



Section-by-Section: Small Contractors Increase Competition Act

Section 1 – Provides the Short Title and the Table of Contents

TITLE I –GOALING FOR SMALL BUSINESS CONCERNS

As discussed at hearings on February 12, 2015, March 17, 2015, and March 19, 2015, the Committee is concerned that the small business goaling process is being misused to the detriment of small businesses. Under the Small Business Administration’s (SBA) scorecard system, the federal government received an “A” grade for FY 2013.¹ While an “A” grade and a reasonable percentage of small business prime contracting dollars would seem to indicate that a healthy percentage of dollars are being awarded to small businesses, Chart 1 shows that the use of small businesses is declining even as the percentage of dollars awarded to small businesses increases. Additionally, it is worth noting that in obtaining its A, the federal government did not meet half of its numerical goals.²

Chart 1. Small Business Contracting FY10-FY14³

FY	Total Contract Dollars (in Billions)	Total Small Business (SB) Dollars	Total Number of SB Actions	Total DoD Contract Dollars	Total DoD Small Business Dollars	Total Number of DoD SB Actions	Average Value of Small Business Contract Action	Average Value of DoD Small Business Contract Action
11	\$549.6	\$103.6	3,346,553	\$374.1	\$60.4	2,325,622	\$30,957.23	\$25,971.55
12	\$518.3	\$100.0	2,584,893	\$290.1	\$60.2	1,453,952	\$38,686.32	\$41,404.39
13	\$462.3	\$91.9	1,560,467	\$308.5	\$50.0	711,998	\$58,892.63	\$70,224.92
14	\$444.7	\$98.9	1,390,987	\$284.7	\$55.6	745,626	\$71,100.59	\$74,568.22

¹ SBA, “FY 2013 Procurement Scorecard,” available at https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf (last accessed February 26, 2015).

² SBA, “FY 2013 Procurement Scorecard,” available at https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf.

³ *Id.*

From FY11 through FY14, the percentage of dollars awarded to small businesses increased each year, from just over 18 percent to approximately 22.25 percent.⁴ At the same time, despite a decline in overall federal spending, the dollars awarded to small businesses remained fairly constant during this period. While this would normally be heralded as a success, a deeper dive into the numbers shows that the number of small business contract actions fell by almost 60 percent and the average size of a contract action increased 230 percent. This reflects that fewer small businesses are winning contracts, but those contracts are worth more, which may indicate that some small businesses are doing very well but many others are losing opportunities to compete.

Alarming, at the Department of Defense (DoD), which is arguably a better reflection of the federal government's ability to maintain a healthy industrial base capable of supporting defense programs, the results were worse. The percentage of contract dollars awarded to small businesses at DoD increased from just over 16 percent to just over 19 percent, but the actual dollars only fluctuated by about 10 percent. The number of small business contract actions at DoD fell by almost 70 percent, and the value of those contract actions rose by nearly 290 percent. The number of companies registered to do business with the federal government has dropped by over 100,000 from 2012, so that only 273,072 small businesses are still registered to compete for federal contract.⁵ This speaks to a greater problem in the industrial base—a declining participation rate.

SBA's Office of Advocacy (Advocacy) recently highlighted this small business participation problem. Specifically, Advocacy identified 23 industries in which the government spends over \$500 million per year, but where less than 10 percent of procurements are awarded to small businesses.⁶ These are areas important to the industrial base where small businesses are not participating, but this is not reflected in the current scorecard process.

Consequently, this language seeks to address the small business hoaling process through three legislative changes:

Sec. 101. Amendment to Governmentwide goal for small business participation in procurement contracts. This section requires that SBA work to increase the number of industries in which small businesses compete for contracts. Currently, there are gaps in our industrial base but no policy of encouraging small businesses to compete for work in these areas, which exacerbates the problem and leads to less competition and higher prices.

Sec. 102. Including subcontracting goals in agency responsibilities. Currently, when considering whether senior agency executives are eligible for bonuses, agencies must look at

⁴ Analysis based upon FPDS, available at <https://www.fpds.gov> (last accessed January 28, 2015). Copies of reports are on file with the Committee.

⁵ 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 382,092 active small businesses.

⁶ SBA Advocacy, EVALUATION OF THE SMALL BUSINESS PROCUREMENT GOALS ESTABLISHED IN SECTION 15(G) OF THE SMALL BUSINESS ACT 41-42 (2014).

whether they met the small business prime contracting goals. However, agencies don't look at whether the agency is meeting its subcontracting goals. As a consequence, the percentage of subcontract dollars awarded to small businesses has been falling, and is down 2.5% since 2010. Make no mistake about the significance of subcontracting: in FY 2013, small businesses received \$86.7 billion in subcontracts. Subcontracting is an important entry point for federal contractors. Therefore, this provision holds senior agency officials accountable for meeting all the goals.

