

SMALL BUSINESS FAIRNESS IN CONTRACTING ACT

MAY 3, 2007.—Ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 1873]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1873) to reauthorize the programs and activities of the Small Business Administration relating to procurement, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	6
Background and Need for Legislation	7
Legislative History	7
Section-by-Section	8
Explanation of Amendments	12
Committee Consideration	12
Rollcall Votes	12
Application of Law to the Legislative Branch	12
Statement of Oversight Findings and Recommendations of the Committee	13
Statement of General Performance Goals and Objectives	13
Constitutional Authority Statement	13
Federal Advisory Committee Act	13
Unfunded Mandates Statement	13
Earmark Identification	13
Committee Estimate	13
Changes in Existing Law Made by the Bill as Reported	14

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Small Business Fairness in Contracting Act”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
 Sec. 2. Regulations.

TITLE I—CONTRACT BUNDLING

- Sec. 101. Definitions of bundling of contract requirements and related terms.
 Sec. 102. Justification.
 Sec. 103. Appeals.
 Sec. 104. Review.

TITLE II—INCREASING THE NUMBER OF SMALL BUSINESS CONTRACTS AND SUBCONTRACTS

- Sec. 201. Small business goal.
 Sec. 202. Annual goal negotiation.
 Sec. 203. Usage of small companies in goal achievement.
 Sec. 204. Annual plan for each agency explaining how agency will meet small business goals.
 Sec. 205. Making small businesses the first choice.
 Sec. 206. Uniform metric for subcontracting achievements.
 Sec. 207. Subcontracting database.
 Sec. 208. National database.
 Sec. 209. Review of subcontracting plans.
 Sec. 210. Agency obligation for fulfilling contracting goals.
 Sec. 211. Appropriate limits on value of sole source contracts.

TITLE III—PROTECTION OF TAXPAYERS FROM FRAUD

- Sec. 301. Small business size protest notification.
 Sec. 302. Review of national registry.
 Sec. 303. Recertification of compliance with size standards and registration with Central Contractor Registry.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS

- Sec. 401. Authorization of appropriations.

SEC. 2. REGULATIONS.

(a) **IN GENERAL.**—Not later than 180 days after the date of the enactment of this Act—

- (1) the Administrator of the Small Business Administration shall promulgate regulations to implement this Act and the amendments made by this Act; and
- (2) the Federal Acquisition Regulation shall be revised to implement this Act and the amendments made by this Act.

(b) **NOTICE AND COMMENT.**—The regulations required by subsection (a) shall be promulgated after opportunity for notice and comment as required by section 553(b) of title 5, United States Code.

TITLE I—CONTRACT BUNDLING**SEC. 101. DEFINITIONS OF BUNDLING OF CONTRACT REQUIREMENTS AND RELATED TERMS.**

Section 3 of the Small Business Act (15 U.S.C. 632) is amended by amending subsection (o) to read as follows:

“(o) **DEFINITIONS OF BUNDLING OF CONTRACT REQUIREMENTS AND RELATED TERMS.**—For purposes of this Act:

“(1) **BUNDLED CONTRACT.**—

“(A) **IN GENERAL.**—The term ‘bundled contract’ means a contract or order that is entered into to meet procurement requirements that are consolidated in a bundling of contract requirements, without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made.

“(B) **EXCEPTIONS.**—The term does not include—

“(i) a contract or order with an aggregate dollar value below the dollar threshold specified in paragraph (4); or

“(ii) a contract or order that is entered into to meet procurement requirements, all of which are exempted requirements under paragraph (5).

“(2) **BUNDLING OF CONTRACT REQUIREMENTS.**—

“(A) **IN GENERAL.**—The term ‘bundling of contract requirements’ means the use of any bundling methodology to satisfy 2 or more procurement requirements for goods or services, including any construction services, previously supplied or performed under separate smaller contracts or orders that is likely to be unsuitable for award to a small business concern due to—

“(i) the diversity, size, or specialized nature of the elements of the performance specified;

“(ii) the aggregate dollar value of the anticipated award;

“(iii) the geographical dispersion of the contract or order performance sites; or

“(iv) any combination of the factors described in clauses (i), (ii), and (iii).

“(B) **INCLUSION OF NEW FEATURES OR FUNCTIONS.**—A combination of contract requirements that would meet the definition of a bundling of contract

requirements but for the addition of a procurement requirement with at least one new good or service shall be considered to be a bundling of contract requirements unless the new features or functions substantially transform the goods or services previously performed.

