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An Overview of Small Business Contracting

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SUMMARY

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An Overview of Small Business Contracting

Congress has broad authority to impose requirements upon the federal procurement process, that is, the process whereby agencies obtain goods and services from the private sector. One way in which Congress has exercised this authority is by adopting measures to promote contracting and subcontracting between "small businesses" and federal agencies.

These measures, among other things, declare a congressional policy of ensuring that a "fair proportion" of federal contract and subcontract dollars is awarded to small businesses; establish government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to small businesses; establish an annual Small Business Goaling Report to measure progress in meeting these goals; generally require federal agencies, under specified circumstances, to reserve contracts that have an anticipated value greater than the micro-purchase threshold (currently $10,000), but not greater than the simplified acquisition threshold (currently $250,000) exclusively for small businesses; authorize federal agencies, under specified circumstances, to set aside contracts that have an anticipated value greater than the simplified acquisition threshold exclusively for small businesses; authorize federal agencies to make sole source awards to small businesses when the award could not otherwise be made (e.g., only a single source is available, under urgent and compelling circumstances); authorize federal agencies to set aside contracts for, or grant other contracting preference to, specific types of small businesses (e.g., 8(a) small businesses, HUBZone small businesses, women-owned small businesses (WOSBs) and service-disabled veteran-owned small businesses (SDVOSBs)); and task the Small Business Administration (SBA) and other federal procurement officers with reviewing and restructuring proposed procurements to maximize opportunities for small business participation.

Small business contracting programs generally have strong bipartisan support. However, that does not mean that these programs face no opposition, or that issues have not been raised concerning the impact and operations of specific programs. For example, small business advocates note that implementing regulations in the Federal Acquisition Regulation (FAR) narrow the reach (and impact) of some small business contracting preferences by excluding specific types of contracts, such as those listed in the Federal Supply Schedules, from FAR requirements pertaining to small business contracting. Advocates want the federal government to enact policies that reduce or eliminate such exclusions. Critics have questioned some of these programs' effectiveness, in terms of both promoting small business opportunities to win federal contracts and promoting a more diversified, robust economy.

Many observers judge the relative success or failure of federal efforts to enhance small business contracting opportunities by whether federal government and individual federal agencies meet the predetermined procurement goals in the annual Small Business Goaling Report. In recent years, the federal government has generally succeeded in meeting the government-wide goals of awarding 23% of the total value of all small business eligible prime contract awards to small businesses, 5% to small disadvantaged businesses (SDBs), and 3% to SDVOSBs. It has had difficulty meeting the goals of 5% to WOSBs and 3% to HUBZone small businesses.

The Small Business Goaling Report is the most convenient measure available to compare federal small business contracting performance over time, but it has limitations. For example, the SBA excludes some contracts from the report in its determination of what is "small business eligible" and some federal procurement activities are not included because they are not recorded in the Federal Procurement Data System—Next Generation. It also does not evaluate the effect these contracts have on small businesses, industry competitiveness, or the overall economy.

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Introduction

During World War II and then again after the outbreak of fighting in Korea, Congress found that the existence of thousands of small business concerns was being threatened by war-induced shortages of materials coupled with an inability to obtain defense contracts or financial assistance.[1] Concerned that many small businesses might fail without government assistance, in 1953, Congress passed and President Dwight Eisenhower signed into law the Small Business Act (P.L. 83-163), which authorized the Small Business Administration (SBA).[2] The act specifies that it is the declared policy of Congress to promote the interests of small businesses to "preserve free competitive enterprise." Congress specified that one of the ways to preserve free competitive enterprise was to insure that small businesses received a "fair proportion" of federal contracts and subcontracts:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.[3]

Congress indicated that its intent in supporting small businesses was not to "favor small business at the expense of its larger competitors. Our only purpose in supporting the creation and effective operation of the SBA is to equalize the scales when necessary to guarantee the continued vigor of our competitive free enterprise system."[4]

More recently, a House committee report indicated that the primary rationale for small business contracting programs

> is the positive economic benefits they provide, as well as assisting small businesses overcome the complexities of the system. The economic benefits of these programs can be seen in two primary areas—market competition and local economic development. First, [these] programs … are designed to increase and diversify small contractors with the intent of expanding the federal supplier base. This leads to increased competition, which results in higher quality, greater product variety, and lower prices. Second, these contracting initiatives lower barriers to entry in a wide range of markets for small businesses. This

[1] U.S. Congress, Senate Select Committee on Small Business, *Small Business Administration*, committee print, 83rd Cong., 1st sess., August 10, 1953 (Washington: GPO, 1953), p. iii. Also, see U.S. Congress, House Committee on Banking and Currency, *Small Business Act of 1953*, report to accompany H.R. 5141, 83rd Cong., 1st sess., May 28, 1953, H.Rept. 83-494 (Washington: GPO, 1953).

[2] On July 31, 1951, the Small Defense Plants Administration (SDPA) was created by an amendment to P.L. 81-774, the Defense Production Act of 1950, and was given "primary responsibility in the field of channeling defense contracts to small producers." As hostilities with Korea subsided, so did the perceived need for the SDPA. Congress granted the Small Business Administration (SBA) similar authority to promote small business contracting with federal agencies, but with all federal agencies, as opposed to focusing on the Department of Defense. See U.S. Congress, Senate Select Committee on Small Business, *Small Business Administration*, committee print, 83rd Cong., 1st sess., August 10, 1953 (Washington: GPO, 1953), p. iv.

[3] 15 U.S.C. §631(a); and P.L. 83-163, the Small Business Act of 1953 (as amended), see http://legcounsel.house.gov/Comps/Small%20Business%20Act.pdf.

[4] U.S. Congress, Senate Select Committee on Small Business, *Small Business Administration*, committee print, 83rd Cong., 1st sess., August 10, 1953 (Washington: GPO, 1953), p. v.

> provides greater market access for small firms' goods and services. From an economic perspective, such access is critical to generating positive macroeconomic benefits, including higher job creation, wage growth, and greater income distribution.[5]

Over the years, Congress has approved legislation to support small business in various ways. For example, the SBA administers several types of programs to support small businesses, including loan guaranty and venture capital programs to enhance small business access to capital; contracting programs to increase small business opportunities in federal contracting; direct loan programs for businesses, homeowners, and renters to assist their recovery from natural disasters; and small business management and technical assistance training programs to assist business formation and expansion. In recent years, congressional interest in these programs has increased, primarily because assisting small businesses is viewed as a means to stimulate economic activity and create jobs.

This report describes the various federal programs, requirements, procurement officers, and procurement offices involved in promoting federal contracting and subcontracting with small businesses, small disadvantaged businesses (SDBs), SDBs participating the SBA's "8(a) Program," Historically Underutilized Business Zone (HUBZone) small businesses, women-owned small businesses (WOSBs), and service-disabled veteran-owned small businesses (SDVOSBs). The SBA administers many, but not all, of these programs.

It examines the following federal requirements and authorities in promoting contracting and subcontracting with small businesses:

1. The requirement that federal agencies generally reserve contracts that have an anticipated value greater than the micro-purchase threshold (currently $10,000) but not greater than the simplified acquisition threshold (currently $250,000) exclusively for small businesses unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive with market prices and the quality and delivery of the goods or services being purchased.[6]
2. The establishment of small business procurement goals, both government-wide and agency specific, to promote the awarding of contracts to small businesses.
3. The requirement that federal agencies generally set aside contracts that have an anticipated value exceeding the simplified acquisition threshold exclusively for small businesses when there is a reasonable expectation that offers will be obtained from at least two responsible small businesses offering the products of different small businesses (Rule of Two) and the award will be made at a fair market price.[7]
4. The authority provided federal agencies to make sole source awards to small businesses when the award could not otherwise be made (e.g., only a single source is available, under urgent and compelling circumstances).

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[5] U.S. Congress, House Committee on Small Business, *Small Business Contracting Program Improvements Act*, report to accompany H.R. 3867, 110th Cong., 1st sess., October 22, 2007, H.Rept. 110-400 (Washington: GPO, 2007), p. 4.

[6] Federal Acquisition Regulation (FAR) §19.502-2.

[7] "For acquisitions of supplies or services that have an anticipated dollar value exceeding the simplified acquisition threshold … the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs (i.e., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a small business set-aside (see 19.502-2(b)). However, if a requirement has been accepted by the Small Business Administration (SBA) under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 C.F.R. parts 124, 125, and 126." FAR §19.203(c).

5. The authority provided federal agencies to set aside contracts for, or grant other contracting preference to, specific types of small businesses (e.g., 8(a) small businesses, HUBZone small businesses, WOSBs, and SDVOSBs).

It discusses the SBA's oversight and responsibilities concerning the small business goaling program, small business mentor-protégé programs, the 7(j) management and training program, and the surety bond guaranty program.

It also discusses the role of the Office of Small and Disadvantaged Business Utilization (OSDBU), located in each federal agency, in promoting contracting with small businesses, and examines the role and responsibilities of various federal procurement officers, including procurement center representatives, commercial market representatives, and business opportunity specialists, in promoting small business contracting opportunities.

This report concludes with a brief discussion of the strong bipartisan support for small business contracting programs. However, that does not mean that these programs face no opposition, or that issues have not been raised concerning the impact and operations of specific programs. For example, small business advocates note that implementing regulations in the Federal Acquisition Regulation (FAR) narrow the reach (and impact) of some small business contracting preferences by excluding specific types of contracts, such as those listed in the Federal Supply Schedules, from FAR requirements pertaining to small business contracting.[8] Advocates want the federal government to enact policies that reduce or eliminate exclusions that narrow the reach of small business contracting preferences. Critics have questioned some of these programs' effectiveness, in terms of promoting both small business opportunities to win federal contracts and a more diversified, robust economy.[9]

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[8] FAR §8.405-5 indicates that the small business preference programs are not mandatory in this subpart (blanket purchase agreements and Federal Supply Schedules). Federal agencies may, at their discretion, set aside orders under the Federal Supply Schedules and blanket purchase agreements for small businesses.

