

TESTIMONY OF

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House Small Business Committee

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Good afternoon, Mr. Chairman and Members of the Committee. I am honored to be here this afternoon to discuss the pace of the Small Business Administration's implementation of three key small business provisions that became law upon the passage of the National Defense Authorization Act (NDAA) of 2013. These provisions are intended to provide clarity and protection to small firms doing business with the US government. Delays in establishing rules through which the implementation of the legislation is executed harm the small businesses that Congress wanted to protect by passing the original legislation.

I have worked in government procurement and contracting for 25 years. During that time I have worked with thousands of small firms that sell to the US government as either a prime or subcontractor. I have both extensive policy and business planning experience. When President of the Coalition for Government Procurement, I was privileged to work on legislation such as the Federal Acquisition Streamlining Act, Clinger-Cohen Act and legislation requiring Federal Prison Industries to compete more evenly with small businesses. I have advocated for a level playing field for small firms throughout my professional career and, as a small business myself, continue to work for a federal business climate that promotes common sense.

The federal government relies on small business contractors to make it possible for agencies to meet their missions. Small businesses help ensure that programs assisting low income households have the money they need to feed their families. Small firms help provide for the national defense. Others perform critical, cutting edge research that will help solve problems in healthcare and technology that many of us do not know yet exist.

The diverse nature of small firms doing work with federal agencies makes it essential that the rules governing this business are as clear and well-known as possible. Today's small business supplier base includes firms with substantial federal experience as well as those just entering the market. Experienced firms need to know if the ground beneath them is shifting, while new market entries need to ensure they have a good map in the first place.

I am here today to discuss Sections 1681, 1682, and 1683 of the FY'13 NDAA. Collectively, these laws will limit the liability of companies receiving advice from federally-supported entities on government contracting matters, provide greater clarity about small business suspension and debarment procedures, and provide this body with additional reporting on that process to ensure the fair treatment of small business government contractors.

Section 1681

Section 1681 establishes Safe Harbor protections for small businesses that rely on advice given by either Procurement Technical Assistance Centers (PTAC's) or Small Business Development Centers (SBDC's). PTAC's provide local, in-person counseling and training services for small business owners. SBDC's provide services through professional business advisors such as the development of business plans; manufacturing assistance; financial packaging and lending assistance, and other services small firms need to become successful. These two organizations work in tandem with the US Small Business Administration to offer assistance to small firms seeking information on how to get established as a government contractor. Information on both PTAC's and SBDC's can be found on the SBA's own web site. Small businesses that take advice from these organizations implicitly believe that it is correct and has the support of an agency of the United States government behind it.

Yet, without the implementation of Section 1681 small contractors could find themselves in significant trouble if they act based on recommendations of an SBDC or PTAC that are inconsistent with established procurement rules. There are many centers dispensing advice to small firms of all kinds and, despite the best intentions of those involved, it is very possible that either incorrect or incomplete information could be dispensed. If, though, a company believes that it has received correct advice from an organization to which a US government agency directed it, and acts on it, it could be in violation of a host of federal procurement rules. Without the protections envisioned by Section 1681, small firms that inadvertently fall into non-compliance could find themselves exposed to government audits, investigations or whistleblower actions.

The myriad federal contract oversight organizations ensuring contract compliance are extremely active in the current market. I spend a significant amount of time in my business explaining government contract compliance to clients and emphasizing its importance. The need to ensure strict contract compliance can best be summarized by my current motto: "When selling to the government, it's not about how much money you make, it's about how much you keep."

Failure to properly follow applicable laws and regulations can have a significant negative impact on a small firm's ability to operate. Under the Civil False Claims Act, for example, the government is entitled to triple the amount of monetary damages it actually incurred, in addition

to an \$11,000 per invoice fine. Once a small firm that has committed a False Claims Act violation is through with the litigation, fines, and attorney's fees associated with a negative action, it may find that its very viability has been compromised.

The Safe Harbor provisions of Section 1681 would protect small firms from the worst penalties if their violations were caused due to reliance on faulty information provided by a PTAC or SBDC. Violators would not be off the hook for all problems, but rather have limited liability for any portion of their violations that came from advice supplied by a PTAC or SBDC.

Section 1681 calls for the SBA to establish a process by which small businesses receiving information and advice from PTAC's and SBDC's would receive a standard letter noting that the business has some limited legal protection if advice from the organization relied upon turns out to be incorrect. As with any other issue surrounding government contracting, having a written determination on government letterhead is essential if proper protection is to be provided contractors during an audit or investigation.

Having a standard, transparent, consistent practice for the issuance of such letters is critical if Section 1681 is to operate as intended. SBDC's and PTAC's are operated by a wide array of organizations in over 1,000 locations throughout the world. A common standard, therefore, is essential to ensure that all businesses operate on an equal platform and have the protections intended no matter where a firm is doing business.

One particularly important matter where accurate guidance is needed is on the matter of whether a particular business can actually be considered "small". As the Committee is aware, the regulations governing business size are complex and vary widely. While intended to be an objective standard, the nature of business and commercial market evolution injects a considerable degree of subjective judgment into the proper identification of some companies. Section 1681 recognizes this reality by requiring that the SBA issue a Compliance Guide to assist in ensuring that companies are properly classified. This Guide could be a valuable tool to reduce the chances that a firm would be improperly classified.