“(C) EXCEPTIONS.—The term does not include—

“(i) the use of a bundling methodology for an anticipated award with an aggregate dollar value below the dollar threshold specified in paragraph (5); or

“(ii) the use of a bundling methodology to meet procurement requirements, all of which are exempted requirements under paragraph (6).

“(3) BUNDLING METHODOLOGY.—The term ‘bundling methodology’ means—

“(A) a solicitation to obtain offers for a single contract or order, or a multiple award contract or order; or

“(B) a solicitation of offers for the issuance of a task or a delivery order under an existing single or multiple award contract or order.

“(4) SEPARATE SMALLER CONTRACT.—The term ‘separate smaller contract’, with respect to bundling of contract requirements, means a contract or order that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.

“(5) DOLLAR THRESHOLD.—The term ‘dollar threshold’ means—

“(A) \$65,000,000, if solely for construction services; and

“(B) \$5,000,000, in all other cases.

“(6) EXEMPTED REQUIREMENTS.—The term ‘exempted requirement’ means a procurement requirement solely for items that are not commercial items (as the term ‘commercial item’ is defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

“(7) PROCUREMENT REQUIREMENT.—The term ‘procurement requirement’ means a determination by an agency that a specified good or service is needed to satisfy the mission of the agency.”.

SEC. 102. JUSTIFICATION.

Section 15(a) of the Small Business Act (15 U.S.C. 644(a)) is amended—

(1) by striking “(2) why delivery schedules” and inserting “(2) the names, addresses and size of the incumbent contract holders; (3) a description of the industries that might be interested in bidding on the contract requirements; (4) the number of small businesses listed in the industry categories that could be excluded from future bidding if the contract is combined or packaged; (5) why delivery schedules”;

(2) by striking “(3) why the proposed acquisition” and inserting “(6) why the proposed acquisition”;

(3) by striking “(4) why construction” and inserting “(7) why construction”;

(4) by striking “(5) why the agency” and inserting “(8) why the agency”;

(5) by striking “justified.” and inserting “justified. The statement shall also set forth the proposed procurement strategy required by subsection (e) and, if applicable, the specifications required by subsection (e)(3). The statement shall be made available to the public, including through dissemination in the Federal contracting opportunities database, concurrently with the issuance of the solicitation.”; and

(6) by inserting after “prime contracting opportunities.” the following: “If no notification of the procurement and accompanying statement is received, but the Administrator determines that there is cause to believe the contract combines requirements or a contract (single or multiple award) or task or delivery order for construction services or includes unjustified bundling, then the Administrator may request that such a statement of work goods or services be completed by the procurement activity and sent to the Procurement Center Representative and the solicitation process postponed for 10 days to allow the Administrator to review the statement and make recommendations as described in this section before the procurement is continued.”.

SEC. 103. APPEALS.

Section 15(a) of the Small Business Act (15 U.S.C. 644(a)) is amended by inserting before “Whenever the Administration and the contracting procurement agency fail to agree,” the following: “If a small business concern would be adversely affected, directly or indirectly, by the procurement as proposed, and that small business concern or a trade association on behalf of that small business concern so requests, the Administrator may, in the Administrator’s discretion, take action to further the interests of that small business concern.”.

SEC. 104. REVIEW.

Section 15(a) of the Small Business Act (15 U.S.C. 644(a)) is amended by striking the sentence beginning “Whenever the Administration and the contracting procurement agency fail to agree,” and inserting the following: “Whenever the Administration and the contracting procurement agency fail to agree, the Administrator shall submit the matter to the head of the agency for a determination. The head of the agency shall provide a written response to the Administrator. A copy of such response shall also be provided to the Committees on Small Business of the House of Representatives and Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate.”.

TITLE II—INCREASING THE NUMBER OF SMALL BUSINESS CONTRACTS AND SUB- CONTRACTS

SEC. 201. SMALL BUSINESS GOAL.

(a) **GOVERNMENT-WIDE GOAL.**—Section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) is amended by striking “23 percent” and inserting “25 percent”.

(b) **GOALS FOR SMALL DISADVANTAGED BUSINESSES AND WOMEN-OWNED BUSINESSES.**—Section 15(g)(1) of such Act is further amended by striking “5 percent” both places it appears and inserting “8 percent”.

