

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

Memorandum

To: Members, Subcommittee on Contracting and Workforce
From: Committee Staff
Date: October 25, 2017
Re: Hearing: “GAO Audit Reveals Half-Measures Taken by Small Business Advocates”

On Wednesday, October 25, 2017 at 11:00 a.m., the Subcommittee on Contracting and Workforce will meet in Room 2360 of the Rayburn House Office Building for the purpose of reviewing a comprehensive audit of the Offices of Small and Disadvantaged Business Utilization (OSDBU) by the Government Accountability Office (GAO). The GAO report examines compliance with select Small Business Act section 15(k) requirements by the OSDBU across 24 federal agencies. The report also compares GAO’s findings with results of the Small Business Procurement Advisory Council’s (SBPAC) annual review of OSDBU compliance. This hearing will also assess whether flexibility in fulfilling section 15(k) requirements is appropriate, and identify ways in which the SBPAC may be improved.

I. The Role of the Offices of Small and Disadvantaged Business Utilization (OSDBU)

In 1978, Section 15(k) of the Small Business Act established an OSDBU within “each Federal agency having procurement powers.”¹ While the nomenclature of these offices varies slightly from agency to agency, both the offices and the heads of the offices are collectively referred to as OSDBUs. Each OSDBU is to be appointed by the head of the agency, and, with the exception of the Department of Defense (DOD), report directly to the head of the agency or deputy.² Subsequent statutory amendments prescribe additional requirements for the OSDBU director, such as minimum seniority or compensation levels, and qualifying prior work experience.

The Small Business Act assigns specific duties and responsibilities to the OSDBU, primarily the implementation and execution of small business contracting assistance-related functions and duties as outlined in section 15(k) of the Small Business Act. OSDBUs are expressly charged with fighting unjustified contract bundling³ and working with acquisition officials to increase the participation of small businesses as prime contractors, subcontractors, and suppliers.⁴

¹ 15 U.S.C. § 644(k).

² *Id.* at § 644(k)(2)-(3).

³ *Id.* at § 644(k)(5). Contract bundling occurs when two or more requirements that would be suitable for award to small business are consolidated into a larger contract that is no longer suitable for award to small business. Due to concerns regarding limiting competition and excluding small business participation, the Small Business Act has very specific procedures agencies must follow to justify bundling. The OSDBUs are a critical part of this process.

⁴ *Id.* at § 644(k)(5).

Given the scope of their task, the Small Business Act grants OSDBUs corresponding resources and authority. This includes having supervisory authority over personnel carrying out the functions of the Small Business Act.⁵ To assist SBA, OSDBUs are required to assign small business technical advisors to each Procurement Center Representative and are directed to “cooperate, and consult on a regular basis, with the [SBA] with respect to carrying out the functions and duties” vested in them by the Small Business Act.⁶ Over time, OSDBUs have taken on additional duties and responsibilities, as outlined in section 15(k). Each of these statutory responsibilities was created specifically to ensure that the OSDBUs are fulfilling their role as front-line small business advocates at their respective agencies. Furthermore, OSDBUs play a role in negotiating their agency’s contribution to the statutory government-wide 23% small business contracting goal and SBA’s assessment of the agency’s success in meeting those goals.⁷

II. The GAO Report

GAO selected 23 federal agencies (civilian and military) for review. These agencies procured over \$900 million combined in goods and services in fiscal year 2015, accounting for 87% of all federal contracting obligations that year. The Department of Defense Office of the Secretary (DOD OS) was also reviewed due to its oversight role within the Department of Defense. These 24 agency OSDBUs vary in size and in terms of the agency’s contracting dollars.⁸

GAO looked at three key elements within this report. First, GAO reviewed the extent to which the agencies demonstrated compliance with requirements relating to the OSDBU director. Second, they evaluated agency compliance with the various functions of the OSDBUs. Finally, they assessed the SBPAC’s review of OSDBU compliance.

a. Noncompliance with OSDBU Director Requirements

GAO examined five requirements and duties of the OSDBU director listed in section 15(k). None of these requirements were met by all 24 OSDBUs.⁹ GAO found:

- **Section 15(k)(3) Reporting Requirement:** *OSDBU directors must report directly to the agency head or deputy head.* Four agencies were noncompliant – Department of Energy (DOE), Department of Veterans Affairs (VA), the Social Security Administration (SSA), and Department of Education (Ed.).¹⁰ The lack of direct access to top-level decision-makers interferes with OSDBU directors’ ability to effectively advocate for small businesses.

⁵ *Id.* at § 644(k)(7).

⁶ *Id.* at § 644(k)(9).

