracts, not only are small businesses left out of the market but the firms that win these contracts can grow out of their size standard with just one award. These actions result in small businesses graduating from their size standard without the ability to compete for full and open government contracts or commercial contracts. Furthermore, these types of awards not only significantly decrease the contract opportunities for graduated smalls and other businesses, but by not ensuring companies have the tools to succeed long-term, contracting officials are also undermining one of the primary goals of the small business program, which is to enhance the nation's industrial and manufacturing base.

Agencies are measured on their ability to meet their small business goals and since the inception of the agency scorecards, this Committee has been able to hold agencies accountable to the goals. However, these scorecards have been heavily weighted towards one metric—the dollars awarded to small businesses, mostly primes. Subcontracting and steps taken by the agency to meet the goals are weighted in the scorecard at lesser levels. While this is due to change once the SBA revises its scorecard as required in the

FY16 National Defense Authorization Act,[3] we must ensure that the new scorecard provides greater insight into the health of small businesses working with each agency and the overall health of the industrial base.

Recommendations:

- Measure success by more than the percentage of contracts going to small businesses, particularly if those businesses have no opportunities once they graduate from the program. The definition of success for the small business program should be expanded to contain metrics that include the overall health of the small business industrial base.
- Develop and track metrics on the ability of small businesses and graduated small businesses to compete and thrive in full and open competitions and identify barriers to success post-graduation. Possible metrics could include: time and performance; job growth; and ability to win contracts via free and open competition.
- Reduce poor business practices or weaknesses in the industrial base and incentivize healthier business practices with stronger oversight and accountability.
- Implement government-wide monitoring of resulting revenue, growth, or job creation like the Department of Defense's (DoD) recent changes in required reporting of the Mentor Protégé Program impact success.
- Require that the 23 percent statutory goal of awards to small business concerns be spread across all NAICS codes, with a prohibition on agencies using set-asides that exceed a certain percentage of dollars in any particular NAICS code. Further dispersal could be found by preventing agencies from placing requirements on prime contractors to subcontract more than 50 percent of work to small businesses in any one NAICS code.
- Collect better data to understand impacts of small business goaling and set-asides on the industrial base.
- Improve oversight on value and scope of contract awards set-aside for small businesses to ensure sustainable success.

Increase Transparency and Efficiency in the Marketplace

While the set-aside process needs improvement, the competitive marketplace is not perfect. As businesses of all sizes look to win free and open awards, the process has become timely and costly, preventing and discouraging businesses from competing. Large indefinite delivery-indefinite quantity (IDIQ) contracts have become the norm. These large acquisitions are costly to compete for and the market research, bidding, and selection phases sometimes span over the course of years. At the end of those years and dollars spent, few companies win the awards and the others can be left out of the market for upwards of five to ten years. If a graduated small business is shuttered out of the market for the length of these contracts, it is likely they will revert to a small business. Increased transparency into the process and on-ramps onto these contracts will help small and middle-market businesses formulate more competitive proposals.

Another improvement needed to the marketplace is greater transparency through post-award debriefings to those offerors who lost the contract. While many believe increased communication will lead to more bid

[3] Pub. L. 114–92 (Nov. 25, 2015).

protests, that is simply not the case. In a report released earlier this year, RAND Corporation found that the share of contracts that are protested is small compared to the number of awards and better debriefings could help the offeror understand why they lost and potentially prevent protests.[4] A better understanding of how and why disappointed offerors did not win an award helps businesses of all sizes become more competitive in future competitions.

Even when a business wins a competition, obstacles remain. For example, only small businesses can currently receive accelerated payments. While the Office of Management and Budget (OMB) had previously ensured that both small and other than small businesses could receive payment quickly, OMB has only extended the payments for small businesses, leaving middle-market and large businesses waiting for payments. Accelerated payments are necessary for businesses of all sizes: small and middle-market businesses can cover their overhead expenses and quickly pay employees, while middle-market and large businesses are able to quickly distribute payments to their small business subcontractors. A permanent extension of both is an easy way to cut out some of the red tape out of the acquisitions system.