SEC. 202. ANNUAL GOAL NEGOTIATION.

Section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) is amended by striking “The President shall annually establish Government-wide goals for procurement contracts” and inserting “The President shall before the close of each fiscal year establish new Government-wide procurement goals for the following fiscal year for procurement contracts”.

SEC. 203. USAGE OF SMALL COMPANIES IN GOAL ACHIEVEMENT.

Section 15(g) of the Small Business Act (15 U.S.C. 644(g)) is amended by adding at the end the following:

“(4) For purposes of this subsection and subsection (h), a small business concern shall be counted toward one additional category goal only, even if that small business concern otherwise qualifies under more than one category goal. In this paragraph, the term ‘category goal’ means a goal described in paragraph (2).”.

SEC. 204. ANNUAL PLAN FOR EACH AGENCY EXPLAINING HOW AGENCY WILL MEET SMALL BUSINESS GOALS.

Section 15(g) of the Small Business Act (15 U.S.C. 644(g)) is amended by adding at the end the following:

“(5) Before the beginning of each fiscal year, the head of each Federal agency shall submit to the Administrator of the Small Business Administration and to Congress a detailed plan explaining how the agency intends to meet the small business goals under this subsection that apply to that agency for that fiscal year.”.

SEC. 205. MAKING SMALL BUSINESSES THE FIRST CHOICE.

Section 15(j) of the Small Business Act (15 U.S.C. 644(j)) is amended—

(1) in paragraph (1), by striking “\$100,000” and inserting “the Simplified Acquisition Threshold”; and

(2) in paragraph (3), by striking “subsection (a) of section 8” and inserting “section 8, 31, or 36”.

SEC. 206. UNIFORM METRIC FOR SUBCONTRACTING ACHIEVEMENTS.

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) is amended by adding at the end the following:

“(12) In carrying out this subsection, the Administrator shall require each prime contractor to report small business subcontract usage at all tiers based on the percentage of the total dollar amount of the contract award.”.

SEC. 207. SUBCONTRACTING DATABASE.

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) is amended by adding at the end the following:

“(13) In carrying out this subsection, the Administrator shall develop and maintain a password-protected database that will enable the Administration to assist small businesses in marketing to large corporations that have not achieved their small business goals.”.

SEC. 208. NATIONAL DATABASE.

The Administrator of the Small Business Administration shall ensure that whenever a small business enters its information in the Central Contractor Registry, or any successor to that registry, the Administrator contacts that business within 30 days regarding the likelihood of Federal contracting opportunities. The Administrator shall ensure that each small business that so registers is, for each industry code entered by that small business, provided with the total dollar value of government contract awards to small businesses for that industry.

SEC. 209. REVIEW OF SUBCONTRACTING PLANS.

Not later than 120 days after the date of the enactment of this section, the Administrator of the Small Business Administration shall, after an opportunity for notice and comment, prescribe regulations to govern the Administrator's review of subcontracting plans, including standards for determining good faith effort in compliance with the subcontracting plans.

SEC. 210. AGENCY OBLIGATION FOR FULFILLING CONTRACTING GOALS.

Section 15(h) of the Small Business Act (15 U.S.C. 644(h)) is amended by adding at the end the following:

"(4) At the conclusion of each fiscal year, the head of each Federal agency shall submit to Congress a report specifying the percentage of contracts awarded by that agency for that fiscal year that were awarded to small business concerns. If the percentage is less than 25 percent, the head of the agency shall, in the report, explain why the percentage is less than 25 percent and what will be done to ensure that the percentage for the following fiscal year will not be less than 25 percent."

SEC. 211. APPROPRIATE LIMITS ON VALUE OF SOLE SOURCE CONTRACTS.

(a) **APPROPRIATE LIMITS.**—If a law is not enacted by December 31, 2007, revising the limits referred to in this subsection, the Administrator for Federal Procurement Policy, in consultation with the Administrator for Small Business, shall establish appropriate limits on the value of contracts awarded without the use of competitive procedures to participants in the program established by section 8(a) of the Small Business Act (15 USC 637(a)) that are not subject to the limits on the value of such contracts established by paragraph (1)(D) of section 8(a) of such Act.