⁷ The OSDBU heads are members of the Small Business Procurement Advisory Council and act as peer reviewers of OSDBU’s compliance with section 15(k) requirements. This explained later in the memorandum.

⁸ The 10 largest contracting agencies examined by GAO include: DOD and its components (Air Force, Army, Navy, Defense Logistics Agency, and Office of the Secretary), the Department of Energy (DOE), Department of Health and Human Services (HHS), Department of Veterans Affairs (VA), National Aeronautics and Space Administration (NASA), and the Department of Homeland Security (DHS). The General Services Administration (GSA) may also be considered “large,” as it represented over 2% of the overall government contracting obligations in FY2015. The remaining agencies examined by GAO in this report may be considered “small;” for example, the Department of Commerce (DOC) reported total obligations of approximately \$3 million, or about 0.7% of total obligations.

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-675, SMALL BUSINESS CONTRACTING: ACTIONS NEEDED TO DEMONSTRATE AND BETTER REVIEW COMPLIANCE WITH SELECT REQUIREMENTS FOR SMALL BUSINESS ADVOCATES, 8-10 (2017).

¹⁰ *Id.* at 9-11.

- Section 15(k) Director Experience: *Prior experience is required from a number of enumerated roles (i.e; as a federal contracting officer). The Department of Housing and Urban Development (HUD) OSDBU director did not have the requisite experience.*¹¹
- Section 15(k)(7) Supervisory Duties: *The OSDBU director must have supervisory authority over the appropriate agency personnel. The Defense Logistics Agency (DLA) was found noncompliant – the OSDBU director does not directly supervise field staff, providing policy and program oversight instead.*¹² This level of separation weakens the OSDBU director’s involvement in and knowledge of the daily operations of its key personnel.
- Section 15(k)(15) Collateral Duties: *The OSDBU director must exclusively carry out the duties enumerated in the Small Business Act and cannot hold any other positions, titles, or responsibilities. Five agencies were noncompliant: the U.S. Department of Agriculture (USDA), Department of Labor (DOL), Environmental Protection Agency (EPA), SSA, and U.S. Agency for International Development (USAID).*¹³ Noncompliance may take valuable time away for the OSDBU director to fulfill critical functions necessary to that position.
- Section 15(k)(2) Compensation & Seniority: *The position must be at the SES level (classified as above grade 15 of the General Schedule, or GS-15) or, if the Chief Acquisition Officer and senior procurement executive at the agency are not SES positions, the OSDBU director can be appointed to a position compensated equivalent to a GS-15. Six OSDBU directors – USDA, Department of Commerce (DOC), DOL, DLA, the Office of Personnel Management (OPM), and SSA held positions at lower levels than that of the Chief Acquisition Officers or senior procurement executives in these agencies. Holding a lesser position than other top-level acquisition officials may weaken the OSDBU director’s ability to effectively advocate for small businesses in federal contracting.*

Noncompliance with these requirements potentially undermines the intent of the Small Business Act. To address this, GAO suggested noncompliant agencies should be required 1) to explain to Congress why they fail to meet the requirements enumerated in the Small Business Act and 2) make a case for why statutory flexibility is appropriate.¹⁴

b. Noncompliance with OSDBU Functions

To review the primary functions of the OSDBU listed in section 15(k), GAO examined eight requirements. Three requirements were met by all 24 OSDBUs;¹⁵ the remaining five requirements showed some level of noncompliance. GAO found:

- Section 15(k)(5) Identifying and addressing bundling of contracts: *OSDBUs are tasked with identifying proposed solicitations that involve significant bundling of contract requirements and work with agency officials to mitigate impacts to small businesses. Only DOD OS was noncompliant, stating no contracting or bundling occurs at its office. Personnel charged with this task are not part of OSDBU due to the size and decentralized nature of the office.*¹⁶

¹¹ *Id.* at 11-12.

¹² *Id.* at 12-13.

¹³ *Id.* at 13-15.

¹⁴ *Id.* at 32.

¹⁵ 15 U.S.C. § 644(k)(12), (13), and (14), which are not described in this memorandum.

¹⁶ *Supra* note 9, at 21-22.