Recommendations:

- Increase transparency into all phases of larger IDIQ contracts and provide mechanisms for new companies to on-ramp onto these vehicles.
- Provide for enhanced debriefings of larger contracts and basic debriefings for other contracts, such as task and delivery orders, to ensure that contractors have a better understanding as to why they were not successful in a given competition.
- Pass H.R. 5337, *The Accelerated Payments for Small Businesses Act*, to provide a permanent solution for accelerated payments to all businesses.

Enhance Mentor-Protégé Programs and Teaming

In 2016, the SBA published a long-awaited proposed rule that opens the benefits of the 8(a) Mentor-Protégé program to small businesses of all categories. The rule provides significant new opportunities to businesses of all sizes as previously only a small percentage of small businesses were eligible for the program and many large and middle market primes previously found the pool of potential protégés too limited. ITAPS believes these programs are vital in building sustainable small businesses.

As part of the process, mentors and protégés are required to jointly develop a tailored developmental assistance plan, which is set forth in a "mentor-protégé agreement" that is also submitted to Office of Small and Disadvantaged Business Utilization officials who, in turn, determine the agreement's compliance with specific agency requirements. These mentor-protégé agreement authorizes a broad array of developmental assistance, such as training, assistance in obtaining production and accounting certifications, contract administration, and overall general business management skills and organizational management.

[4] RAND Corporation, "Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers" (2018), *available at* https://www.rand.org/pubs/research_reports/RR2356.html.

Additionally, some agencies' programs allow mentors to provide loans and can award subcontracts on a noncompetitive basis.[5]

These arrangements are beneficial to small businesses, as it opens a vast array of knowledge and learning opportunities to which they would otherwise not have access. Under these arrangements, primes are arming small businesses with skills in cybersecurity, cost and accounting principles, regulatory compliance assistance, and so many others. Yet, we do not have enough participants on either side. While much of the focus on mentors has been on larger primes, middle-market businesses have the same skills and knowledge to impart on small firms as many of them have participated in the program and have more immediate first-hand knowledge on transitioning from small to middle-market. We need to create additional incentives to middle-market and large primes to participate in the program. The incentives could be as easy as giving the mentors additional credit in their subcontracting plan or extending the length of the agreements to provide for additional contracting opportunities, neither of which would cost the SBA or other agencies any additional funding.

In addition to the formal mentor-protégé program, small businesses often enter into joint ventures or teaming arrangements when an acquisition is too big for a small business to fulfill alone. Rather than not bidding on the contract, these arrangements allow these businesses to form a joint venture or partnership with a middle-market or large prime for a limited amount of time or for a specific project. Through this method, many small businesses have been able to compete and win contracts for work that would normally be out of their grasp. Through these types of arrangements, companies can grow their business and increase their individual capacities.

While ITAPS understands the limited scope that teaming and joint ventures are meant to provide to avoid affiliation, business structures have changed rapidly over the past three decades. In no sector is this more evident than in the IT sector. Many of these companies have been working with DoD and others to provide innovative solutions to some of the warfighter's most pressing problems. However, very few of these companies have experience in the government marketplace, and many continually look for opportunities to partner to escape the "valley of death" too well-known in the research and development field. Nonetheless, it is this need to seek help that will prevent them and others from reaping the benefits of their technology.

Large and middle-market businesses wish to partner with these small firms to help provide solutions to the warfighter. These actions are taken not for the sake of trying to control a smaller company or to defraud the government, but rather to build partnerships and gain trusted business relationships that can be carried forward on future projects. However, the downside of affiliation prevents small businesses from seizing on these opportunities.

<u>Recommendations:</u>

[5] *See generally*, Robert Jay Dilger, *Small Business Mentor-Protégé Programs*, Congressional Research Service R41722 (March 2, 2015) (providing an overview of the different incentives provided by each agency's program).