The Federal Supply Schedule program "provides Federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographic area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas. …Although GSA [General Services Administration] awards most Federal Supply Schedule contracts, it may authorize other agencies to award schedule contracts and publish schedules. For example, the Department of Veterans Affairs awards schedule contracts for certain medical and nonperishable subsistence items." FAR §38.101.

A blanket purchase agreement (BPA) is "a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. …BPAs should be established for use by an organization responsible for providing supplies for its own operations or for other offices, installations, projects, or functions. Such organizations, for example, may be organized supply points, separate independent or detached field parties, or one-person posts or activities. …The use of BPAs does not exempt an agency from the responsibility for keeping obligations and expenditures within available funds." FAR §13.303-1.

For an argument advocating regulatory changes that might require the mandatory application of set-asides to orders in the same manner that law and regulation currently require for contracts, see Interagency Task Force on Federal Contracting Opportunities for Small Businesses, *Report*, September 2010, pp. 8-10, at https://www.sba.gov/document/support—interagency-task-force-federal-contracting-opportunities-small-businesses.

The U.S. Supreme Court ruled in 2016, in *Kingdomware Technologies, Inc. v. United States*, that the Department of Veterans Affairs (VA) cannot continue its former practice of making purchases through the Federal Supply Schedules without first considering whether the contract could be set aside for veteran-owned small businesses (VSOBs) due to language in P.L. 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, that required VA specifically to promote contract awards to VOSBs.

[9] For example, see Henry Beale and Nicola Deas, "The HUBZone Report," prepared for the SBA, Office of Advocacy, May 2008, pp. i, ii, 124-131, at https://www.sba.gov/sites/default/files/rs325tot.pdf; and Clifford A. Grammich,

Basic Contracting Requirements

Federal Contractors

With a few exceptions, businesses interested in bidding on a federal contract must obtain a Dun & Bradstreet Data Universal Numbering System (DUNS) number (i.e., a unique nine-digit identification number) for each of the business's physical locations, and register with the federal government's System for Award Management (SAM).[10] SAM is used by government agencies for several purposes, including to find contractors.[11]

Businesses also must match their products and services to a North American Industry Classification System (NAICS) code. Businesses generally have a primary NAICS code, and may have multiple NAICS codes if they sell multiple products and services.[12]

Businesses that identify themselves as a small business in SAM must (1) meet the Small Business Act's definition of a small business and (2) not exceed size standards established, and updated periodically, by the SBA.[13]

The Small Business Act defines a small business as one that

- is organized for profit;
- has a place of business in the United States;
- operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor;
- is independently owned and operated; and
- is not dominant in its field on a national basis.[14]

The business may be a sole proprietorship, partnership, corporation, or any other legal form.[15]

Thomas R. Edison, Jr., Nancy Young Moore, and Edward G. Keating, *Small Business and Defense Acquisitions: A Review of Policies and Current Practices* (Santa Monica, CA: RAND, 2011), p. xii, 15, 16, at https://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG443.pdf.

[10] SBA, "Federal Contracting Guide: Basic Requirements," at https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements. For additional information and analysis, see CRS Report R44490, *Unique Identification Codes for Federal Contractors: DUNS Numbers and CAGE Codes*, by L. Elaine Halchin; and CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by L. Elaine Halchin.

[11] SBA, "Register with SAM," at https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements#section-header-8.

[12] U.S. Bureau of the Census, "North American Industry Classification System," at https://www.census.gov/eos/www/naics/.

[13] P.L. 111-240, the Small Business Jobs Act of 2010, requires the SBA to conduct a detailed review of not less than one-third of the SBA's industry size standards every 18 months beginning on the new law's date of enactment (September 27, 2010) and ensure that each size standard is reviewed at least once every five years.

[14] 15 U.S.C. §632(a); and 13 C.F.R. §121.105. Affiliations between businesses, or relationships allowing one party control or the power of control over another, generally count in size determinations. Businesses can thus be determined to be other than small because of their involvement in joint ventures, subcontracting arrangements, or franchise or license agreements, among other things, provided that their employment or income, plus those of their affiliate(s), exceed the pertinent size threshold. See 13 C.F.R. §121.103.

[15] For additional information and analysis of the SBA's size standards, see CRS Report R40860, *Small Business Size Standards: A Historical Analysis of Contemporary Issues*, by Robert Jay Dilger.

The Small Business Act authorizes the SBA to establish size standards to ensure that only small businesses are provided SBA assistance. The SBA currently uses two types of size standards to determine SBA program eligibility: *industry-specific size standards* and *alternative size standards*, for some lending and venture capital investment programs based on the applicant's maximum tangible net worth and average net income after federal taxes.[16] The SBA's industry-specific size standards are used to determine eligibility for federal small business contracting purposes.

The SBA determines if a business is small by comparing that business's economic characteristics (typically number of employees or average annual receipts) to size standards listed in the SBA's Table of Small Business Size Standards. The table has size standards for 1,036 industrial classifications in the North American Industrial Classification System. Businesses that exceed the applicable size standard for their primary industry do not meet the requirement of being small.

The SBA's size standards are designed to (1) encourage competition within each industry and (2) ensure that SBA assistance is provided only to firms that are not dominant in their field on a national basis. The size standards are derived through an assessment of four economic factors: (1) the average firm size, (2) the average assets size as a proxy of start-up costs and entry barriers, (3) the four-firm concentration ratio (the cumulative share of total industry receipts of that industry's four biggest firms) as a measure of industry competition, and (4) the size distribution of firms.[17] The SBA also considers the ability of small businesses to compete for federal contracting opportunities and, when necessary, several secondary factors "as they are relevant to the industries and the interests of small businesses, including technological change, competition among industries, industry growth trends, and impacts of size standard revisions on small businesses."[18]

Historically, the SBA has used the number of employees to determine if manufacturing and mining companies are small (ranging from fewer than 50 employees for some industries to fewer than 1,500 employees for others) and average annual receipts for most other industries (ranging from no more than $1 million for some industries to no more than $40 million for others).[19]

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[16] The SBA's 7(a) loan guarantee program allows businesses to qualify as small if they meet the SBA's size standard for the industry in which the applicant is primarily engaged, or a maximum tangible net worth of not more than $15 million and average after-tax net income after federal taxes (excluding any carry-over losses) of not more than $5 million for two full fiscal years before the date of application. 15 U.S.C. §632(a)(2-3) and 15 U.S.C. §632(a)(5)(B).

Businesses participating in the SBA's 504/Certified Development Company (504/CDC) loan guaranty program are deemed small if they did not have a tangible net worth in excess of $15 million and did not have an average net income in excess of $5 million after taxes (excluding any carry-over losses) for the preceding two years before the date of application. 15 U.S.C. §632(a)(5)(B).

The SBA's Small Business Investment Company (SBIC) program allows businesses to qualify as small if they meet the SBA's size standard for the industry in which the applicant is primarily engaged, or a maximum tangible net worth of not more than $19.5 million and average after-tax net income for the preceding two years of not more than $6.5 million. 15 U.S.C. §662(12)(A-B); and SBA, "Small Business Size Standards: Inflation Adjustment to Monetary Based Size Standards," 79 *Federal Register* 33647-33669, June 12, 2014.

[17] SBA, Office of Government Contracting and Business Development, "SBA Size Standards Methodology," April 27, 2018, pp. 29, 30, at https://www.sba.gov/document/support—size-standards-methodology-white-paper.

[18] Ibid., p. 1. Any changes to size standards must follow the rulemaking procedures of the Administrative Procedure Act. A proposed rule changing a size standard is first published in the *Federal Register*, allowing for public comment. It must include documentation establishing that a significant problem exists that requires a revision of the size standard, plus an economic analysis of the change. Comments from the public, plus any other new information, are reviewed and evaluated before a final rule is promulgated establishing a new size standard.

[19] Ibid., p. 28.

Federal Agencies

To make it easier to determine if an offeror meets the SBA's definition of a small business, prior to soliciting bids, federal agencies are required to classify a product or service being acquired in only one (NAICS code) industry, "whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one."[20] When acquiring a product or service that could be classified in two or more industries with different size standards, contracting officers must "apply the size standard for the industry accounting for the greatest percentage of the contract price."[21] If a solicitation calls for more than one item and allows offers to be submitted on any or all of the items, "an offeror must meet the size standard for each item it offers to furnish."[22] If a solicitation calling for more than one item requires offers on all or none of the items, "an offeror may qualify as a small business by meeting the size standard for the item accounting for the greatest percentage of the total contract price."[23]

With several notable exceptions (e.g., HUBZone small businesses, SBA 8(a) program participants, and veteran-owned small businesses [VOSBs] and SDVOSBs seeking contracts with the Department of Veterans Affairs), businesses generally self-certify their status as small when they register their business in the SAM database.

The contracting officer is required to accept an offeror's representation in a specific bid or proposal that it is a small business unless "(1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer has a reason to question the representation."[24]

If an offeror's small business status is challenged, the contracting officer is generally not allowed to award the contract until the SBA has made a size determination or 15 business days after the SBA receives the protest, whichever occurs first.[25] The SBA's Office of Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located initially reviews the protest.[26] The Area Office is required, by regulation, to determine the offeror's size status within 15 business days after receipt of the protest, or "within any extension

[20] FAR §19.102(c).

[21] FAR §19.102(d).

[22] FAR §19.102(e).

[23] FAR §19.102(e).

[24] FAR §19.301-1(b).

[25] The contracting officer may award the contract if he or she "determines in writing that an award must be made to protect the public interest." FAR §19.302(g)(1).

