

112TH CONGRESS  
2D SESSION

# H. R. 3893

To amend the Small Business Act with respect to subcontracting and insourcing, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 2012

Mr. MULVANEY introduced the following bill; which was referred to the Committee on Small Business, and in addition to the Committee on Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend the Small Business Act with respect to subcontracting and insourcing, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Subcontracting Transparency and Reliability Act of  
6 2012”.

7 (b) TABLE OF CONTENTS.—

Sec. 1. Short title; table of contents.

TITLE I—LIMITATIONS ON SUBCONTRACTING

Sec. 101. Limitations on subcontracting.  
 Sec. 102. Penalties.  
 Sec. 103. Conforming amendments.  
 Sec. 104. Guidance.

## TITLE II—SUBCONTRACTING PLANS

Sec. 201. Subcontracting plans.  
 Sec. 202. Notices of subcontracting opportunities.

## TITLE III—INSOURCING

Sec. 301. Definitions relating to procurement protest system.  
 Sec. 302. Insourcing.

# 1           **TITLE I—LIMITATIONS ON** 2                           **SUBCONTRACTING**

## 3   **SEC. 101. LIMITATIONS ON SUBCONTRACTING.**

4           The Small Business Act (15 U.S.C. 631 et seq.) is  
 5 amended—

6                   (1) by redesignating section 45 as section 47;

7           and

8                   (2) by inserting after section 44 the following:

### 9   **“SEC. 45. LIMITATIONS ON SUBCONTRACTING.**

10           “(a) IN GENERAL.—If awarded a contract under sec-  
 11 tion 8(a), 8(m), 15(a), 31, or 36, a covered small business  
 12 concern—

13                   “(1) in the case of a contract for services (ex-  
 14 cept construction), may not expend on subcontractors  
 15 more than 50 percent of the amount paid to the  
 16 concern under the contract;

17                   “(2) in the case of a contract for general con-  
 18 struction, may not expend on subcontractors more

1 than 85 percent of the amount, less the cost of ma-  
2 terials, paid to the concern under the contract;

3 “(3) in the case of a contract for construction  
4 by a special trade contractor, may not expend on  
5 subcontractors more than 75 percent of the amount,  
6 less the cost of materials, paid to the concern under  
7 the contract;

8 “(4) in the case of a contract for supplies  
9 (other than from a regular dealer in such supplies),  
10 may not expend on subcontractors more than 50  
11 percent of the amount, less the cost of materials,  
12 paid to the concern under the contract;

13 “(5) in the case of a contract described in more  
14 than 1 of paragraphs (1) through (4)—

15 “(A) shall determine for which category of  
16 services or supplies, described in 1 of para-  
17 graphs (1) through (4), the greatest percentage  
18 of the contract amount is awarded;

19 “(B) shall determine the amount awarded  
20 under the contract for that category of services  
21 or supplies; and

22 “(C) may not expend on subcontractors,  
23 with respect to the amount determined under  
24 subparagraph (B), more than—

1           “(i) 50 percent of that amount, if the  
2           category of services or supplies applicable  
3           under subparagraph (A) is described in  
4           paragraph (1);

5           “(ii) 85 percent of that amount, if the  
6           category of services or supplies applicable  
7           under subparagraph (A) is described in  
8           paragraph (2);

9           “(iii) 75 percent of that amount, if  
10          the category of services or supplies applica-  
11          ble under subparagraph (A) is described in  
12          paragraph (3); and

13          “(iv) 50 percent of that amount, if the  
14          category of services or supplies applicable  
15          under subparagraph (A) is described in  
16          paragraph (4); and

17          “(6) in the case of a contract for supplies from  
18          a regular dealer in such supplies, shall supply the  
19          product of a domestic small business manufacturer  
20          or processor, unless a waiver of such requirement is  
21          granted—

22                 “(A) by the Administrator, after reviewing  
23                 a determination by the applicable contracting  
24                 officer that no small business manufacturer or  
25                 processor can reasonably be expected to offer a

1 product meeting the specifications (including  
2 period for performance) required by the con-  
3 tract; or

4 “(B) by the Administrator for a product  
5 (or class of products), after determining that no  
6 small business manufacturer or processor is  
7 available to participate in the Federal procure-  
8 ment market.