(b) **CONSULTATION.**—In establishing any limit described in subsection (a), the Administrator for Federal Procurement Policy shall consult with representatives of the affected program participants. The Administrator shall also take into account—

- (1) any special circumstances and needs of the affected program participants;
- and
- (2) the advantages of promoting competition in Federal contracting.

TITLE III—PROTECTION OF TAXPAYERS FROM FRAUD

SEC. 301. SMALL BUSINESS SIZE PROTEST NOTIFICATION.

(a) **IN GENERAL.**—The Administrator of the Small Business Administration shall work with appropriate Federal agencies to ensure that whenever a business concern is awarded a contract on the basis that it qualifies as small and then is determined not to qualify as small, a notification of those facts (that an award was made on such a basis, and that such a determination was made) shall be placed adjacent to that concern's listing in the Central Contractor Registry (or any successor to that registry).

(b) **COMPTROLLER GENERAL CERTIFICATION.**—The Administrator shall, in making any report of small business goal accomplishments, qualify the accomplishments as "estimated", until the Administrator obtains from the Comptroller General the Comptroller General's certification that there are no data integrity issues with respect to the national repository of contract award information known as Federal Procurement Data System-Next Generation (FPDS-NG), or any successor to that repository.

(c) **AWARDS TO LARGE BUSINESSES.**—For each Federal agency, the Inspector General of that agency shall, on an annual basis, submit to Congress a report on the number and dollar value of contract awards that were coded as awards to small business concerns but in fact were made to businesses that did not qualify as small business concerns.

SEC. 302. REVIEW OF NATIONAL REGISTRY.

The Administrator of the Small Business Administration shall ensure, on a biannual basis, that an independent audit is performed of the Central Contractor Registry, or any successor to that registry, and that the Dynamic Small Business

Search portion of the registry, or any successor to that portion of the registry, is purged of any businesses that are not in fact small businesses. If a business that has been so purged attempts, while not in fact a small business, to re-register, that business is subject to debarment as a Federal contractor and is further subject to penalties outlined in section 16 of the Small Business Act (15 U.S.C. 645).

SEC. 303. RECERTIFICATION OF COMPLIANCE WITH SIZE STANDARDS AND REGISTRATION WITH CENTRAL CONTRACTOR REGISTRY.

Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) is amended by adding at the end the following:

“(5) RECERTIFICATION.—

“(A) IN GENERAL.—If a business concern is awarded a contract because of a standard by which it is determined to be a small business concern, and the business concern is close to exceeding that standard at the time the award is made, then the business concern must, annually after the date of the award, recertify to the agency awarding the contract whether it meets that standard.

“(B) ‘CLOSE TO EXCEEDING’.—For purposes of subparagraph (A), a business concern is close to exceeding—

“(i) a number-of-employees standard if the number of employees of the business concern is 95 percent or more of the maximum number of employees allowed under the standard; and

“(ii) a dollar-volume-of-business standard if the dollar volume of business is 80 percent or more of the maximum dollar volume allowed under the standard.

“(6) REGISTRY.—For a business concern to be awarded a contract because of a standard by which it is determined to be a small business concern, the business concern must, annually after the end of the fiscal year used by the business concern, update its listing in the Central Contractor Registry.”.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS

SEC. 401. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this Act and the amendments made by this Act.

PURPOSE AND SUMMARY

H.R. 1873, the Small Business Fairness in Contracting Act of 2007, was introduced on April 17, 2007, by Reps. Bruce L. Braley, Steve Chabot, and Nydia M. Velázquez. The bill amends the Small Business Act to address issues relating to small business participation in federal procurement. This report summarizes H.R. 1873, as ordered reported by the Committee on Oversight and Government Reform.

H.R. 1873 contains provisions concerning contract bundling, government procurement goals for small business contracts, and the accuracy of contracting data maintained in federal databases.

As reported by the Oversight Committee, the bill expands the definition of contract bundling to ensure that small businesses have access to work previously available for small business. The bill improves the current bundling dispute process by allowing small businesses to request that the Small Business Administration (SBA) appeal a contract award to the contracting agency on their behalf and by requiring agencies to provide written responses to SBA. The bill increases the government-wide small business contracting goal and raises the threshold for set-asides of small business contracts to the Simplified Acquisition Threshold. The bill would provide for the establishment of appropriate limitations on the award of contracts without competition to Alaska Native Cor-

porations and other economically disadvantaged Indian tribes. The bill requires improvements to federal contracting databases.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 1873 improves small business access to federal procurement opportunities. Concerns have been raised that some agencies may be combining work previously awarded to small businesses and then adding some small new requirement so the agency can avoid conducting the required contract bundling analysis. As reported by the Oversight Committee, H.R. 1873 addresses this concern by covering under the definition of a contract bundling a combination of contract requirements that would meet the definition of a bundling if it were not for the addition of a new feature or function that does not substantially transform the goods or services previously performed.