[26] FAR §19.302(c)(1). "An offeror, the SBA, or another interested party may protest the small business representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA." FAR §19.302(a)(2). "The protest, or confirmation if the protest was initiated orally, shall be in writing and shall contain the basis for the protest with specific, detailed evidence to support the allegation that the offeror is not small. The SBA will dismiss any protest that does not contain specific grounds for the protest." FAR §19.302(c)(2). "The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation." FAR §19.302(c)(3). "In order to affect a specific solicitation, a protest must be timely." FAR §19.302(d). "To be timely, a protest … must be received … by the close of business of the fifth business day after bid opening (in sealed bid acquisitions) or receipt of the special notification from the contracting officer that identifies the apparently successful offeror (in negotiated acquisitions)." FAR §19.302(d)(1). "…a protest filed by the contracting officer or the SBA is generally always considered timely whether filed before or after award." FAR §19.302(d)(2).

of time granted by the contracting officer."[27] If the SBA does not make a determination within the required time, the contracting officer "may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the government."[28]

An appeal of the Area Office's decision may be filed with the SBA's Office of Hearings and Appeals (OHA). If the OHA accepts the appeal for consideration and finds the protested concern to be ineligible for award, the contracting officer must "terminate the contract unless termination is not in the best interests of the government, in keeping with the circumstances described in the [aforementioned] written determination. However, the contracting officer shall not exercise any options or award further task or delivery orders."[29] Furthermore, a concern cannot become eligible for a specific award after the SBA has determined that it is not a small business, even if the concern takes action to meet the definition of a small business.[30]

The SBA or the federal agency may suspend or debar a firm from future government contracts for misrepresenting its size status. In addition, individuals that knowingly misrepresent a business's size to secure a federal contract can be subject to civil and criminal penalties.[31]

The Pre-Award Process

Federal Agency Requirements

15 U.S.C. §644(e)(1) states, "To the maximum extent practicable, procurement strategies used by a Federal department or agency having contracting authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers." To accomplish this goal, FAR regulations (FAR §19.202-1) require contracting officers, when applicable, to take the following actions prior to awarding a federal contract:

1. "Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement."
2. "Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by the SBA against loss under 15 U.S.C. §694b [generally $6.5 million, or $10 million if the contracting officer certifies that the higher amount is necessary]."
3. "Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government."
4. "Encourage prime contractors to subcontract with small business concerns [primarily through the agency's role in negotiating an acceptable small business subcontracting plan

[27] FAR §19.302(f)(1).

[28] FAR §19.302(g)(2).

[29] FAR §19.302(h).

[30] FAR §19.301-1(c).

[31] 13 C.F.R. §121.108; 18 U.S.C. §287; and 18 U.S.C. §1001. For additional information and analysis, see CRS Report R45322, *Selected Legal Tools for Maintaining Government Contractor Accountability*, by David H. Carpenter and Kathleen Ann Ruane.

with prime contractors on contracts anticipated to exceed $700,000 or $1.5 million for construction contracts]."[32]

5. "Provide a copy of the proposed acquisition package to the SBA procurement center representative [PCR, duties are described later]" for his or her review, comment and recommendation, or, if a PCR is not assigned, to the SBA Area Office serving the area in which the procuring activity is located "at least 30 days prior to the issuance of the solicitation if (i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract; (ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; or (iii) The proposed acquisition is for a consolidated or bundled requirement.… The contracting officer shall provide all information relative to the justification for the consolidation or bundling, including the acquisition plan or strategy and if the acquisition involves substantial bundling, the information identified in [FAR] 7.107-4.[33] The contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization [duties are described later]."
6. "Provide a statement explaining why the (i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement; (ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the government; (iii) Proposed acquisition cannot be structured so as to make it likely that small businesses can compete for the prime contract; (iv) Consolidated construction project cannot be acquired as separate discrete projects; or (v) Consolidation or bundling is necessary and justified."
7. "Process the 30-day notification concurrently with other processing steps required prior to the issuance of the solicitation."
8. "If the contracting officer rejects the SBA procurement center representative's recommendation … document the basis for the rejection and notify the SBA procurement

[32] Subcontracting plans are not required from small businesses, for personal services contracts, for contracts or contract modifications that will be performed entirely outside of the United States and its outlying areas, or for modifications that were within the scope of the contract. "[A]ny contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract." FAR §19.702(c). In addition, "Any contractor receiving a contract with a value greater than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance." FAR §19.702.

[33] FAR §7.017-4(2)(b) states "…when the proposed acquisition strategy involves substantial bundling, the agency shall document in its strategy—(1) The specific benefits anticipated to be derived from substantial bundling; (2) An assessment of the specific impediments to participation by small business concerns as contractors that result from substantial bundling; (3) Actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming; (4) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements; (5) The determination that the anticipated benefits of the proposed bundled contract or order justify its use; and (6) Alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives."

center representative [who (as described later) may appeal the rejection to the chief of the contracting office and, ultimately, to the agency head]."[34]

The Role of SBA Procurement Center Representatives

The SBA may assign one or more procurement center representatives (PCRs) to any contracting activity or contract administration office to implement the SBA's policies and programs. The SBA currently has 49 PCRs located in the SBA's six Area Offices.[35] PCRs are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information.[36]

PCR duties include the following:

- Review proposed acquisitions to recommend "the setting aside of selected acquisitions not unilaterally set aside by the contracting officer;" new qualified small business sources; and the feasibility of breaking out components of the contract for competitive acquisitions.[37]
- Review proposed acquisition packages. If the PCR (or, if a PCR is not assigned, the SBA Area Office serving the area in which the procuring activity is located) "believes that the acquisition, as proposed, makes it unlikely that small businesses can compete for the prime contract," the PCR can recommend any alternate contracting method that he or she "reasonably believes will increase small business prime contracting opportunities." The recommendation must be made to the contracting officer within 15 days after the package's receipt.[38]
- Recommend small businesses "for inclusion on a list of concerns to be solicited in a specific acquisition."[39]
- Appeal to the contracting office's chief "any contracting officer's determination not to solicit a concern recommended by the SBA for a particular acquisition, when not doing so results in no small business being solicited." This appeal may be further appealed to the agency head.[40]
- Conduct periodic reviews of the agency's contracting activity, including the agency's assessment of any required small business subcontracting plan, "to ascertain whether the agency is complying with the small business policies in this regulation."[41]
- Sponsor and participate in conferences and training "designed to increase small business participation in the contracting activities of the office."[42]

[34] FAR §19.202-1. See FAR §19.505 for a description of the appeals process.

[35] SBA, "Procurement Center Representative Directory," at https://www.sba.gov/federal-contracting/counseling-help/procurement-center-representative-directory.

[36] FAR §19.402(a)(1).

[37] FAR §19.402(c)(1).

[38] FAR §19.402(c)(2).

[39] FAR §19.402(c)(3).

[40] FAR §19.402(c)(4). See FAR §19.505 for a description of the appeals process.

[41] FAR §19.402(c)(5).

[42] FAR §19.402(c)(6).

The Role of the Office of Small and Disadvantaged Business Utilization

Every federal agency (except the SBA) that has procurement powers is required to have an OSDBU, whose director, by statute, reports directly to the head of the agency and has supervisory authority over agency staff performing certain procurement functions.[43] The OSDBU's primary responsibility is to ensure that small businesses, SDBs, WOSBs, SDVOSBs, and HUBZone small businesses are treated fairly and that they have an opportunity to compete and be selected for a fair amount of the agency's contract dollars. Among its statutory responsibilities are the following:

- "Identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the Administration to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers, if a solicitation for a bundled contract is to be issued."[44]
- Assist small businesses "to obtain payments, required late payment interest penalties, or information regarding payments due to the concern from an executive agency or a contractor."[45]
- Assign "a small business technical adviser to each office to which the SBA has assigned" a PCR. The small business technical advisor "shall be a full-time employee of the procuring activity, well qualified, technically trained and familiar with the supplies or services purchased at the activity; and whose principal duty shall be to assist" the PCR.[46]
- Provide the agency's "Chief Acquisition Officer and senior procurement executive … with advice and comments on acquisition strategies, market research, and justifications [related to limitations on the consolidation of contracts as a means to provide small businesses appropriate opportunities to participate as prime contractors and subcontractors]."[47]
- Provide training to small businesses and contract specialists, provided that the training does not interfere with the director carrying out his or her other responsibilities.[48]
- Ensure that a small business that notifies the PCR prior to a contract's award that "a solicitation, request for proposal, or request for quotation unduly restricts [its] ability … to compete for the award … is aware of other resources and processes available to address unduly restrictive provisions … even if such resources and

[43] For a discussion of the extent to which Offices of Small and Disadvantaged Business Utilization have implemented these statutory requirements, see U.S. Government Accountability Office (GAO), *Small Business Contracting: Actions Needed to Demonstrate and Better Review Compliance with Select Requirements for Small Business Advocates*, GAO-17-675, August 25, 2017, pp. 1-4, at https://www.gao.gov/assets/690/686766.pdf.

[44] 15 U.S.C. §644(k)(5).

[45] 15 U.S.C. §644(k)(6).

[46] 15 U.S.C. §644(k)(8).

[47] 15 U.S.C. §644(k)(12).

[48] 15 U.S.C. §644(k)(13).

processes are provided by such agency, the Administration, the Comptroller General, or a Department of Defense (DOD) procurement technical assistance program [described below]."[49]

- Review all subcontracting plans "to ensure that the plan provides maximum practicable opportunity for small business concerns to participate in the performance of the contract to which the plan applies."[50]

In accordance with P.L. 109-163, the National Defense Authorization Act of 2006, the DOD renamed its OSDBU the Office of Small Business Programs (OSBP). The act also redesignated the Army, Navy, and Air Force's OSDBUs to OSBPs of the Department of the Army, Navy, and Air Force, respectively.