- Section 15(k)(6) Provide assistance on payments: *OSDBUs assist small businesses in obtaining payments, interest penalties, and information on payments.* Only SSA was noncompliant, delegating this task to the contracting office instead.¹⁷
- Section 15(k)(8) Assign small business technical advisers: *Small business technical advisors must be assigned to each office where the SBA has assigned a procurement center representative.* Ten agencies did not comply: Army, DOC, DOD OS, DOE, Navy, Department of State (State), Department of Treasury (Treasury), VA, OPM, and SSA.¹⁸
- Section 15(k)(11) Advise on in-sourcing: *The OSDBU director must review and advise the agency on decisions converting activities performed by small businesses to internal, federal employee activities (i.e. in-sourcing).* Eight agencies did not comply: DLA, DOC, Ed., HUD, Department of the Interior (DOI), Treasury, VA, and SSA.¹⁹
- Section 15(k)(17) Respond to notification of an undue restriction on ability of small businesses to compete: *When notified by a small business before contract award that a solicitation unduly restricts the ability of the small business to compete for the award, the OSDBU director must 1) submit the notice to the contracting officer and recommend ways to increase competition (if necessary), 2) inform the agency's advocate for competition; and 3) ensure the small business is aware of other avenues for redress.* Nine agencies did not comply in full, only partially fulfilling this requirement: DLA, USDA, DOC, DOE, DOI, State, National Aeronautics and Space Administration (NASA), OPM, and USAID.²⁰

The GAO report showed significant noncompliance, particularly with sections 15(k)(8), (11), and (17). Continued noncompliance may inhibit OSDBUs' ability to effectively advocate for small business interests. Additionally, noncompliance may limit OSDBUs' ability to identify challenges to small businesses that may require additional attention.

II. Issues Before the Subcommittee

The Small Business Act is very clear regarding the duties and functions of OSDBUs enumerated in section 15(k), yet this report revealed many disagreements from the agencies responding to GAO's findings. Across the board, agencies commonly cited inadequate staffing levels, organizational structure barriers, and limited budgets as reasons for noncompliance. Requirements with the highest rates of noncompliance are described in the following sections.

a. Supporting Procurement Center Representatives with Small Business Technical Advisors Not a Priority for OSDBUs

Ten agencies, both large and small, fell short of the section 15(k)(8) requirement to assign small business technical advisors to each office in which the SBA has assigned a procurement center representative (PCR).²¹ Small business technical advisors play a key role supporting PCRs in the performance of their many duties.²² PCRs are responsible for assessing the acquisition

¹⁷ *Supra* note 9, at 22.

¹⁸ *Supra* note 9, at 19-20.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Supra* note 9, at 23.

²² Federal Acquisition Regulation Subpart 19.403(d), "The duties of the SBA small business technical advisors are to assist the SBA breakout procurement center representative in carrying out the activities described in paragraphs (c)(1) through (7) of this section..."

strategy for any contract not set aside for small businesses and recommending requirements suitable for small business set-aside contracts.²³ Additionally, PCRs review subcontracting plans created by other-than-small businesses.²⁴ Lacking this staff support from small business technical advisors, PCRs may be hamstrung in their efforts to assist small businesses in obtaining federal contracts. Indeed, PCRs are already stretched thin – at the Department of State, there is only one PCR assigned to cover all 46 bureaus.²⁵

On one hand, a large agency such as the VA stated that compliance would require an “unusual degree”²⁶ of matrixed reporting between the OSDBU director and personnel performing technical advisor functions. The VA has 46 staff members – none of them OSDBU personnel – performing duties similar to a small business technical advisor, but they do not assist PCRs.²⁷ The VA believes this duty belongs to the procuring office.²⁸ On the other hand, smaller agencies like SSA consider this requirement better suited for larger acquisition agencies with multiple offices; SSA has one acquisition office and has not assigned a technical advisor.²⁹ Similarly, OPM (also a small agency) said it cannot dedicate full time staff to this role; instead, OPM’s OSDBU staff takes on multiple roles, including that of technical advisor.³⁰

Furthermore, the Departments of the Army and Navy both cite the Defense Federal Acquisition Regulation in their decision to delegate this responsibility to the head of contracting³¹ or the procuring activity office,³² which they state is effective in carrying out the intent of this requirement.³³ The Navy also cites a lack of staff as a reason for noncompliance.³⁴ When statutory provisions conflict with regulations, as in this case, statute controls.³⁵ Both the Army and Navy are large procuring agencies. Their decisions not to comply with statutory requirements designed to ensure small business advocates meet their mission objectives may negatively impact small businesses. GAO recommends Army and Navy explain its noncompliance before Congress, or the Departments should seek a legislative exemption from the requirement.

b. In-Sourcing Viewed as Not a Primary OSDBU Function

Each time an OSDBU reports it is not responsible for any of the section 15(k) functions assigned to its office, it means that another part of the agency is usurping this authority or that the function may not be performed at all. Non-responsibility was a commonly cited reason for noncompliance with the section 15(k)(11) requirement that the OSDBU director review and advise the agency on in-sourcing decisions. This requirement is critical to ensure that small businesses are not disadvantaged by agencies arbitrary decisions to in-source work previously and successfully performed by small businesses. Noncompliant agencies stated that OSDBUs did not have a role in reviewing every in-sourcing decision but, at some agencies, may be consulted on a case-by-case

²³ 48 C.F.R. 19.402(c).