Federal contracting law provides a limited privilege for small minority and economically disadvantaged businesses. These companies can be awarded contracts worth up to \$5 million without competition. In 1986, Congress made Alaska Native Corporations and economically disadvantaged Indian tribes eligible to participate in the program but provided that the \$5 million ceiling did not apply to those groups. These firms are thus eligible to receive non-competitive federal contracts of any value. The number and value of noncompetitive federal contracts awarded to Alaska Native Corporations has increased in recent years. In 2000, Alaska Native Corporations received \$265 million in federal contracts while in 2005, spending on these contracts grew to more than \$1 billion per year. As reported by the Oversight Committee, H.R. 1873 puts in place a mechanism to begin to address this loophole. The bill contains a “placeholder” provision that gives Congress until the end of the year to revise the statute. If Congress fails to act, the Office of Management and Budget would set “appropriate limits” after a consultation process.

Concerns have been raised about the validity and usefulness of the data maintained in federal contractor databases. According to the Inspector General for the Small Business Administration, agencies are getting credit toward their small business procurement goals for contracts which are actually awarded to large companies. This bill addresses these concerns by requiring changes to the information that is available in federal contractor databases and by requiring a biannual audit of the Central Contractor Registry.

LEGISLATIVE HISTORY

H.R. 1873 was introduced on April 17, 2007, and referred to the Committee on Small Business. The Committee on Small Business held a markup to consider the bill on April 24, 2007, and ordered the bill reported, as amended, on a voice vote.

The bill was sequentially referred to the Committee on Oversight and Government Reform. The Committee held a markup to consider H.R. 1873 on May 1, 2007, and ordered the bill to be reported, as amended, on a voice vote.

SECTION-BY-SECTION

Section 1. Short title; table of contents

This section provides that the short title of H.R. 1873 is the “Small Business Fairness in Contracting Act of 2007.” This section also contains a table of contents.

Section 2. Regulations

This section requires the SBA Administrator to issue regulations, after providing the opportunity for notice and comment, implementing this Act. This section also requires the Federal Acquisition Regulation to be revised to implement the Act and the amendments made by the Act.

Title I—Contract Bundling

Section 101. Definitions of bundling of contract requirements and related terms

This section clarifies the definition of contract bundling and related terms. The term “bundled contract” is amended to include a contract or an order that is entered into to meet requirements that are consolidated in a bundling of contract requirements without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made. This provision is intended to cover single award or multiple award “task and delivery” orders under requirements-type contracts and indefinite delivery indefinite quantity contracts. This expansion of the current statutory coverage ensures that small businesses have an appropriate opportunity to share in the federal business opportunities offered through task and delivery orders under already existing contracts.

Under the current definition, a contract is considered bundled if it involves the consolidation of work that has been previously performed. This section expands the definition of “bundling of contract requirements” to cover construction services and to cover a combination of contract requirements that would meet the definition of a bundling if it were not for the addition of a procurement requirement with at least one new good or service if the new features or functions do not substantially transform the good or services previously performed. None of these definitions apply if the anticipated aggregate dollar value of the award is under \$65 million for construction services or under \$5 million for all other contracts, or if it applies only to non-commercial items.

The bill, as introduced, could have been read to change the definition of contract bundling to include virtually all contracts the federal government puts out for bid. This would require agencies to conduct time-consuming and burdensome economic analyses for almost all federal contracts. This section, as amended during Committee consideration, provides a balanced expansion that improves small business access to federal contracts while preserving the discretion of agency contracting officials.

Section 102. Justification

This section requires a contracting agency to provide the small business representative for the agency with information on incum-

bent contract holders, a description of the industries which might be interested in bidding on the contract requirements, and the number of small businesses listed in the industry categories which potentially could be excluded if the contract is combined or packaged. This section allows the SBA Administrator to intervene and request a statement of work for goods or services and to request that the solicitation process be postponed 10 days to allow the Administrator to review the statement and make recommendations.