The Roles of Other Procurement Officers and Offices

At the agency level, procurement department heads (sometimes titled *senior procurement executive*) are responsible for implementing small business programs at their agencies, including achieving program goals. In general, procurement department staff who work on small business issues (often titled *small business specialists*) coordinate with OSDBU directors on their agencies' small business programs.[51]

Chief acquisition officers provide a focal point for acquisition in agency operations. Their key functions include "monitoring and evaluating agency acquisition activities, increasing the use of full and open competition, increasing performance-based contracting, making acquisition decisions, managing agency acquisition policy, acquisition career management, acquisition resources planning, and conducting acquisition assessments."[52]

The SBA must assign a *breakout procurement center representative* (breakout PCR) to each major procurement center. A major procurement center is, in the opinion of the SBA Administrator, a procurement center that purchases substantial dollar amounts of other than commercial items, and has the potential to incur significant savings as a result of the placement of a breakout PCR.[53]

The breakout PCR advocates for (1) the appropriate use of full and open competition, and (2) the breakout of items, "when appropriate and while maintaining the integrity of the system in which such items are used." [54] The breakout PCR is in addition to the PCR.

When a breakout PCR is assigned, the SBA must assign at least two co-located small business technical advisors. SBA breakout PCRs and technical advisors must comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain security clearances for its breakout PCRs and technical advisors as required by the contracting agency.[55]

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[49] 15 U.S.C. §644(k)(17).

[50] 15 U.S.C. §644(k)(20).

[51] GAO, *Small Business Contracting: Actions Needed to Demonstrate and Better Review Compliance with Select Requirements for Small Business Advocates*, GAO-17-675, August 25, 2017, p. 7, at https://www.gao.gov/assets/690/686766.pdf.

[52] Ibid., pp. 7-8.

[53] 15 U.S.C. §644(l)(6); and FAR §19.403(a).

[54] FAR §19.403(a).

[55] FAR §19.403(a).

The SBA has four *commercial market representatives* who, among other duties, help prime contractors find small businesses that are capable of performing subcontracts; provide counseling on the contractor's responsibility to maximize subcontracting opportunities for small businesses; and conduct periodic reviews of contractors awarded contracts requiring an acceptable subcontracting plan that provides small businesses "the maximum practicable opportunity to participate in contract performance consistent with its efficient performance" (generally any solicitation to perform a contract that is expected to exceed $700,000 ($1.5 million for construction) and that has subcontracting possibilities).[56]

The SBA's *business opportunity specialists* provide, among other duties, guidance, counseling, and referrals for assistance with technical, management, financial, or other matters intended to improve the competitive viability of SBA 8(a) program participants. They provide 8(a) program participants comprehensive assessments of the firm's strengths and weaknesses; monitor and document their compliance with 8(a) program requirements; advise them on compliance with contracting regulations after the award of a 8(a) program contract or subcontract; review and monitor their compliance with mentor-protégé agreements; represent the interests of the SBA Administrator and small businesses in the award, modification, and administration of 8(a) program contracts and subcontracts; and report fraud or abuse involving the 8(a) program.[57]

The *Small Business Procurement Advisory Council* (SBPAC), whose members are composed of the SBA Administrator (or his or her designee), the director of the Minority Business Development Agency, and the head of each OSDBU in each federal agency having procurement powers, has the following statutory duties:

1. Develop positions on proposed procurement regulations affecting the small business community.
2. Submit comments reflecting such positions to appropriate regulatory authorities.
3. Conduct reviews of each OSDBU to determine the office's compliance with its statutory requirements.
4. Identify best practices for maximizing small business utilization in federal contracting that may be implemented by federal agencies having procurement powers.
5. Submit annually, to the House Committee on Small Business and Senate Committee on Small Business and Entrepreneurship, a report describing (1) the comments submitted to appropriate regulatory authorities, including any outcomes related to the comments; (2) the results of its review of each OSDBU; and (3) best practices identified for maximizing small business contracting.[58]

The Defense Logistic Agency's *Procurement Technical Assistance Program* (PTAC) helps "businesses pursue and perform under contracts with the Department of Defense, other federal agencies, state and local governments and with government prime contractors. Most of the assistance the PTACs provide is free. PTAC support to businesses includes registration in systems such as the System for Award Management (SAM), identification of contract opportunities, and help in understanding requirements and in preparing and submitting bids."[59]

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[56] 15 U.S.C. §633(h)(1). For additional information on subcontracting plan requirements, see FAR §19.702(a)(1); and 15 U.S.C. §637(d)(3).

[57] 15 U.S.C. §633(g)(1).

[58] 15 U.S.C. §644a(b).

[59] DOD, Defense Logistics Agency, "Procurement Technical Assistance Program," at http://www.dla.mil/

Set-Asides and Sole Source Awards

The Competition in Contracting Act of 1984 generally requires "full and open competition" for government procurement contracts.[60] However, various provisions of the Small Business Act authorize or, in some cases, require federal agencies to provide for other than "full and open competition through the use of competitive procedures" when contracting with small businesses. For example, as mentioned previously, federal agencies are generally required to reserve contracts that have an anticipated value greater than the micro-purchase threshold (currently $10,000), but not greater than the simplified acquisition threshold (currently $250,000) exclusively for small businesses unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive with market prices and the quality and delivery of the goods or services being purchased.[61]

In addition, federal agencies

- are generally required to set aside contracts that have an anticipated value exceeding the simplified acquisition threshold exclusively for small businesses when there is a reasonable expectation by the contracting officer that offers will be obtained by at least two responsible small businesses offering the products of different small businesses (Rule of Two) and the award will be made at a fair market price;[62]
- may similarly set aside contracts exceeding the simplified acquisition threshold for competition reserved for specific types of small businesses (e.g., 8(a) small businesses, HUBZone small businesses, WOSBs and SDVOSBs);[63]
- may enter into negotiations directly with particular types of small businesses (e.g., a sole source award) when the award could not otherwise be made (e.g., only a single source is available or under urgent and compelling circumstances);[64] and
- are required to grant HUBZone small businesses a price evaluation preference of not more than 10% in open and unrestricted competitions.[65]

SmallBusiness/PTAP/. For a list of Procurement Technical Assistance Centers, see SBA, "Procurement Technical Assistance Center," at https://www.sba.gov/tools/local-assistance/ptac

[60] 41 U.S.C. §253(b)(1); 41 U.S.C. §259(b); and P.L. 98-369, the Deficit Reduction Act of 1984 (Title VII, the Competition in Contracting Act).

[61] 15 U.S.C. §644(j)(1). As mentioned previously, certain regulations implementing this provision of the Small Business Act effectively narrows its scope. For example, certain small business contracts awarded or performed overseas are not necessarily required to be set aside for small businesses, and the small business provisions contained in Part 19 of the FAR generally do not apply to blanket purchase agreements and orders placed against Federal Supply Schedule contracts.

[62] 15 U.S.C. §644(a). A set-aside is commonly used to refer to a competition in which only small businesses may compete. However, some set-asides involve small purchases that may be made by means of simplified acquisition procedures that entail less than "full and open competition," and by sealed bidding or contracting by negotiation that is more commonly associated with set-asides of larger contracts.

[63] 15 U.S.C. §637(a) for 8(a) participants; 15 U.S.C §657a for HUBZone small businesses; 15 U.S.C §637(m) for WOSBs; and 15 U.S.C §657f for SDVOSBs.

[64] 15 U.S.C. §637(a) for 8(a) participants; 15 U.S.C §657a for HUBZone small businesses; 15 U.S.C §637(m) for WOSBs; and 15 U.S.C §657f for SDVOSBs.

[65] 15 U.S.C. §657a(b)(3).

SBA Contracting Programs[66]

Several SBA programs assist small businesses in obtaining and performing federal contracts and subcontracts. These include various prime contracting programs; subcontracting programs; and other assistance (e.g., contracting technical training assistance and oversight of the federal small business goaling program and the Surety Bond Guarantee program).

Prime Contracting Programs

Several contracting programs allow small businesses to compete only with similar firms for government contracts or receive sole source awards in circumstances in which such awards could not be made to other firms. These programs provide small businesses an opportunity to win government contracts without having to compete against larger and more experienced companies.

8(a) Program[67]

The 8(a) Minority Small Business and Capital Ownership Development Program (named for the section of the Small Business Act from which it derives its authority) provides business development assistance to businesses owned and controlled by persons who are socially and economically disadvantaged.[68] African Americans, Hispanics, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans, and Subcontinent Asian Americans are presumed to be socially and economically disadvantaged.[69] Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis. To be considered economically disadvantaged, an individual's net worth, excluding ownership interest in the 8(a) firm and equity in his or her primary personal residence, must be less than $250,000 at the time of application to the 8(a) Program, and less than $750,000 thereafter.

Federal agencies are authorized to award contracts for goods or services, or to perform construction work, to the SBA for subcontracting to 8(a) firms. The SBA is authorized to delegate the function of executing contracts to the procuring agencies and often does so. Once the SBA has accepted a contract for the 8(a) Program, the contract is awarded through either a set-aside or on a sole source basis, with the contract amount generally determining the acquisition method used. When the contract's anticipated total value, including any options, is less than $4 million ($7 million for manufacturing contracts), the contract is normally awarded without competition (as a sole source award). In contrast, when the contract's anticipated value exceeds these thresholds, the contract generally must be awarded via a set-aside with competition limited to 8(a) firms so long as there is a reasonable expectation that at least two eligible and responsible 8(a) firms will

[66] These programs apply government-wide but are implemented under the authority of the Small Business Act, pursuant to regulations promulgated by the SBA that determine, in part, eligibility for the programs.

[67] For additional information and analysis, see CRS Report R44844, *SBA's "8(a) Program": Overview, History, and Current Issues*, by Robert Jay Dilger.

[68] Section 8(a) of the Small Business Act, P.L. 85-536, as amended, can be found at 15 U.S.C. §637(a). Regulations are in 13 C.F.R. §124.

[69] Asian Pacific Americans are those whose country of origin is Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia, Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru. Subcontinent Asian Americans are those whose country of origin is India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, or Nepal. 13 C.F.R. §124.103(b).

submit offers and the award can be made at fair market price.[70] The SBA also provides technical assistance and training to 8(a) firms. Firms may participate in the 8(a) Program for no more than nine years.

In FY2017, the federal government awarded $27.2 billion to 8(a) firms.