²⁴ 15 U.S.C. § 637(d); 48 C.F.R. § 19.704.

²⁵ *Supra* note 9, at 23.

²⁶ *Supra* note 9, at 40.

²⁷ *Supra* note 9, at 98.

²⁸ *Id.*

²⁹ *Supra* note 9, at 23.

³⁰ *Supra* note 9, at 140.

³¹ *Supra* note 9, at 90. Department of the Navy.

³² *Supra* note 9, at 66. Department of the Army.

³³ *Supra* note 9, at 24.

³⁴ *Supra* note 9, at 90.

³⁵ *Supra* note 9, at 24.

basis.³⁶ This responsibility is often delegated to other offices, for instance, the budget office at SSA.³⁷ HUD stated that this was a business decision and therefore in the purview of the Office of the Chief Procurement Officer.³⁸ The Department of Education cited limited OSDBU resources as the reason why the duty was delegated to another office.³⁹ Noncompliance with this requirement is not limited to smaller agencies; DLA, a large subcomponent of the DOD, also delegates this role to the human resources offices in consultation with the acquisition office, and the DLA OSDBU director does not view this delegation of responsibility as negatively affecting small businesses.⁴⁰ At the hearing, the Committee hopes to learn why there is widespread hesitation across the federal government to comply with this requirement and the potential impacts of noncompliance on small businesses.

c. Smaller Agencies Consolidating OSDBU Director Roles Contrary to Statutory Requirement that OSDBU Directors Have No Collateral Duties

A commonly cited reason for failure to comply is that the agency is seeking efficiencies by consolidating different programs within the purview of the OSDBU, violating the section 15(k)(15) requirement that the OSDBU director hold no other positions, titles, or have other collateral duties. Having collateral duties or holding other titles would minimize OSDBU directors' abilities to fulfill the responsibilities of that office. At the EPA, the OSDBU director also oversees the Disadvantaged Business Enterprise Program; the stated reasoning was that this increases cost efficiencies and effectiveness in overlapping functions directed at small businesses, and sharing resources towards these complementary agendas was in the agency's best interest.⁴¹ Similarly, the USAID OSDBU director oversees the Minority Servicing Institutions Program. The agency argues this complements the OSDBU's role in promoting and assisting disadvantaged businesses.⁴² The common theme among these five noncompliant agencies⁴³ is that they are all "small" in terms of the dollar level of contracting that occurs at that agency. The Committee questions if this consolidation is appropriate, particularly for smaller agencies, and if there are any strong mission-oriented or resource benefits to this consolidation.

In addition to taking time away from the OSDBU director's primary responsibilities, violating this requirement may create conflicts of interest. For example, DOL's acting OSDBU director is also the Chief Acquisition Officer (CAO).⁴⁴ This is problematic as the OSDBU Director and CAO have conflicting mandates; the OSDBU's responsibility is to promote the use of small businesses in federal contracting, often through the use of small business set aside contracts. The CAO has acquisition management as his or her primary responsibility and so is responsible for "increasing the use of full and open competition in the acquisition of property and services by the executive agency."⁴⁵ Thus, the role of the OSDBU director must act as a check against him or herself in the role of the CAO, since this person is now required to both increase and decrease the use of small business set-aside contracts.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Supra* note 9, at 37.

⁴⁰ *Supra* note 9, at 60.

⁴¹ *Supra* note 9, at 14.

⁴² *Supra* note 9, at 15.

⁴³ *Supra* note 9, at 9-10.

⁴⁴ *Supra* note 9, at 14.

⁴⁵ 41 U.S.C. § 414(b)(2)

d. Agencies Prefer to Resolve Notifications of Restrictions on the Ability of Small Business to Compete at Lower Levels

OSDBUs demonstrated compliance with two of three section 15(k)(17) sub-requirements; however, widespread noncompliance was found in the third sub-requirement to notify the agency's advocate for competition.⁴⁶ Each executive agency is required to have an advocate for competition whose primary role is to promote competition and challenge barriers to competition.⁴⁷ Both large and small agencies argued it was more efficient to resolve the issue at lower levels rather than notifying the agency's advocate for competition.⁴⁸ For example, NASA's (a large agency) OSDBU works directly with contracting personnel to resolve issues at one of NASA's 10 buying centers.⁴⁹ Similarly, the USDA (a small agency) OSDBU works with the small business technical advisor and the contracting officer, notifying the advocate for competition only if the issue cannot be resolved at lower levels.⁵⁰ Additionally, both large and small agencies cited low staffing levels as a barrier.⁵¹ The Committee questions the impact of noncompliance on small businesses and seeks to understand whether flexibility is warranted.