Section 103. Appeals

This section allows a small business or a trade association acting on behalf of a small business adversely affected by a proposed procurement to request that SBA take actions to further the interests of that small business concern.

Section 104. Review

Under current law, when SBA and a procuring agency disagree on a contract bundling issue, the head of the contracting agency resolves the dispute. This section improves accountability by requiring the head of the agency to provide a written response to the SBA Administrator and to provide copies of the response to Congress.

This section was amended during Committee consideration to eliminate the requirement that OMB become involved in disputes between SBA and other federal agencies over whether a contract is bundled. The authority to resolve these disputes should ultimately remain with the individual responsible for ensuring that the contract is fulfilled and not with political appointees at OMB. The reporting requirements of this section will ensure appropriate oversight of the issue.

Title II—Increasing the Number of Small Business Contracts and Subcontracts

Section 201. Small business goal

This section increases the government-wide small business procurement goal from 23% to 25%. This section would also raise the government-wide procurement goal for small disadvantaged businesses and women-owned businesses from 5% to 8%. This section was amended during Committee consideration. As introduced, the bill would have raised the small business procurement goal to 30%. The federal government barely meets the current goal of 23% and 25% will be a significant improvement.

Section 202. Annual goal negotiation

This section requires the President, before the close of each fiscal year, to establish new government-wide procurement goals for the following fiscal year. This provision is intended to ensure that new goals are set each year.

Section 203. Usage of small companies in goal achievement

This section would only permit agencies to count a small business toward one additional procurement category goal (small businesses owned by service disabled veterans, socially and economically disadvantaged individuals, qualified HUB Zone concerns, and

women) even if the small business would otherwise qualify to be counted under more than one goal.

Section 204. Annual plan for each agency explaining how agency will meet small business goals

This section requires the head of each agency to submit to the SBA Administrator and Congress a detailed plan on how the agency intends to meet its small business procurement goals for that fiscal year.

Section 205. Making small business the first choice

This section would require that the maximum dollar value for the small business threshold be raised to that of the Simplified Acquisition Threshold. The Simplified Acquisition Threshold is adjusted based on inflation. Tying the maximum small business threshold to the Simplified Acquisition Threshold allows both thresholds to be adjusted to inflation at the same time. H.R. 1873, as introduced, included a provision that would extend the small business reservation to orders under existing contracts. This provision was eliminated in the bill as reported by the Oversight Committee.

Section 206. Uniform metric for subcontracting achievements

This section requires prime contractors to report small business usage, at all tiers, based on the percentage of the total dollar amount of the contract award. This provision establishes a uniform way of measuring subcontracting performance.

Section 207. Subcontracting database

This section requires the SBA Administrator to develop and maintain a password protected database to enable agencies to assist small businesses in marketing to large corporations that have not achieved their small business goals.

Section 208. National database

This section requires the SBA Administrator to ensure that whenever a small business enters its information in the Central Contractor Registry, the Administrator contacts the business within 30 days regarding the likelihood of federal contracting opportunities. This section also requires the Administrator to ensure that each small business is provided with the total dollar value of government contract awards to small businesses for each of its relevant industries.

Section 209. Review of subcontracting plans

This section requires the SBA Administrator, within 120 days and after an opportunity for notice and comment, to prescribe regulations governing the Administrator's review of subcontracting plans, including standards for determining good faith effort in compliance with the subcontracting plans.

Section 210. Agency obligation for fulfilling contracting goals

This section requires the head of each federal agency to submit to Congress a report on the percentage of contracts the agency awarded to small businesses for that fiscal year. If it is less than

25%, the head of the agency must explain why and what the agency will do to ensure that the percentage will not be less than 25% for the next fiscal year.

Section 211. Change in threshold for sole source contracts for certain entities

This section gives Congress until the end of the year to adopt legislation addressing sole-source contracting by Alaska Native Corporations and economically disadvantaged Indian tribes. If Congress fails to act during this “placeholder” period, the section requires the Administrator for Federal Procurement Policy, in consultation with the SBA Administrator, to establish appropriate limits on the value of sole-source contracts awarded to these groups. In setting these limits, the Administrator must consult with representatives of affected Alaska Natives and Indian tribes and take into account any special circumstances and needs of the affected program participants and the advantages of promoting competition in federal contracting.