9 “(b) SIMILARLY SITUATED ENTITIES.—Contract  
10 amounts expended by a covered small business concern on  
11 a subcontractor that is a similarly situated entity shall not  
12 be considered subcontracted for purposes of determining  
13 whether the covered small business concern has violated  
14 a requirement established under subsection (a) or (d).

15 “(c) MODIFICATIONS OF PERCENTAGES.—

16 “(1) IN GENERAL.—The Administrator may  
17 change, by rule (after providing notice and an oppor-  
18 tunity for public comment), a percentage specified in  
19 paragraphs (1) through (4) of subsection (a) if the  
20 Administrator determines that such change is nec-  
21 essary to reflect conventional industry practices  
22 among business concerns that are below the numer-  
23 ical size standard for businesses in that industry  
24 category.

1           “(2) UNIFORMITY.—A change to a percentage  
2           under paragraph (1) shall apply to all covered small  
3           business concerns.

4           “(d) OTHER CONTRACTS.—

5           “(1) IN GENERAL.—With respect to a category  
6           of contracts to which a requirement under sub-  
7           section (a) does not apply, the Administrator is au-  
8           thorized to establish, by rule (after providing notice  
9           and an opportunity for public comment), a require-  
10          ment that a covered small business concern may not  
11          expend on subcontractors more than a specified per-  
12          centage of the amount paid to the concern under a  
13          contract in that category.

14          “(2) UNIFORMITY.—A requirement established  
15          under paragraph (1) shall apply to all covered small  
16          business concerns.

17          “(e) DEFINITIONS.—In this section, the following  
18          definitions apply:

19                 “(1) COVERED SMALL BUSINESS CONCERN.—  
20                 The term ‘covered small business concern’ means a  
21                 business concern that—

22                         “(A) with respect to a contract awarded  
23                         under section 8(a), is a small business concern  
24                         eligible to receive contracts under that section;

1           “(B) with respect to a contract awarded  
2           under section 8(m)—

3                   “(i) is a small business concern owned  
4                   and controlled by women (as defined in  
5                   that section); or

6                   “(ii) is a small business concern  
7                   owned and controlled by women (as de-  
8                   fined in that section) that is not less than  
9                   51 percent owned by 1 or more women  
10                  who are economically disadvantaged (and  
11                  such ownership is determined without re-  
12                  gard to any community property law);

13                  “(C) with respect to a contract awarded  
14                  under section 15(a), is a small business con-  
15                  cern;

16                  “(D) with respect to a contract awarded  
17                  under section 31, is a qualified HUBZone small  
18                  business concern; or

19                  “(E) with respect to a contract awarded  
20                  under section 36, is a small business concern  
21                  owned and controlled by service-disabled vet-  
22                  erans.

23                  “(2) SIMILARLY SITUATED ENTITY.—The term  
24                  ‘similarly situated entity’ means a subcontractor  
25                  that—

1           “(A) if a subcontractor for a small busi-  
2           ness concern, is a small business concern;

3           “(B) if a subcontractor for a small busi-  
4           ness concern eligible to receive contracts under  
5           section 8(a), is such a concern;

6           “(C) if a subcontractor for a small busi-  
7           ness concern owned and controlled by women  
8           (as defined in section 8(m)), is such a concern;

9           “(D) if a subcontractor for a small busi-  
10          ness concern owned and controlled by women  
11          (as defined in section 8(m)) that is not less  
12          than 51 percent owned by 1 or more women  
13          who are economically disadvantaged (and such  
14          ownership is determined without regard to any  
15          community property law), is such a concern;

16          “(E) if a subcontractor for a qualified  
17          HUBZone small business concern, is such a  
18          concern; or

19          “(F) if a subcontractor for a small busi-  
20          ness concern owned and controlled by service-  
21          disabled veterans, is such a concern.”.