- $16.4 billion was awarded with an 8(a) preference ($8 billion through an 8(a) set-aside and $8.4 billion through an 8(a) sole source award);
- $4.8 billion was awarded to an 8(a) firm in open competition with other firms; and
- $6 billion was awarded with another small business preference (e.g., set-asides and sole source awards for small businesses generally and for HUBZone firms, women-owned small businesses, and service-disabled veteran-owned small businesses).[71]

Historically Underutilized Business Zone Program[72]

This program assists small businesses located in Historically Underutilized Business Zones (HUBZones) through set-asides, sole source awards (so long as the award can be made at a fair and reasonable price, and the anticipated total value of the contract, including any options, is below $4 million, or $7 million for manufacturing contracts) and price evaluation preferences (of up to 10%) in full and open competitions.[73] The HUBZone program targets assistance to small businesses located in areas with low income, high poverty, or high unemployment.[74] To be certified as a HUBZone small business, at least 35% of the small business's employees must generally reside in a HUBZone.

In FY2017, the federal government awarded $7.53 billion to HUBZone-certified small businesses.

- $1.90 billion was awarded with a HUBZone preference ($1.49 billion through a HUBZone set-aside, $65.3 million through a HUBZone sole source award, and $346.9 million through a HUBZone price-evaluation preference);
- $1.53 billion was awarded to HUBZone-certified small businesses in open competition with other firms; and
- $4.10 billion was awarded with another small business preference (e.g., set-asides and sole source awards for small businesses generally and for 8(a), women-owned, and service-disabled veteran-owned small businesses).[75]

[70] 15 U.S.C. §637(a)(1)(D)(ii); and SBA, "Conforming Statutory Amendments and Technical Corrections to Small Business Government Contracting Regulations," 83 *Federal Register* 12849, March 26, 2018.

[71] U.S. General Services Administration (GSA), Federal Procurement Data System—Next Generation, June 5, 2018, at https://www.fpds.gov/fpdsng/.

[72] For additional information and analysis, see CRS Report R41268, *Small Business Administration HUBZone Program*, by Robert Jay Dilger.

[73] 15 U.S.C. §657a(b)(2-3); and SBA, "Conforming Statutory Amendments and Technical Corrections to Small Business Government Contracting Regulations," 83 *Federal Register* 12849, March 26, 2018.

[74] For specific criteria, see 15 U.S.C. §632(p)(4); and 13 C.F.R. §126.103.

[75] GSA, Federal Procurement Data System—Next Generation, June 5, 2018, at https://www.fpds.gov/fpdsng/.

Service-Disabled Veteran-Owned Small Business Program

This program allows agencies to set aside contracts for SDVOSBs. Also, federal agencies may award sole source contracts to SDVOSBs so long as the award can be made at a fair and reasonable price, and the anticipated total value of the contract, including any options, is below $4 million ($6.5 million for manufacturing contracts).[76] For purposes of this program, veterans and service-related disabilities are defined as they are under the statutes governing veterans affairs.[77]

In FY2017, the federal government awarded $18.2 billion to SDVOSBs.

- $6.8 billion was awarded through a SDVOSB set-aside award;
- $4.3 billion was awarded to a SDVOSB in open competition with other firms; and
- $7.1 billion was awarded with another small business preference (e.g., set-asides and sole source awards for small businesses generally and for HUBZone firms, 8(a) firms, and WOSBs).[78]

Women-Owned Small Business Program

Under this program, contracts may be set aside for economically disadvantaged WOSBs in industries in which women are underrepresented and substantially underrepresented. Federal agencies may award sole source contracts to WOSBs so long as the award can be made at a fair and reasonable price, and the anticipated total value of the contract, including any options, is below $4 million ($6.5 million for manufacturing contracts).[79]

In FY2017, the federal government awarded $21.3 billion to WOSBs.

- $648.9 million was awarded with a WOSB preference ($580.5 million through a WOSB set-aside and $68.4 million through a WOSB sole source award);
- $7.0 billion was awarded to a WOSB in open competition with other firms; and
- $13.7 billion was awarded with another small business preference (e.g., set-asides and sole source awards for small businesses generally and for HUBZone firms, 8(a) firms, and SDVOSBs).[80]

Subcontracting Programs

Federal contracting officers are required to provide the SBA's PCR (or, if a PCR is not assigned, the SBA Area Office serving the procuring activity area) a "reasonable period of time" to review any solicitation requiring submission of a small business subcontracting plan and to submit

[76] 15 U.S.C. §657f(a-b); and SBA, "Conforming Statutory Amendments and Technical Corrections to Small Business Government Contracting Regulations," 83 *Federal Register* 12849, March 26, 2018.

[77] 38 U.S.C §8127(f). Veteran-owned small businesses and service-disabled veteran-owned small businesses are eligible for separate preferences in procurements conducted by the Department of Veterans Affairs under the authority of P.L. 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended by P.L. 110-389, the Veterans' Benefits Improvements Act of 2008.

[78] GSA, Federal Procurement Data System—Next Generation, June 5, 2018, at https://www.fpds.gov/fpdsng/.

[79] 15 U.S.C. §637(m); and SBA, "Conforming Statutory Amendments and Technical Corrections to Small Business Government Contracting Regulations," 83 *Federal Register* 12849, March 26, 2018.

[80] GSA, Federal Procurement Data System—Next Generation, June 5, 2018, at https://www.fpds.gov/fpdsng/.

advisory findings before the solicitation is issued.[81] The PCR's advisory comments regarding the small business subcontracting plan's acceptability must be submitted, in writing, to the appropriate contracting officer within five working days after the plan's receipt.[82]

As mentioned previously, the SBA's commercial market representatives help prime contractors find small businesses to perform subcontracts; counsel contractors on their responsibility to maximize subcontracting opportunities for small businesses; and conduct periodic reviews, often in concert with a SBA PCR, of contractors awarded contracts that require an acceptable small business subcontracting plan.[83]

Other Federal Agency Contracting Programs

Federal agencies may also set aside contracts or make sole source awards to small businesses not participating in any other program under certain conditions.

Department of Transportation Disadvantaged Business Enterprise Program

The Department of Transportation's (DOT's) Disadvantaged Business Enterprise (DBE) Program originally began in 1980 as a minority/women's business enterprise program "established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs."[84] Congress has reauthorized the DBE program several times since its inception; most recently in P.L. 114-94, the Fixing America's Surface Transportation Act (FAST-Act).

The FAST-Act provides, that, except to the extent the Secretary of Transportation determines otherwise, not less than 10% of the amounts made available for any program under Titles I (federal-aid highways), II (innovative project finance), III (public transportation) and VI (innovation) of the act and 23 *U.S. Code* 403 (highway safety research and development), shall be expended with DBEs. DOT also has a separate DBE program for airport concessions.[85]

A DBE is a for-profit small business owned and controlled by socially and economically disadvantaged individuals.[86] Eligibility for the DBE program differs somewhat from the 8(a)

[81] FAR §19.705-3.

[82] SBA, "Prime Contracts Program," SOP 60 02 8, effective October 27, 2013, p. 15, at https://www.sba.gov/document/sop-60-02-prime-contracts-program.

[83] 15 U.S.C. §633(h)(1). For additional information on subcontracting plan requirements, see FAR §19.702(a)(1); and 15 U.S.C. §637(d)(3).

[84] Department of Transportation (DOT), "Disadvantaged Business Enterprise (DBE) Program," at https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise.

[85] 49 C.F.R. Part 23. "As recipients of DOT financial assistance, state and local transportation agencies … certify the eligibility of DBE firms to participate in their DOT-assisted contracts; establish narrowly-tailored goals for the participation of disadvantaged entrepreneurs; and evaluate their DOT-assisted contracts throughout the year and establish contract-specific DBE subcontracting goals as necessary to achieve the overall goal of the agency…. DOT is responsible for developing the rules and regulations for the national DBE program; providing guidance and conducting oversight to make sure that these rules and regulations are followed by the recipients of DOT funds; and considering appeals from state/local certification decisions." DOT, "Definition of a Disadvantaged Business Enterprise," at https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise.

[86] DOT, "Definition of a Disadvantaged Business Enterprise," at https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise.

program. For example, under the DBE program, women are presumed to be socially and economically disadvantaged individuals. Also, to be regarded as economically disadvantaged, an individual must have a personal net worth (excluding ownership interest in the firm and equity in his or her primary personal residence) that does not exceed $1.32 million. The DBE must also meet SBA size criteria and have average annual gross receipts not exceeding $23.98 million. Size limits for the airport concessions DBE program are higher.[87]

The DBE program's eight objectives are to

1. ensure nondiscrimination in the award and administration of DOT-assisted contracts in the department's highway, transit, and airport financial assistance programs;
2. create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. ensure that the department's DBE program is narrowly tailored in accordance with applicable law;
4. ensure that only firms that fully meet the program's eligibility standards are permitted to participate as DBEs;
5. help remove DBE-participation barriers in DOT-assisted contracts;
6. promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
7. assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.[88]

Subcontracting Programs for Small Disadvantaged Businesses

Other federal programs promote subcontracting with small disadvantaged businesses (SDBs). SDBs include 8(a) participants and other small businesses that are at least 51% unconditionally owned and controlled by socially or economically disadvantaged individuals or groups. Individuals owning and controlling non-8(a) SDBs may have net worth of up to $750,000 (excluding ownership interests in the SDB firm and equity in their primary personal residence). Otherwise, however, SDBs must generally satisfy the same eligibility requirements as 8(a) firms, although they do not apply to the SBA to be designated SDBs in the same way that 8(a) firms do.

Federal agencies must negotiate "subcontracting plans" with the apparently successful bidder or offeror on eligible prime contracts prior to awarding the contract. Subcontracting plans set goals for the percentage of subcontract dollars to be awarded to SDBs, among others, and describe efforts that will be made to ensure that SDBs "have an equitable opportunity to compete for subcontracts."[89] Federal agencies may also consider the extent of subcontracting with SDBs in determining to whom to award a contract or give contractors "monetary incentives" to subcontract with SDBs.