Sec. 103. Scorecard program for evaluating Federal agency compliance with small business contracting goals. This provision redirects SBA's scorecard program. Currently the program allows SBA to award "A" and "A+" grades to agencies that fail to meet the goals. As implemented now, only 10 percent of an agency's grade looks at its subcontracting achievements, even though if all the goals had been met in FY 2013, prime contracting would have only accounted for 0.001 percent more dollars than subcontracting.

This legislation would require that SBA look at all five prime contracting goals, all five subcontracting goals, grades, the number of each type of small businesses awarded contracts in each industry each year, and the number of each type of small businesses competing for contracts in each industry each year. Thus, while it still would place a premium on dollars awarded to small business prime contractors, it would also encourage a greater small business participation rate to increase competition and improve the health of the industrial base.

TITLE II—BUNDLING AND CONSOLIDATION OF CONTRACTING REQUIREMENTS FOR SMALL BUSINESS CONCERNS

As discussed at hearings on March 17, 2015, and October 10, 2013, contract bundling and consolidation continue to unnecessarily prevent small businesses from competing for federal contracts. Cases examined by the Committee identified contracts where thousands of small businesses were displaced and no longer allowed to compete for federal work. The Committee worries that this lack of competition will ultimately result in higher prices and in a lack of businesses able to properly service the federal market. Therefore, this title offers two provisions to reduce unjustified bundling and consolidation:

Sec. 201. Data quality improvement. Prior to bundling or consolidating a contract, agencies are required to identify the contract as bundled or consolidated, justify the decision to bundle or consolidate the contract, mitigate any adverse effects on small businesses, and track the contract to ensure the anticipated benefits occurred. Unfortunately, these requirements are rarely observed, as hearing witnesses told of requesting justifications under the Freedom of Information Act only to discover no justification occurred. This provision would require agencies implement a plan to improve compliance with the current law.

Sec. 202. Notice and justification requirements for bundling or consolidation of contract requirements. Small businesses and the SBA have the ability to challenge contracts that are

unjustly bundled or consolidated. However, to do so requires that that SBA or company be aware that the bundling or consolidation is occurring. Currently, agencies are only required to publish justifications within a year of bundling or consolidating a contract – long after small businesses or SBA could benefit from the data. This provision requires that agencies publish bundling and consolidation justifications with the contract solicitation.

TITLE III—ENHANCING COMPETITION IN CONTRACTING FOR SMALL BUSINESS CONCERNS

As discussed at hearings on February 12, 2015, March 17, 2015, and March 19, 2015, the Committee is concerned that the procurement practices are limiting the ability of small businesses to compete and thereby undermining the federal procurement process. Each of these threats is addressed as a section of the legislation.

Sec. 301. Joint venturing and teaming. The Small Business Act (the Act) encourages small businesses to team and joint venture, and the SBA will approve joint ventures to facilitate small businesses participating on federal contracts. In the 112th Congress, this Committee successfully passed legislation as part of the National Defense Authorization Act for FY 2013 to make it easier for small businesses to team by changing the limitations on subcontracting. However, small businesses that do team and joint venture are often unsuccessful at winning contracts because some agencies have stated that the agency will only consider the past performance or financial responsibility of the joint venture or the prime contractor, not the small business members of the joint venture or the parties to the team. As many joint ventures are unpopulated, this all but disqualifies the small business from competition. This provision requires that contracting officers look at the qualifications of team members and members of the joint venture.

Sec. 302. Restrictions on reverse auctions. As defined by this provision, reverse auctions are an auction between a group of offerors who compete against each other by submitting offers for requirement, and offerors have the ability to submit revised offers with lower prices throughout the course of the auction. When used properly, reverse auctions are an important tool that may benefit taxpayers and contracting agencies. However, when used inappropriately, reverse auctions may place taxpayers, warfighters and small businesses at risk. Therefore, this language creates a new section of the Act to limit the use of reverse auctions when using small business contracting authorities. Specifically, it requires training of contracting officers, and prohibits the use of reverse auctions for sole source contracts or contracts with inadequate competition. It also states that reverse auctions should only be used when the good or service being purchased can be considered only either technically acceptable or unacceptable. This provision requires that the government communicate honestly with bidders regarding the ranking of offers, as some reverse auctions have misled offerors regarding the status of bids. The bill also makes it clear that when using a third-party reverse auction service, the government must still follow all of the normal procurement rules, as there are cases where a third party provider is excluding companies from competing or using third party data to inform responsibility determinations. Finally, the

provision states that reverse auctions may only be used for contracts other than contracts for construction, goods used to protect people from bodily harm, and technical goods and services.