22 **SEC. 102. PENALTIES.**

23          Section 16 of the Small Business Act (15 U.S.C. 645)  
24 is amended by adding at the end the following:

25          “(g) SUBCONTRACTING LIMITATIONS.—

1           “(1) IN GENERAL.—Whoever violates a require-  
2           ment established under section 45 shall be subject to  
3           the penalties prescribed in subsection (d), except  
4           that, for an entity that exceeded a limitation on sub-  
5           contracting under such section, the fine described in  
6           subsection (d)(2)(A) shall be treated as the greater  
7           of—

8                     “(A) \$500,000; or

9                     “(B) the dollar amount expended, in excess  
10           of permitted levels, by the entity on subcontractors.  
11           tors.

12           “(2) MONITORING.—Not later than 1 year after  
13           the date of enactment of this subsection, the Admin-  
14           istrator shall take such actions as are necessary to  
15           ensure that an existing Federal subcontracting re-  
16           porting system is modified to notify the Adminis-  
17           trator, the appropriate Director of the Office of  
18           Small and Disadvantaged Business Utilization, and  
19           the appropriate contracting officer if a requirement  
20           established under section 45 is violated.”.

21 **SEC. 103. CONFORMING AMENDMENTS.**

22           (a) HUBZONES.—Section 3(p)(5) of the Small Busi-  
23           ness Act (15 U.S.C. 632(p)(5)) is amended—

24                     (1) in subparagraph (A)(i) by striking sub-  
25           clause (III) and inserting the following:

1                   “(III) with respect to any sub-  
2                   contract entered into by the small  
3                   business concern pursuant to a con-  
4                   tract awarded to the small business  
5                   concern under section 31, the small  
6                   business concern will ensure that the  
7                   requirements of section 45 are satis-  
8                   fied; and”;

9                   (2) by striking subparagraphs (B) and (C); and  
10                  (3) by redesignating subparagraph (D) as sub-  
11                  paragraph (B).

12                  (b) ENTITIES ELIGIBLE FOR CONTRACTS UNDER  
13                  SECTION 8(a).—Section 8(a) of such Act (15 U.S.C.  
14                  637(a)) is amended by striking paragraph (14) and insert-  
15                  ing the following:

16                  “(14) LIMITATIONS ON SUBCONTRACTING.—A con-  
17                  cern may not be awarded a contract under this subsection  
18                  as a small business concern unless the concern agrees to  
19                  satisfy the requirements of section 45.”.

20                  (c) SMALL BUSINESS CONCERNS.—Section 15 of  
21                  such Act (15 U.S.C. 644) is amended by striking sub-  
22                  section (o) and inserting the following:

23                  “(o) LIMITATIONS ON SUBCONTRACTING.—A concern  
24                  may not be awarded a contract under subsection (a) as

1 a small business concern unless the concern agrees to sat-  
 2 isfy the requirements of section 45.”.

3 **SEC. 104. REGULATIONS.**

4 Not later than 180 days after the date of enactment  
 5 of this Act, the Administrator of the Small Business Ad-  
 6 ministration shall issue guidance with respect to compli-  
 7 ance with the changes made to the Small Business Act  
 8 by the amendments in this Act, with opportunities for no-  
 9 tice and comment.

10 **TITLE II—SUBCONTRACTING**  
 11 **PLANS**

12 **SEC. 201. SUBCONTRACTING PLANS.**

13 (a) SUBCONTRACTING REPORTING REQUIRE-  
 14 MENTS.—

15 (1) IN GENERAL.—Section 8(d)(6) of the Small  
 16 Business Act (15 U.S.C. 637(d)(6)) is amended—

17 (A) by striking “(6) Each subcontracting  
 18 plan” and inserting the following:

19 “(6) SUBCONTRACTING PLAN REQUIREMENTS.—  
 20 Each subcontracting plan”;

21 (B) by amending subparagraph (E) to read  
 22 as follows:

23 “(E) assurances that the offeror or bidder  
 24 will—

25 “(i) submit—

1           “(I) not later than 180 days after the  
2           date on which performance under the ap-  
3           plicable contract begins, and every 180  
4           days thereafter until contract performance  
5           ends, a report that describes all subcon-  
6           tracting activities under the contract dur-  
7           ing the preceding 180-day period;