[87] Ibid.

[88] 49 C.F.R. §26.1.

[89] 15 U.S.C. §637(d)(6)(c).

As of February 11, 2019, the SBA's Dynamic Small Business Search database included 2,538 SBA-certified SDBs and 100,595 self-certified SDBs.[90]

Other Small Business Programs of Interest

The SBA 7(j) Management and Technical Assistance Program

The SBA's 7(j) Management and Technical Assistance program provides "a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including: (a) counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and (b) the identification and development of new business opportunities."[91] Eligible individuals and businesses include "8(a) certified firms, SDBs, businesses operating in areas of high unemployment, or low income or firms owned by low income individuals."[92]

In FY2017, the 7(j) Management and Technical Assistance program assisted 4,100 small businesses.[93]

SBA Surety Bond Guarantee Program[94]

The SBA's Surety Bond Guarantee program aims to increase small businesses' access to federal, state, and local government contracting, as well as private-sector contracts, by guaranteeing bid, performance, and payment bonds for small businesses that cannot obtain surety bonds through regular commercial channels.[95] The program guarantees individual contracts of up to $6.5 million and up to $10 million if a federal contracting officer certifies that such a guarantee is necessary. The SBA's guarantee ranges from not to exceed 80% to not to exceed 90% of the surety's loss if a default occurs.[96] In FY2017, the SBA guaranteed 10,397 bid and final surety bonds with a total contract value of more than $6.3 billion.[97]

A surety bond is a three-party instrument between a surety (someone who agrees to be responsible for the debt or obligation of another), a contractor, and a project owner. The agreement binds the contractor to comply with the terms and conditions of a contract. If the

[90] SBA, "Dynamic Small Business Search," at http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm.

[91] 13 C.F.R. §124.702.

[92] SBA, *FY2018 Congressional Budget Justification and FY2016 Annual Performance Report*, p. 44, at https://www.sba.gov/sites/default/files/aboutsbaarticle/FINAL_SBA_FY_2018_CBJ_May_22_2017c.pdf.

[93] SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 74, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf.

[94] For additional information and analysis, see CRS Report R42037, *SBA Surety Bond Guarantee Program*, by Robert Jay Dilger.

[95] Ancillary bonds are also eligible if they are incidental and essential to a contract for which the SBA has guaranteed a final bond. A reclamation bond is eligible if it is issued to reclaim an abandoned mine site and for a project undertaken for a specific period of time.

[96] P.L. 114-92, the National Defense Authorization Act for Fiscal Year 2016, includes a provision that increased the Preferred Surety Bond Guarantee Program's guarantee rate from not to exceed 70% to not to exceed 90% of losses starting one year from enactment (effective November 25, 2016). For additional information and analysis, see CRS Report R42037, *SBA Surety Bond Guarantee Program*, by Robert Jay Dilger.

[97] SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 66, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf.

contractor is unable to successfully perform the contract, the surety assumes the contractor's responsibilities and ensures that the project is completed. The surety bond reduces the risk associated with contracting.[98]

Surety bonds are meant to encourage project owners to contract with small businesses that may not have the credit history or prior experience of larger businesses and may be at greater risk of failing to comply with the contract's terms and conditions.[99]

Surety bonds are important to small businesses interested in competing for federal contracts because the federal government requires prime contractors—prior to the award of a federal contract exceeding $150,000 for the construction, alteration, or repair of any building or public work of the United States—to furnish a performance bond issued by a surety satisfactory to the contracting officer in an amount that the officer considers adequate to protect the government.[100]

Small Business Mentor-Protégé Programs[101]

Small business mentor-protégé programs typically seek to pair new businesses with more experienced businesses in mutually beneficial relationships. Protégés may receive financial, technical, or management assistance from mentors in obtaining and performing federal contracts or subcontracts, or serving as suppliers under such contracts or subcontracts. Mentors may receive credit toward subcontracting goals, reimbursement of certain expenses, or other incentives.

The federal government currently has several mentor-protégé programs to assist small businesses in various ways.

- The *8(a) Mentor-Protégé Program* is a government-wide program designed to assist small businesses "owned and controlled by socially and economically disadvantaged individuals" participating in the SBA's Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) program) in obtaining and performing federal contracts. For that purpose, mentors may (1) form joint ventures with protégés that are eligible to perform federal contracts set aside for small businesses; (2) make certain equity investments in protégé firms; (3) lend or subcontract to protégé firms; and (4) provide technical or management assistance to their protégés.[102]
- The *SBA's All Small Business Mentor-Protégé Program* is a government-wide mentor-protégé program for all small business concerns, consistent with the

[98] SBA, "Surety Bonds," at https://www.sba.gov/category/navigation-structure/loans-grants/bonds/surety-bonds.

[99] Ibid.

[100] The threshold amount was originally set at $2,000 in 1935 under P.L. 74-321, An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to be Accompanied by a Performance Bond Protecting the United States and an Additional Bond for the Protection of Persons Furnishing Material or Labor for the Construction, Alteration, or Repair of Said Public Buildings or Public Work [the Miller Act of 1935], 49 Stat. 793 (August 24, 1935) (codified at 40 U.S.C. §3131(a)(b)). Also, see Department of Defense, General Services Administration, and National Aeronautics and Space Administration, "Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds," 75 *Federal Register* 53130, August 30, 2010.

[101] For additional information and analysis of federal small business mentor-protégé programs, see CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger.

[102] 15 U.S.C. §636(j)(10); and 13 C.F.R. §124.520.

SBA's mentor-protégé program for participants in the SBA's 8(a) Business Development program.[103]

- The *Department of Defense (DOD) Mentor-Protégé Program*, in contrast, is agency-specific. It assists various types of small businesses and other entities in obtaining and performing DOD subcontracts and serving as suppliers on DOD contracts. Mentors may (1) make advance or progress payments to their protégés that DOD reimburses; (2) award subcontracts to their protégés on a noncompetitive basis when they would not otherwise be able to do so; (3) lend money to or make investments in protégé firms; and (4) provide or arrange for other assistance.[104]

Other agencies also have agency-specific mentor-protégé programs to assist various types of small businesses or other entities in obtaining and performing subcontracts under agency prime contracts. The Department of Homeland Security (DHS), for example, has a mentor-protégé program wherein mentors may provide protégés with rent-free use of facilities or equipment, temporary personnel for training, property, loans, or other assistance. Because these programs are not based in statute, unlike the SBA and DOD programs, they generally rely upon preexisting authorities (e.g., authorizing use of evaluation factors) or publicity to incentivize mentor participation.

Currently, more than 1,200 mentor-protégé agreements are in place, even though there are issues with the accuracy and thoroughness of some federal agency records.[105]

Small Business Procurement Goals

Since 1978, federal agency heads have been required to establish federal procurement goals, in consultation with the SBA, "that realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals" to participate in federal procurement. Each agency is required, at the conclusion of each fiscal year, to report its progress in meeting the goals to the SBA.[106]

In 1988, Congress authorized the President annually to establish government-wide minimum participation goals for procurement contracts awarded to small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals. Congress required the government-wide minimum participation goal for small businesses to be "not less than 20% of the total value of all prime contract awards for each fiscal year" and "not less than 5% of the

[103] 15 U.S.C. §657r; SBA, "Small Business Mentor Protégé Programs," 81 *Federal Register* 48558-48595, July 25, 2016; and 13 C.F.R. §125.9.

[104] 10 U.S.C. §2302note: Mentor-Protégé Pilot Program.

[105] As of February 27, 2018, there were 493 active 8(a) mentor-protégé agreements. See Small Business Procurement Advisory Council, "All Small Mentor Protégé Program," February 27, 2018.

As of December 5, 2018, there were 644 active all small business mentor-protégé agreements. See SBA, "Active mentor-protégé agreements," at https://www.sba.gov/document/support—active-mentor-protege-agreements.

As of January 1, 2018, there were 63 active Department of Defense (DOD) mentor-protégé agreements. See DOD, Office of Small Business Programs, "Active MPP [Mentor-Protégé Program] Agreements," at http://business.defense.gov/Programs/Mentor-Protege-Program/Protege-Eligibility-Requirements/.

[106] 15 U.S.C. §644(g)(2); and P.L. 95-507, a bill to amend the Small Business Act and the Small Business Investment Act of 1958.

total value of all prime contract and subcontract awards for each fiscal year" for small businesses owned and controlled by socially and economically disadvantaged individuals.[107]

Each federal agency was also directed to "have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency."[108] The SBA was also required to report to the President annually on the attainment of the goals and to include the information in an annual report to Congress.[109] The SBA negotiates the goals with each federal agency and establishes a *small business eligible* baseline for evaluating the agency's performance.[110] The agency head is required to "make consistent efforts to annually expand participation by small business concerns from each industry category."[111] If the SBA and the agency cannot agree on the goals, the agency may submit the case to the Office of Management and Budget (OMB) Office of Federal Procurement Policy (OFPP) for resolution.[112]

The small business eligible baseline excludes certain contracts that the SBA has determined do not realistically reflect the potential for small business participation in federal procurement (such as those awarded to mandatory and directed sources), contracts funded predominately from agency-generated sources (i.e., non-appropriated funds), contracts not covered by the FAR, acquisitions on behalf of foreign governments, and contracts not reported in the Federal Procurement Data System – Next Generation, or FPDS-NG (such as government procurement card purchases and contracts valued less than $10,000).[113] These exclusions typically account for 18% to 20% of all federal prime contracts each year.

The SBA then evaluates the agencies' performance against their negotiated goals annually, using FPDS-NG data, managed by the U.S. General Services Administration (GSA), to generate the small business eligible baseline. This information is compiled into the official Small Business Goaling Report, which the SBA releases annually. Each agency that fails to achieve any proposed prime or subcontract goal is required to submit a justification to the SBA on why it failed to achieve a proposed or negotiated goal with a proposed plan of corrective action.[114]

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[107] 15 U.S.C. §644(g)(1); and P.L. 100-656, the Business Opportunity Development Reform Act of 1988. The government-wide minimum participation goal for small businesses was increased from 20% to 23% by P.L. 105-135, the Small Business Reauthorization Act of 1997.