These changes are intended to preserve the integrity of the contracting privileges afforded to Alaska Native Corporations and economically disadvantaged Indian tribes by introducing competition into the program.

Title III—Protection of Taxpayers From Fraud

Section 301. Small business size protest notification

Subsection (a) requires the SBA Administrator to work with agencies to ensure that whenever a business fails to prevail in a size protest and the determination is made that the business is not small, a note is made in the Central Contractor Registry.

Subsection (b) requires the SBA Administrator, in any report on small business goal accomplishments, to qualify the accomplishments as “estimated” until the Comptroller General certifies to the Administrator that there are no data integrity issues with respect to the Federal Procurement Data System-Next Generation.

Subsection (c) requires the Inspector General of each agency to report annually on contracts that were coded as awards to small businesses but were in fact awarded to businesses that did not qualify as small.

Section 302. Review of national registry

This section requires the SBA Administrator to ensure, on a bi-annual basis, that an independent audit is performed of the Central Contractor Registry and that the Dynamic Small Business Search portion of the registry is purged of any businesses that are not small businesses. This section provides that if a business that has been purged attempts to re-register, it will be subject to debarment as a federal contractor and will be subject to penalties outlined in section 645 of chapter 15 of the United States Code.

Section 303. Recertification of compliance with size standards and registration with central contractor registry

This section requires businesses that are, at the time of a contract award, close to exceeding their size standards, to annually recertify throughout the duration of the contract.

This provision is intended to ensure that small businesses that outgrow the small business classification do not continue to be eligible for small business awards and to ensure that agencies do not receive credit toward their small business procurement goals for awarding contracts to such businesses. This provision does not require a business that outgrows its small business designation to lose its contract.

Title IV—Authorization of Appropriations

Section 401. Authorization of appropriations

This section authorizes necessary appropriations for implementation.

EXPLANATION OF AMENDMENTS

The following amendments were adopted in Committee:

Mr. Waxman and Mr. Davis offered an amendment, passed by voice vote, in the nature of a substitute. The amendment makes a number of changes to H.R. 1873. The amendment changes the definition of contract bundling and eliminates the requirement that OMB become involved in contract-specific disputes between SBA and other federal agencies over contract bundling. The amendment requires the contracting agency to provide a written opinion to SBA and to Congress regarding such disputes. The amendment changes the increase in the government-wide small business procurement goal to 25% from 30% as included in the bill as it was referred to the Committee. The amendment gives Congress until the end of the year to address sole-source contracting by Alaska Native Corporations and economically disadvantaged Indian tribes. The amendment also eliminated provisions of the bill, as introduced, which would have required overseas contracts to be included in determining achievement of procurement goals and to require agencies to negotiate individual procurement goals, not lower than the national goal.

Mr. Clay and Mr. Cummings offered an amendment, passed by voice vote, to raise the government-wide procurement goal for small disadvantaged businesses and women-owned businesses from 5% to 8%.

COMMITTEE CONSIDERATION

On Tuesday, May 1, 2007, the Committee met in open session and favorably ordered the bill, H.R. 1873, to be reported as amended, by a voice vote.

ROLLCALL VOTES

No rollcall votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations.

H.R. 1873 does not relate to the terms and conditions of employment or access to public services and accommodations within the meaning of Section 102(b)(3).

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the need to establish appropriate limits for certain sole-source contracts and the need for improvements in the accuracy of contracting data maintained in federal databases.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(a) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including improving the federal procurement system.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1873. Article I, Section 8, Clause 18, of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this law, and in the absence of an estimate from the Congressional Budget Office, the committee states that the bill deals only with the functions and operations of the federal government and, as such, contains no unfunded mandates.

EARMARK IDENTIFICATION

H.R. 1873 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

At the time of the filing of this report on H.R. 1873, the cost estimate of the Congressional Budget Office was not available. In compliance with clause 3(d)(2) of rule XIII of the Rules of the House

of Representatives, and based on the best information available at this time the Committee on Oversight and Government Reform provides the following estimate. The Committee on Small Business, in its report on H.R. 1873, estimated that should the bill be enacted, it would cost \$2.5 million in fiscal year 2008 and \$2 million each year thereafter. Most of the costs fall within budget function 370 and other budget functions that procure goods and services. If the bill is enacted prior to fiscal year 2008 and necessary amounts are appropriated near the start of each fiscal year thereafter, the five year cost of the bill reported by the Committee on Small Business from 2008 to 2012 would be \$10.5 million. The bill as reported by the Committee on Oversight and Government Reform may reduce those cost due to differences in bundling and goaling requirements.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * *
 SEC. 3. (a)(1) * * *
 * * * * *