8           “(II) not later than 1 year after the  
9           date on which performance under the ap-  
10          plicable contract begins, and annually  
11          thereafter until contract performance ends,  
12          a report that describes all subcontracting  
13          activities under the contract that have oc-  
14          curred before the date on which the report  
15          is submitted (except that, with respect to  
16          the Department of Defense and the Na-  
17          tional Aeronautics and Space Administra-  
18          tion, a report under this subclause shall be  
19          submitted not later than 180 days after  
20          the date on which contract performance  
21          begins and every 180 days thereafter until  
22          contract performance ends); and

23          “(III) not later than 30 days after the  
24          date on which performance under the ap-  
25          plicable contract ends, a report that de-

1 scribes all subcontracting activities under  
2 the contract; and

3 “(ii) cooperate with any study or survey  
4 required by the applicable Federal agency or  
5 the Administration to determine the extent of  
6 compliance by the offeror or bidder with the  
7 subcontracting plan;”; and

8 (C) by moving subparagraph (G), including  
9 each clause therein, 2 ems to the left.

10 (2) REPORTING SYSTEM MODIFICATION.—

11 (A) IN GENERAL.—Not later than 1 year  
12 after the date of enactment of this Act, the Ad-  
13 ministrator of the Small Business Administra-  
14 tion shall take such actions as are necessary to  
15 ensure that the Federal subcontracting report-  
16 ing system to which covered reports are sub-  
17 mitted is modified to notify the Administrator,  
18 the appropriate contracting officer, and the ap-  
19 propriate Director of Small and Disadvantaged  
20 Business Utilization if an entity fails to submit  
21 a required covered report. If the Administrator  
22 does not modify the subcontracting reporting  
23 system on or before the date that is 1 year  
24 after the date of enactment of this Act, the Ad-  
25 ministrator may not carry out or establish any

1 pilot program until the date the Administrator  
2 modifies the reporting system.

3 (B) COVERED REPORT DEFINED.—In this  
4 paragraph, the term “covered report” means a  
5 report submitted in accordance with assurances  
6 provided under section 8(d)(6)(E) of the Small  
7 Business Act (15 U.S.C. 637(d)(6)(E)).

8 (b) FAILURE TO SUBMIT SUBCONTRACTING RE-  
9 PORTS AS BREACH OF CONTRACT.—Section 8(d)(8) of  
10 such Act (15 U.S.C. 637(d)(8)) is amended—

11 (1) by striking “(8) The failure” and inserting  
12 the following:

13 “(8) MATERIAL BREACH.—The failure”;

14 (2) in subparagraph (A) by striking “sub-  
15 section, or” and inserting “subsection,”;

16 (3) in subparagraph (B) by striking “sub-  
17 contract,” and inserting “subcontract, or”; and

18 (4) by inserting after subparagraph (B) the fol-  
19 lowing:

20 “(C) assurances provided under paragraph  
21 (6)(E),”.

22 (c) AUTHORITY OF SMALL BUSINESS ADMINISTRA-  
23 TION.—Section 8(d)(10) of such Act (15 U.S.C.  
24 637(d)(10)) is amended—

1           (1) by striking “(10) In the case of” and insert-  
2           ing the following:

3           “(10) AUTHORITY OF ADMINISTRATION.—In the case  
4           of”;

5           (2) in subparagraph (B) by striking “, which  
6           shall be advisory in nature,”; and

7           (3) in subparagraph (C) by striking “, either on  
8           a contract-by-contract basis, or in the case contrac-  
9           tors” and inserting “as a supplement to evaluations  
10          performed by the contracting agency, either on a  
11          contract-by-contract basis or, in the case of contrac-  
12          tors”.

13          (d) APPEALS.—Section 8(d) of such Act (15 U.S.C.  
14          637(d)) is amended by adding at the end the following:

15          “(13) APPEALS.—

16                 “(A) IN GENERAL.—If a procurement center  
17                 representative or commercial market representative  
18                 determines that a subcontracting plan required  
19                 under paragraph (4) or (5) fails to provide the max-  
20                 imum practicable opportunity for covered small busi-  
21                 ness concerns to participate in the performance of  
22                 the contract to which the plan applies, such rep-  
23                 resentative may delay acceptance of the plan in ac-  
24                 cordance with subparagraph (B).