[108] Ibid.

[109] Ibid.

[110] According to a 2001 GAO report, the SBA began to specify what types of contracts the Federal Procurement Data System would exclude when determining agency compliance with federal contracting goals in FY1998. Prior to FY1998, "agencies reported their small business achievements directly to SBA and excluded from their calculations certain types of contracts, such as those for which small businesses had a limited or no chance to compete. SBA then published an annual report summarizing each agency's achievements. SBA officials said that in some cases they were not aware of all exclusions the agencies made when reporting their numbers." GAO, *Small Business: More Transparency Needed in Prime Contract Goal Program*, GAO-01-551, August 1, 2001, pp. 9-10, at http://www.gao.gov/assets/240/231854.pdf.

[111] 15 U.S.C. §644(g)(2).

[112] SBA, Office of Policy, Planning & Liaison, Office of Government Contracting & Business Development, "FY 2018 Goaling Guidelines," August 30, 2017, p. 4, at https://www.sba.gov/document/report—sba-goaling-guidelines.

[113] Ibid., p. 3; and GSA, Federal Procurement Data System—Next Generation, "What's In FPDS-NG," at https://www.fpds.gov/wiki/index.php/FPDS-NG_FAQ.

[114] SBA, Office of Policy, Planning & Liaison, Office of Government Contracting & Business Development, "FY 2018 Goaling Guidelines," August 30, 2017, p. 6, at https://www.sba.gov/document/report—sba-goaling-guidelines.

Agencies can take credit in every category that is applicable to the recipient of the contract. For example, "when counting goaling achievements, a contract awarded to a service-disabled Veteran-Owned Woman-Owned Small Business would be counted toward the Small Business (SB) goal, the Service-Disabled Veteran-Owned Small Business (SDVOSB) goal and the Women-Owned Small Business (WOSB) goal. However, these category counts are not summed to triple the total count. *The Sum of Parts Does Not Equal the Whole* (italics in original)."[115]

Over the years, federal government-wide procurement goals have been established for small businesses generally (P.L. 100-656, the Business Opportunity Development Reform Act of 1988, and P.L. 105-135, the HUBZone Act of 1997—Title VI of the Small Business Reauthorization Act of 1997); small businesses owned and controlled by socially and economically disadvantaged individuals (P.L. 100-656); women (P.L. 103-355, the Federal Acquisition Streamlining Act of 1994); small businesses located within a HUBZone (P.L. 105-135); and small businesses owned and controlled by a service-disabled veteran (P.L. 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999).

The current federal small business procurement goals are

- at least 23.0% of the total value of all small business eligible prime contract awards to small businesses for each fiscal year;
- 5.0% of the total value of all small business eligible prime contract awards and subcontract awards to small disadvantaged businesses (including participants in the SBA's 8(a) Program) for each fiscal year;[116]
- 5.0% of the total value of all small business eligible prime contract awards and subcontract awards to women-owned small businesses;
- 3.0% of the total value of all small business eligible prime contract awards and subcontract awards to HUBZone small businesses;[117] and
- 3.0% of the total value of all small business eligible prime contract awards and subcontract awards to service-disabled veteran-owned small businesses.[118]

There are no punitive consequences for not meeting these goals. However, the SBA's Small Business Goaling Report is distributed widely, receives media attention, and serves to heighten public awareness of the issue of small business contracting. For example, agency performance as reported in the SBA's Small Business Goaling Report is often cited by Members during their questioning of federal agency witnesses during congressional hearings.

As shown in **Table 1**, the *FY2017 Small Business Goaling Report*, using FPDS-NG data, indicates that federal agencies met the federal procurement goal for small businesses generally, small disadvantaged businesses, and service-disabled veteran-owned small businesses in FY2017.

Table 1 also provides, for comparative purposes, the percentage of total reported federal contracts (without exclusions) awarded to those small businesses in FY2017.

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[115] Ibid., p. 5. "The exception to this non-additive rule is for total Small Disadvantaged Business (SDB) which is the sum of 8(a) and non-8(a) SDBs. Each special type of small business is first of all a small business. That also means Federal procurements awarded to SDVOSB will also have been awarded to Veteran-Owned Small Business (VOSB)."

[116] For additional information and analysis of the SBA's 8(a) Program, see CRS Report R44844, *SBA's "8(a) Program": Overview, History, and Current Issues*, by Robert Jay Dilger.

[117] For additional information and analysis of the HUBZone program, see CRS Report R41268, *Small Business Administration HUBZone Program*, by Robert Jay Dilger.

[118] 15 U.S.C. §644(g)(1)-(2).

Table 1. Federal Procurement Goals and Percentage of FY2017 Federal Contract Dollars Awarded to Small Businesses, by Type

Business Type	Federal Goal	Percentage of Federal Contracts (small business eligible)	Percentage of Federal Contracts (all reported contracts)
Small Businesses	23.0%	23.88%	21.70%
Small Disadvantaged Businesses	5.0%	9.10%	8.41%
Women-Owned Small Businesses	5.0%	4.71%	4.20%
HUBZone Small Businesses	3.0%	1.65%	1.48%
Service-Disabled Veteran-Owned Small Businesses	3.0%	4.05%	3.59%

Sources: U.S. Small Business Administration, "Statutory Guidelines," at https://www.sba.gov/content/statutory-guidelines-0 (federal goals); U.S. General Services Administration, Federal Procurement Data System—Next Generation, "Small Business Goaling Report: Fiscal Year 2017," at https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2017.pdf and U.S. General Services Administration, Federal Procurement Data System—Next Generation, at https://www.fpds.gov/fpdsng/ (contract dollars).

Notes: The Small Business Goaling Report for FY2017 reports that small business eligible contracts, as of May 18, 2018, totaled $442.5 billion and that $105.7 billion was awarded to small businesses, $40.2 billion to small disadvantaged businesses, $20.8 billion to women-owned small businesses, $7.3 billion to SBA-certified HUBZone small businesses, and $17.9 billion to service-disabled veteran-owned small businesses. The Small Business Goaling Report for FY2017 does not indicate the total amount of federal contracts reported in the FPDS-NG on May 18, 2018. The percentages provided in the column for all reported contracts in FY2017 were calculated using FPDS-NG data for all contracts as reported on May 30, 2018: $508.8 billion in total contracts; $110.4 billion to small businesses, $42.8 billion to small disadvantaged businesses, $21.4 billion to women-owned small businesses, $7.5 billion to SBA-certified HUBZone small businesses, and $18.3 billion to service-disabled veteran-owned small businesses.

Certificate of Competency Program

Before awarding a federal contract, the contracting officer must affirmatively determine that the business is responsible to perform the contract. If the contracting officer determines that an apparent successful small business offeror lacks certain elements of responsibility (e.g., is unable to fulfill the requirements of a specific government procurement because it lacks capability, competency, capacity, credit, integrity, perseverance, tenacity, or limitations on subcontracting), the officer is required to refer the matter in writing to the SBA for review and a possible Certificate of Competency (COC), even if the next acceptable offer is also from a small business.[119] The COC certifies in writing that the small business meets all required elements of responsibility for the purpose of receiving and performing a specific government contract. The "COC program empowers the SBA to certify to contracting officers as to all elements of responsibility of any small business concern to receive and perform a specific government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other federal agencies."[120]

[119] 15 U.S.C. §637(b)(7); and FAR §19.601(a-e).

[120] FAR §19.601(b).

Post-Award Requirements

As mentioned previously, the SBA's commercial market representatives conduct periodic compliance reviews of contractors awarded contracts that require an acceptable small business subcontracting plan. [121] In addition, once the contract is completed, federal agencies are required to pay the contractor on a timely basis and pay interest penalties for late payments. Under specified circumstances, federal agencies may also pay contractors before the contract's payment's due date.

Small Business Subcontracting Plan Reviews

The periodic compliance review can take place on-site, at the contracting agency, or virtual.[122] Materials that may be reviewed include the contractor's contract files, correspondence that is directly or indirectly related to the contract, IT systems, subcontracting methods, and procedures.[123] Contractors are selected randomly for audit.[124] The SBA may enter into agreements with other federal agencies to conduct these assessments.[125]

The compliance report includes compliant and non-compliant items found during the assessment of the contractor's subcontracting activities and a rating indicating the contractor's level of compliance or non-compliance, ranging from unsatisfactory to outstanding.[126] If any deficiencies are found, the contractor is required to submit, within 30 days of the compliance review rating letter date, a corrective action plan (CAP).[127] The CAP is submitted to the SBA Area Office via email, or any method designated by the SBA. The commercial market representative conducts a follow-up compliance report within six months to a year of the date the SBA acknowledges receipt of the contractor's CAP to ensure that corrective actions have been taken to eliminate the deficiencies. The SBA keeps the federal agency that awarded the contract informed of the contractor's adherence to correcting the deficiencies.[128]

If the contractor refuses to provide or address all deficiencies in the CAP, a delinquent CAP letter is sent advising the contractor that it has 15 days from the letter's date to comply with federal regulations. If an acceptable CAP is not received in the allotted time frame the case is escalated to the SBA's subcontracting program manager who informs the SBA's Office of Government Contracting director and works with the SBA's Office of General Counsel and the federal agency that awarded the contract for resolution or to begin accessing liquidated damages.[129]

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[121] 15 U.S.C. §633(h).

[122] SBA, "Subcontracting Assistance Program Post Award," SOP 60 03 7, effective July 17, 2018, p. 11, at https://www.sba.gov/document/sop-60-03-subcontracting-assistance-program-post-award.

[123] Ibid.

[124] Ibid., p. 12.

[125] Ibid., p. 14.

[126] 13 C.F.R. §125.3(e)(3).

[127] SBA, "Subcontracting Assistance Program Post Award," SOP 60 03 7, effective July 17, 2018, p. 12, at https://www.sba.gov/document/sop-60-03-subcontracting-assistance-program-post-award.