e. The Small Business Procurement Advisory Council (SBPAC) OSDBU Review Scores are Inconsistent with GAO's OSDBU Compliance Determinations

The SBPAC is tasked with reviewing OSDBUs compliance with section 15(k) requirements.⁵² The results of SBPAC's reviews are incorporated into SBA's annual scorecard grade for each agency.⁵³ The SBA chairs the SBPAC. Members include the Director of the Minority Business Development Agency and the heads of each OSDBU for agencies having procurement powers.⁵⁴ Discrepancies were found between SBPAC scores and GAO's review. For example, SBPAC gave SSA a satisfactory score, while GAO found SSA was noncompliant with 4 out of 5 organizational structure requirements.⁵⁵ Similarly, SBPAC gave USDA an excellent score, while GAO found USDA was noncompliant with two out of four requirements.⁵⁶

One weakness in SBPAC's peer review is that agencies are not required to submit supporting documentation corroborating explanations of their small business contracting efforts.⁵⁷ The materials SBPAC reviewers use in their assessment consist only of the items submitted to them by the agencies; SBA's guidance does not provide additional means by which peer reviewers can clarify or obtain additional information. SBA stated that it relies on SBPAC members to

⁴⁶ Compliance was found with the two sub-requirements to: 1) submit notice to the contracting officer of undue restrictions on the ability of small businesses to compete and to 2) ensure the small business is aware of other resources and processes available to address the issue. *Supra* note 10, at 24-26.

⁴⁷ Examples of barriers to competition include unnecessarily restrictive statements of work and burdensome contract clauses FAR 6.502

⁴⁸ *Supra* note 9, at 25.

⁴⁹ *Supra* note 9, at 105.

⁵⁰ *Supra* note 9, at 63.

⁵¹ The United States Air Force is a large agency citing low staffing levels; Commerce and SSA, both small agencies, also cite reduced resources as barriers to compliance. *Supra* note 9, at 25.

⁵² 15 U.S.C. § 644(b)(3),(5)

⁵³ *Supra* note 9, at 7. The SBA's annual scorecard is an assessment tool measuring how well agencies reach their small business and socio-economic prime contracting and subcontracting goals.

⁵⁴ 15 U.S.C. § 644(c)

⁵⁵ *Supra* note 9, at 27.

⁵⁶ *Supra* note 9, at 29.

⁵⁷ *Supra* note 9, at 28.

objectively review the information submitted by their peers and also on agencies to submit information in good faith.⁵⁸

SBA is currently updating its SBPAC peer review processes and scoring methodology, to be finalized later this year. However, GAO found that the new review process will be similar to current processes.⁵⁹ Furthermore, SBA plans to increase the impact of the results of the SBPAC peer review on the SBA scorecard from 10% to 20% towards the agency's scorecard grade.⁶⁰ Given the discrepancies between GAO and SBPAC's reviews of OSDBU compliance with section 15(k) requirements, this raises the concern that future SBA scorecards will be less reliable and may impede on Congress's ability to conduct oversight over agency OSDBUs.

Given the impact of SBPAC's reviews on SBA's scorecards and the discrepancies between GAO and SBPACs reviews, GAO recommended that SBA develop internal controls or additional oversight mechanisms as it updates its SBPAC peer review process. However, GAO's findings regarding SBPAC may not show the whole picture of the SBPAC; understanding how SBA and OSDBU heads utilize the SBPAC is equally important. The Committee is interested in understanding how SBA views its role as chair of the SBPAC, how OSDBUs view the utility and effectiveness of the SBPAC, and seeks to understand how the SBPAC may be improved to further the duties of the SBPAC outlined in statute.⁶¹

III. Conclusion

While the OSDBUs examined by GAO are complying with most section 15(k) requirements, opportunities for improvement exist. Each of these requirements is critical to ensure effective advocacy for small contractors and steps must be taken by OSDBUs to either comply or explain to Congress the reasons for noncompliance. Agencies must seek exemptions from these statutory requirements if they choose to remain noncompliant. Addressing weaknesses in SBPACs review of OSDBUs is also important to ensure effective Congressional oversight in the future of OSDBU activities.

⁵⁸ *Supra* note 9, at 30.

⁵⁹ *Id.*

⁶⁰ *Supra* note 9, at 31.

⁶¹ 15 U.S.C. § 644(b)