1           “(B) PROCESS.—A procurement center rep-  
2           resentative or commercial market representative who  
3           makes the determination under subparagraph (A)  
4           with respect to a subcontracting plan may delay ac-  
5           ceptance of the plan for a 30-day period by pro-  
6           viding written notice of such determination to appro-  
7           priate personnel of the contracting agency. Such no-  
8           tice shall include recommendations for altering the  
9           plan to provide the maximum practicable oppor-  
10          tunity described in that subparagraph.

11          “(C) DISAGREEMENTS.—If a procurement cen-  
12          ter representative or commercial market representa-  
13          tive delays the acceptance of a subcontracting plan  
14          under subparagraph (B) for a 30-day period and,  
15          during such period, does not reach agreement with  
16          appropriate personnel of the contracting agency to  
17          alter the plan to provide the maximum practicable  
18          opportunity described in subparagraph (A), the dis-  
19          agreement shall be submitted to the head of the con-  
20          tracting agency by the Administrator for a final de-  
21          termination.

22          “(D) COVERED SMALL BUSINESS CONCERNS  
23          DEFINED.—In this paragraph, the term ‘covered  
24          small business concerns’ means small business con-  
25          cerns, qualified HUBZone small business concerns,

1 small business concerns owned and controlled by vet-  
2 erans, small business concerns owned and controlled  
3 by service-disabled veterans, small business concerns  
4 owned and controlled by socially and economically  
5 disadvantaged individuals, and small business con-  
6 cerns owned and controlled by women.”.

7 **SEC. 202. NOTICES OF SUBCONTRACTING OPPORTUNITIES.**

8 Section 8(k)(1) of the Small Business Act (15 U.S.C.  
9 637(k)(1)) is amended by striking “in the Commerce  
10 Business Daily” and inserting “on the appropriate Fed-  
11 eral Web site (as determined by the Administrator)”.

12 **SEC. 203. REGULATIONS.**

13 Not later than 180 days after the date of enactment  
14 of this Act, the Administrator of the Small Business Ad-  
15 ministration shall issue guidance with respect to the  
16 changes made to the Small Business Act, with opportunity  
17 for notice and comment.

18 **TITLE III—INSOURCING**

19 **SEC. 301. DEFINITIONS RELATING TO PROCUREMENT PRO-**  
20 **TEST SYSTEM.**

21 (a) PROTEST.—Section 3551(1) of title 31, United  
22 States Code, is amended by adding at the end the fol-  
23 lowing:

1           “(F) Conversion of a function that is being  
2           performed by a private sector entity to perform-  
3           ance by a Federal employee.”.

4           (b) INTERESTED PARTY.—Section 3551(2) of such  
5 title is amended—

6           (1) in subparagraph (A) by striking “and” at  
7           the end;

8           (2) in subparagraph (B) by striking the period  
9           at the end and inserting “; and”; and

10          (3) by adding at the end the following:

11           “(C) with respect to a conversion described  
12           in paragraph (1)(F), includes any small busi-  
13           ness concern (as that term is defined in section  
14           3(a) of the Small Business Act) whose economic  
15           interest would be affected by the conversion.”.

16 **SEC. 302. INSOURCING.**

17          The Small Business Act (15 U.S.C. 631 et seq.), as  
18          amended by this Act, is further amended by inserting after  
19          section 45 the following:

20 **“SEC. 46. INSOURCING.**

21          “A Federal agency may only convert a function that  
22          is being performed by a small business concern to per-  
23          formance by a Federal employee if—

24           “(1) the agency has made publicly available,  
25           after providing notice and an opportunity for public

1 comment, the procedures of the agency with respect  
2 to decisions to convert a function being performed  
3 by a small business concern to performance by a  
4 Federal employee; and

5 “(2) the procedures described in paragraph (1)  
6 include that all decisions described in such para-  
7 graph are reviewed by any appropriate—

8 “(A) Office of Small and Disadvantaged  
9 Business Utilization; and

10 “(B) procurement center representative.”.

○