- Increase the number of protégés that mentors can enter into agreements with, as it will enable smaller firms to gain valuable insight into the contracting marketplace and strengthen the industrial base.
- The current acquisition process to bid and award a contract has long surpassed the timeframe of a traditional mentor-protégé agreement. As such, the timing on these agreements should be extended beyond the current one to three-year timeframes currently used to at least a five-year timeframe that mirrors the length of acquisitions.
- Create additional incentives, such as providing subcontracting credit to mentors, in order to increase participation in the programs.
- Require that past performance of individual companies in teams, joint ventures, or mentor-protégés partners to be considered when evaluating past performance.
- Simplify the affiliation rules to allow for more clarity and more flexibility in allowing small businesses to team with large and middle-market businesses.

Fraud

Fraud and abuse continue to permeate the various small business contracting programs and multiple reports by various Inspectors General and the Government Accountability Office have illustrated the depth of the problem. For example, in the 8(a) Contracting Program, several reports have indicated that agencies are unclear as to who is to monitor the compliance with the subcontracting limitations and the confusion allowed participants in the program to surpass their limitations on subcontracting. Investigations have revealed small businesses operating as pass-throughs with 100 percent of the dollars going to their subcontractors.[6] The same results were found at the Department of Interior (DOI), in which it was determined that in some cases the contract clause was not included and when it was, contracting officers were "unsure how to monitor the requirement [and] had no knowledge of any Departmental guidance in this regard."[7] In another audit, DOI found that an Alaskan Native Corporation had submitted reports showing that it had been non-compliant with its subcontracting limitations for over two years.[8] However, the contracting officer neither corrected the problem nor terminated the contract and therefore, the business was able violate the subcontracting limitation without penalty or risk.[9]

[6] *Id.*
[7] U.S. Dept. of Interior, Office of Inspector General, Recovery Oversight Advisory: Monitoring of Limitations on Subcontracting Clause on 8(a) Contracts, Report No. ROO-ROA MOA-1021-2010 (Oct. 13, 2010).
[8] U.S. Dept. of Interior, Office of Inspector General, Acquisition Services Directorate—Sierra Vista, Report No.ER-IS-NBC-0003-2011 (July 14, 2011).
[9] *Id.*

Fraud has also been found in the Service-Disabled Veteran-Owned Small Business contracting program,[10] as well as with the HUBZone program.[11] While in some cases, firms were decertified from the program,[12] SBA and other agencies have not consistently enforced the limitations nor sought prosecution of the businesses for violating the terms of the contract. Even when a contracting officer can determine that limitations on subcontracting were exceeded or fraud occurred, it is difficult to prove damages caused by the breach since in almost all cases the government has received the good or services that it procured through the contract. While section 16(d) of the *Small Business Act* provides penalties, which include fines and/or imprisonment, for misrepresentation of small business status to obtain a contract,[13] these punishments have yet to be extended to those who violate the limitations on subcontracting. Thus, suspension or debarment is the only penalty available.

These instances of fraud not only prevent other small businesses from being able to compete for contracting opportunities, they can also prevent graduated small and other businesses from competing for the award. If a company cannot meet the prime performance requirements or is defrauding the system by passing the dollars through to an eligible firm, they should not receive the award. However, until there are consequences for these fraudulent actions, they will continue.

Recommendations:

- Clarify who is ultimately responsible for monitoring compliance with subcontracting limitations.
- Ensure that there are consequences that will occur for violating small business compliance requirements.

Conclusion

ITAPS believes the recommendations set forth here outline the steps needed to create a healthy and vibrant industrial base across businesses of all sizes. With these measures, small businesses and graduated businesses will be given the tools to succeed and sustain themselves for the long haul. Chairman Knight, Ranking Member Murphy, and Members of the Committee, thank you again for this opportunity to testify, and I would be happy to answer your questions.

---

[10] U.S. Government Accountability Office, Report to the Chairwoman, Committee on Small Business, House of Representatives, *Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts*, GAO 10-108 (Oct. 23, 2009).

[11] *Id.*

[12] U.S. Government Accountability Office, Report to the Chairwoman, Committee on Small Business, House of Representatives, *Small Business Administration: Undercover Tests Show HUBZone Program Remains Vulnerable to Fraud and Abuse*, GAO-10-759 (June 25, 2010).

[13] Small Business Act, P.L. 111-240, § 16(d), 72 Stat. 384.