Sec. 303. Revision to the Nonmanufacturer rule. The Nonmanufacturer rule (NMR) exists to prevent fraud. Specifically, when the competition for a contract for goods is restricted to small businesses, the NMR requires that the good bought be the product of a small business.

Otherwise, the government risks restricting competition only to have the awardee provide a product it has simply passed along from a large manufacturer or international contractor. The law does provide exceptions in cases where there is not a small business manufacturer.

However, a recent court case stated that the NMR applies to service contracts. While other provisions protect against small service contractors acting as fronts for large businesses, applying the NMR to these contracts will change the way in which construction and service contractors operate, and exclude more small businesses from the industrial base. Therefore, this provision clarifies that the NMR applies to contracts for goods, not contracts for services.

TITLE IV—SMALL BUSINESS ACT PERSONNEL AMENDMENTS

In an effort to operate more efficiently, SBA has suggested that the following changes would allow it to save money and better serve taxpayers.

Sec. 401. Establishment of an Office of Hearings and Appeals in the Small Business

Administration. The Office of Hearings and Appeals (OHA) is an independent administrative tribunal at SBA that hears appeals of SBA program determinations and appeals of the size standards applied to federal contracts. While OHA exists in fact, it does not exist in statute, which poses a challenge to its independence. It also requires that SBA pay other agencies to borrow Administrative Law Judges from time to time. Therefore, this section established OHA and removes the requirement for borrowed judges. In doing so, SBA believes it will save on salaries and expenses.

Sec. 402. Training requirements for Procurement Center Representatives. SBA's Procurement Center Representatives (PCRs) act as advocates for small contractors within federal agencies. Current law requires that PCRs have the highest level federal contracting certification, making it difficult to hire qualified individuals in some areas without incurring relocation expenses. This provision gives SBA one year from the date of hire to train the PCRs.

Sec. 403. Training requirements for Business Opportunity Specialists. SBA's Business Opportunity Specialists (BOS) work with small contractors in the district offices. Current law requires that BOSs have an entry level federal contracting certification, making it difficult to hire qualified individuals in some areas without incurring relocation expenses. This provision gives SBA one year from the date of hire to train the BOSs.

TITLE V—SIZE STANDARDS FOR SMALL BUSINESS CONCERNS

Sec. 501. Petitions for reconsideration of size standards for small business concerns.

As discussed at hearings on March 17, 2015 and May 5, 2011, there is a SBA size standard assigned to each industry that determines which companies are small and which are large for that industry. Each federal contract must adopt one of these size standards. Therefore, the size standards that SBA creates affect which businesses can compete for nearly \$100 billion in federal contracts. Prior to 2011, there were roughly 1100 NAICS codes and 41 separate size standards, but at that time SBA then proposed selecting size standards from a limited number of fixed size standards: eight revenue-based standards and eight employee-based size standards. Following an outcry from industry during a May 5, 2011 hearing, this Committee reported H.R. 3987, the Small Business Protection Act of 2012, which later became law as section 1661 of the National Defense Authorization Act for Fiscal Year 2013 (FY 13 NDAA).

The FY 13 NDAA altered the SBA's ability to establish size standards in three important ways. First, it set minimum requirements for any rulemaking pertaining to any size standards. Second, it limited the use of common size standards. Finally, the FY 13 NDAA prohibited a limitation on the number of size standards.

Unfortunately, SBA continues to propose rules that contradict these provisions of the amended statute, such as its September 10, 2014 proposed rule.⁷ When the Committee urged SBA to withdraw the proposed rule for violating all three of the new provisions, SBA responded that the next version of its size standards guidelines will incorporate the FY 2013 changes, and that these will apply to size standards as early as FY 2017.⁸ However, this does not address the problems created for firms covered by the proposed rule, or proposed rules issued prior to SBA revising its guidance. Hundreds of thousands of small contractors will be subject to SBA's proposed rules – rules that would not withstand judicial scrutiny, but to obtain a remedy these small businesses must resort to the federal courts.

As these size standards are key to the ability of small businesses to compete for contracts, and therefore to the health of the industrial base, this provision provides small contractors with an administrative remedy. Specifically, it provides OHA with the ability to hear challenges brought by firms adversely affected by SBA promulgating size standards that do not abide by the Act. This will hold SBA accountable while minimizing the cost to small businesses.

⁷ Small Business Size Standards: Industries with Employee Based Size Standards Not Part of Manufacturing, Wholesale Trade, or Retail Trade, 79 Fed. Reg. 53,646 (proposed Sept. 10, 2014) (to be codified at 13 C.F.R § 121.201).

⁸ Letter on file with the Committee.