[128] Ibid., p. 13.

[129] Ibid. Liquidated damages are predetermined sums a contractor must pay the procuring agency for specified contract breaches or performance failures. For additional information and analysis, see CRS Report R45322, *Selected Legal Tools for Maintaining Government Contractor Accountability*, by David H. Carpenter and Kathleen Ann Ruane.

Prompt Payments

Once a contract is awarded, federal agencies are generally required to pay interest to prime contractors on any invoice payments the agency fails to make by the date(s) specified in the contract, or within 30 days of receipt of a *proper invoice* for the amount due if no date is specified in the contract.[130]

Similar requirements exist for prime contractors in paying subcontractors on construction contracts. These requirements are especially important for small businesses in the construction industry. Specifically, every construction contract awarded by a federal agency must contain clauses obligating the prime contractor to (1) pay the subcontractor for "satisfactory performance" under the subcontract within seven days of receiving payment from the agency and (2) pay interest on any amounts that are not paid within the proper time frame.[131] The contract must also obligate the prime contractor to include similar payment and interest penalty terms in its subcontracts, as well as require its subcontractors to impose these terms on *their* subcontractors. This latter provision ensures that the payment and interest penalty requirements *flow down* to all tiers of construction subcontractors.

In addition, required subcontracting plans must incorporate terms obligating the prime contractor to notify the agency awarding the contract in writing if a subcontractor is paid a reduced price for goods supplied or services completed under the contract, or if payment is made to the subcontractor more than 90 days past due. The prime contractor must include the reason for the reduction in payment or failure to pay a subcontractor within 90 days.[132] If the contracting officer for a *covered contract* (a contract that requires an acceptable subcontracting plan) determines that a prime contractor has a history of unjustified, untimely payments to contractors, the contracting officer shall record the contractor's identity, describe the circumstances under which the contractor may be determined to have a history of unjustified, untimely payments to subcontractors, and include the contractor's identity in, and make publicly available through, the Federal Awardee Performance and Integrity Information System, or any successor.[133] This information is used by federal agencies to "evaluate the business ethics and quality of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources."[134]

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[130] 31 U.S.C. §3903(a); and P.L. 97-177, the Prompt Payment Act. Among other things, a proper invoice contains (1) the name of the contractor, the invoice date, and the contract number; (2) a description of the goods rendered and the shipping and payment terms; (3) other substantiating documentation or information required under the contract; and (4) the name, title, telephone number, and complete mailing address of the person to whom payment should be sent. 31 U.S.C. §3901(a); and 48 C.F.R. §32.905(b)(1)(i)-(x). The interest rate to be used is that determined by the Secretary of the Treasury twice a year under the Contract Disputes Act. 31 U.S.C. §3902(a).

[131] 31 U.S.C. §3905(b); and P.L. 100-496, the Prompt Payment Act Amendments of 1988.

[132] 15 U.S.C. §637(d)(13)(A-B); and U.S. Department of the Treasury, Bureau of the Fiscal Service, "Prompt Payment," at https://www.fiscal.treasury.gov/fsservices/gov/pmt/promptPayment/promptPayment_home.htm. Under a construction contract, an agency may withhold payment to a prime vendor if it learns that the prime vendor has failed to pay subcontractors in accordance with the terms of the contract.

[133] 15 U.S.C. §637(d)(13)(C-E).

[134] Department of Defense, General Services Administration, and National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System," 75 *Federal Register* 14059, March 23, 2010.

Accelerated Payments

Federal agencies are permitted to make an accelerated payment up to seven days before the required payment date in a federal contract, or earlier if the agency deems it necessary on a case-by-case basis if, after receiving a proper invoice, it is in the best interest of the government, and any of the following is true

- the invoice in under $2,500;
- the payment is to a small business; or
- the payment is related to an emergency, disaster, or military deployment.[135]

In addition, the Secretary of Defense is required, to the fullest extent permitted by law, to establish an accelerated payment date for its small business prime contractors, with a goal of 15 days after receipt of a proper invoice for the amount due if a specific payment date is not established by contract.[136]

The Secretary of Defense is also required to establish, to the fullest extent permitted by law, an accelerated payment date for its prime contractors that subcontract with small businesses, with a goal of 15 days after receipt of a proper invoice for the amount due if a specific payment date is not established by contract and the prime contractor agrees to make payments to the subcontractor "in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor."[137]

Concluding Observations

The small business contracting programs described in this report generally have strong bipartisan support. However, that does not mean that these programs face no opposition or that issues have not been raised concerning the impact or operations of specific programs. For example, small business advocates

- seek policies that reduce or eliminate exclusions that narrow the reach of small business contracting preferences,
- want the SBA to use the total value of all prime contract awards in the Small Business Goaling Report,[138] and

[135] 31 U.S.C. §3903(a)(8); Office of Management and Budget, "Prompt Payment," 64 *Federal Register* 52582-52583, September 29, 1999; and 5 C.F.R. §1315.5.

[136] 10 U.S.C. §2307(2)(A); and P.L. 115-232, the John S. McCain National Defense Authorization Act for Fiscal Year 2019.

[137] 10 U.S.C. §2307(2)(B); and P.L. 115-232, the John S. McCain National Defense Authorization Act for Fiscal Year 2019.

[138] See *American Small Business League v. Maria Contreras-Sweet in her capacity as Administrator of the United States Small Business Administration*, May 3, 2016, at http://www.asbl.com/documents/Filed_Complaint_For_Injunctive_Relief.pdf.

The federal government awarded more than $508.8 billion in federal contracts in FY2017. About $442.5 billion of that amount was deemed small business eligible. GSA, Federal Procurement Data System—Next Generation, at https://www.fpds.gov/fpdsng/ (contract dollar amount); and GSA, Federal Procurement Data System—Next Generation, "Small Business Goaling Report: Fiscal Year 2017," at https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2017.pdf.

- want the SBA to use a more discerning methodology for awarding performance grades to federal agencies in meeting its small business contracting goals.[139]

Critics have questioned some of these programs' effectiveness, in terms of both promoting small business opportunities to win federal contracts and a more diversified, robust economy.[140]

Many observers judge the relative success or failure of federal efforts to enhance small business contracting opportunities by whether the federal government and individual federal agencies meet the procurement goals in the annual Small Business Goaling Report. In recent years, the federal government has generally succeeded in meeting the government-wide goals of awarding 23% of the total value of all small business eligible prime contract awards to small businesses generally, 5% to SDBs, and 3% to SDVOSBs. However, it has had difficulty meeting the goals of 5% to WOSBs and 3% to HUBZone small businesses.[141]

The Small Business Goaling Report is the most convenient measure available to compare federal small business contracting performance over time, but it has limitations. For example, the report does not include all federal contracts, because some are not deemed to be small business eligible and others are not recorded in the FPDS-NG. In addition, the report does not evaluate the effect these contracts have on small businesses, industry competitiveness, or the overall economy. As one group of researchers has argued,

> the entire goal-setting process … is geared to measuring the dollars and contracts awarded to small business, and pays little attention to the *effect* that access to government contracts has on small business starts, growth, and wealth generation. Results of the program are also hard to isolate, difficult to measure, and generally not judged against the next best or other alternative policies [emphasis in original].[142]

Comprehensive studies examining the effect of small business contracting preferences on small business startups, growth, wealth generation, and industry competitiveness may prove useful for congressional oversight. In the meantime, although the Small Business Goaling Report has its

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[139] See Steven Koprince, "Let's Replace SBA Small Business Goaling Grades with Participation Trophies," *SmallGovCon*, May 29, 2018, at http://smallgovcon.com/uncategorized/lets-replace-sba-small-business-goaling-grades-with-participation-trophies/.

The SBA's small business contracting scorecard methodology has four weighted components: 50% based on prime contracting achievement, 20% based on subcontracting achievement, 10% based on a comparison of the number of small business prime contractors in each of the five small business categories in the agency's top 100 small business NAICS codes between FY2016 and FY2017, and 20% based on each Office of Small and Disadvantaged Business Utilization (OSDBU) peer review on agency compliance with section 15(k) of the Small Business Act (18 requirements in FY2017, 21 in FY2018). SBA, "Contracting Scorecard Grading Methodology," at https://www.sba.gov/document/support—contracting-scorecard-grading-methodology. For additional information and analysis of the SBA's methodology, see GAO, *Small Business Administration: Actions Needed to Improve Confidence in Small Business Procurement Scorecard*, GAO-18-672, September 27, 2018, at https://www.gao.gov/assets/700/694777.pdf.

[140] For example, see Henry Beale and Nicola Deas, "The HUBZone Report," prepared for the SBA, Office of Advocacy, May 2008, pp. i, ii, 124-131, at https://www.sba.gov/sites/default/files/rs325tot.pdf; and Clifford A. Grammich, Thomas R. Edison, Jr., Nancy Young Moore, and Edward G. Keating, *Small Business and Defense Acquisitions: A Review of Policies and Current Practices* (Santa Monica, CA: RAND, 2011), pp. xii, 15, 16, at https://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG443.pdf.

[141] SBA, "The Federal Government Achieves Small Business Contracting Goal for the Fifth Consecutive Year with Record-Breaking $105 Billion to Small Businesses," at https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/federal-government-achieves-small-business-contracting-goal-fifth-consecutive-year-record-breaking.

[142] Clifford A. Grammich, Thomas R. Edison, Jr., Nancy Young Moore, and Edward G. Keating, *Small Business and Defense Acquisitions: A Review of Policies and Current Practices* (Santa Monica, CA: RAND, 2011), p. 15, at https://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG443.pdf.

limitations, it can help policymakers identify programs most in need of examination. For example, the SBA has announced that it is focusing additional efforts on promoting the HUBZone program to federal contracting officials, primarily due to the continuing difficulties federal agencies have had in meeting the 3% goal for HUBZone small businesses.[143]

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[143] SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, pp. 75-77, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508-Final-FINAL.PDF.