As the Committee is certainly aware, being mis-categorized as a small firm can lead to significant negative consequences for a business. Just some of the penalties that can be levied include contract cancellation, post-award contract audits, negative performance evaluations and,

of course, suspensions and debarments. Companies that could have been protected from these penalties by the issuance of the Guide called for in Section 1681 are still in as much risk as they were before the law was passed.

Despite the obvious benefits to small firms of having the protections provided for in Section 1681, the SBA has yet to promulgate a rule implementing it. Congress is now far down the road on completing the NDAA for FY' 15, meaning that nearly two years have lapsed since the implementation of the FY' 13 measure. Small businesses continue to be exposed to potential litigation and other negative actions today due the agency's inability to move forward. Put another way, the SBA's inability to act is costing small firms money and placing them in unnecessary risk.

Section 1682

As noted above, among the penalties at the government's disposal to discipline inappropriate contractor behavior are suspension and debarment. These penalties are, quite rightly, referred to as the "death penalty" by some in the federal contracting world. A federal suspension or debarment brings all of a company's public sector work to a halt at the federal, state, and local government levels and as either a prime or sub-contractor.

Suspensions and debarments are currently increasing. Just last month, the Government Accountability Office issued a report showing that such actions have more than doubled government-wide since 2009. Ironically, the same report identified improvements made in six government agencies to bring consistency and transparency to the suspension and debarment process, something the SBA is specifically supposed to do per Section 1682. The GAO noted the positive progress in the agencies it tracked, making a lack of progress at the SBA more notable.

Section 1682 calls on the SBA to issue new suspension and debarment regulations within 270 days of enactment of the original bill. Similarly, new Standard Operation Procedures (SOP's) were to be developed in the same timeframe. Among the latter was a requirement that the name of a specific Suspension and Debarment Officer (SDO) be identified.

We are now significantly beyond the 270 day limit. Without newly issued rules, two things are happening in the small business world. First, companies wrongly identifying themselves as

small, but working under a contract as a small business, have an easier time fighting suspension or debarment proceedings. This is in part the case because the provisions in Section 1682 allowing contracting officers to take such an action regardless of whether the firm is providing satisfactory work have yet to be implemented.

Secondly, truly small firms are suffering from the lack of a consistent, transparent suspension or debarment process from the agency charged with protecting and promoting their federal market participation.

Neither of these outcomes can be called acceptable. The consequences of a suspension or debarment action can be truly business-ending. This is why such proceedings have traditionally been above the political fray and carried out in a clear cut manner. There simply must be an updated, standard set of procedures that the SBA will follow when its officials literally hold the life or death of a firm in their grasp.

Other agencies have taken necessary steps to improve their processes, even in the absence of specific legislative guidance to do so. These recent actions have created a set of real-time best practices that the SBA could draw upon to establish their own rules. Congress passed Section 1682 with the intent to protect small businesses, whether it be from competition from firms that are not actually small or from patchwork suspension and debarment practices that can lack transparency and insert subjectivism into the suspension or debarment process.

As a result of the SBA's inaction, small businesses may actually be treated more fairly at other agencies.

Section 1683

This section requires that the SBA issue an annual report to Congress on suspension and debarment activities. The SBA oversees many types of small firms doing business with the government, including companies with special socio-economic designations. There are special precautions that must be taken when moving against such firms and Congress is right in wanting to review agency actions in this area to ensure that all firms are treated fairly.

As with Section 1682, while the initial intent may have been to suspend or debar companies improperly calling themselves “small”, this section also has the ability to protect actual small firms from inconsistent processes. Including specifics such as the number of companies proposed for suspension, the number actually suspended, and the reasons for such actions, as Section 1683 does, gives Congress a fuller understanding of what is happening in this important area. Other provisions in this section will provide information on how the SBA is working with its Office of the Inspector General and the Department of Justice, to ensure positive procurement outcomes. If these reports work as intended the information in them may actually result in fewer companies being penalized if they can use the information to better understand what it is that gets firms in trouble in the first place.

In addition, properly used, the information in the report can be used to help Congress make future decisions on safeguards, preferences, goals or other public policy measures that impact the manner in which small businesses sell to government agencies. Should, for instance, small firms be subject to the same monetary penalties as a much larger business? The answer to that and other questions may come from the information provided in an annual report. If the report shows that today’s monetary fines are overly punitive on small firms, thus driving some out of the market or keeping others from coming in, Congress could change the rules for small firms if it believed that doing so would be in the government’s best interest.

Conclusion

Our firm recommends that Congress continue to provide oversight on the SBA’s lack of progress in implementing these three key elements of the 2013 NDAA and take steps to hold senior agency officials accountable for this inaction. Small firms are not getting the benefit of the protections originally envisioned. Businesses that are not truly small are still competing with legitimate businesses for small business work. Due to these, and other lapses at the SBA, small businesses are not receiving the support Congress envisioned. As a result, those small firms that are conducting business must often face an uphill battle, while others simply stay out of the market due to their inability to crack the code. This, ultimately, is not in the government’s best interest as it deprives it of unique and cutting edge solutions.

Thank you for your time and attention. I look forward to your questions.