(5) *RECERTIFICATION.*—

(A) *IN GENERAL.*—*If a business concern is awarded a contract because of a standard by which it is determined to be a small business concern, and the business concern is close to exceeding that standard at the time the award is made, then the business concern must, annually after the date of the award, recertify to the agency awarding the contract whether it meets that standard.*

(B) *“CLOSE TO EXCEEDING”.*—*For purposes of subparagraph (A), a business concern is close to exceeding—*

(i) a number-of-employees standard if the number of employees of the business concern is 95 percent or more of the maximum number of employees allowed under the standard; and

(ii) a dollar-volume-of-business standard if the dollar volume of business is 80 percent or more of the maximum dollar volume allowed under the standard.

(6) *REGISTRY.*—*For a business concern to be awarded a contract because of a standard by which it is determined to be a small business concern, the business concern must, annually after the end of the fiscal year used by the business concern, update its listing in the Central Contractor Registry.*

* * * * *
 [(o) **DEFINITIONS OF BUNDLING OF CONTRACT REQUIREMENTS AND RELATED TERMS.**—In this Act:

【(1) BUNDLED CONTRACT.—The term “bundled contract” means a contract that is entered into to meet requirements that are consolidated in a bundling of contract requirements.

【(2) BUNDLING OF CONTRACT REQUIREMENTS.—The term “bundling of contract requirements” means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to—

【(A) the diversity, size, or specialized nature of the elements of the performance specified;

【(B) the aggregate dollar value of the anticipated award;

【(C) the geographical dispersion of the contract performance sites; or

【(D) any combination of the factors described in subparagraphs (A), (B), and (C).

【(3) SEPARATE SMALLER CONTRACT.—The term “separate smaller contract”, with respect to a bundling of contract requirements, means a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.】

(o) DEFINITIONS OF BUNDLING OF CONTRACT REQUIREMENTS AND RELATED TERMS.—For purposes of this Act:

(1) BUNDLED CONTRACT.—

(A) IN GENERAL.—The term “bundled contract” means a contract or order that is entered into to meet procurement requirements that are consolidated in a bundling of contract requirements, without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made.

(B) EXCEPTIONS.—The term does not include—

(i) a contract or order with an aggregate dollar value below the dollar threshold specified in paragraph (4); or

(ii) a contract or order that is entered into to meet procurement requirements, all of which are exempted requirements under paragraph (5).

(2) BUNDLING OF CONTRACT REQUIREMENTS.—

(A) IN GENERAL.—The term “bundling of contract requirements” means the use of any bundling methodology to satisfy 2 or more procurement requirements for goods or services, including any construction services, previously supplied or performed under separate smaller contracts or orders that is likely to be unsuitable for award to a small business concern due to—

(i) the diversity, size, or specialized nature of the elements of the performance specified;

(ii) the aggregate dollar value of the anticipated award;

(iii) the geographical dispersion of the contract or order performance sites; or

(iv) any combination of the factors described in clauses (i), (ii), and (iii).

(B) INCLUSION OF NEW FEATURES OR FUNCTIONS.—A combination of contract requirements that would meet the

definition of a bundling of contract requirements but for the addition of a procurement requirement with at least one new good or service shall be considered to be a bundling of contract requirements unless the new features or functions substantially transform the goods or services previously performed.

(C) EXCEPTIONS.—The term does not include—

(i) the use of a bundling methodology for an anticipated award with an aggregate dollar value below the dollar threshold specified in paragraph (5); or

(ii) the use of a bundling methodology to meet procurement requirements, all of which are exempted requirements under paragraph (6).

(3) BUNDLING METHODOLOGY.—The term “bundling methodology” means—

(A) a solicitation to obtain offers for a single contract or order, or a multiple award contract or order; or

(B) a solicitation of offers for the issuance of a task or a delivery order under an existing single or multiple award contract or order.

(4) SEPARATE SMALLER CONTRACT.—The term “separate smaller contract”, with respect to bundling of contract requirements, means a contract or order that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.

(5) DOLLAR THRESHOLD.—The term “dollar threshold” means—

(A) \$65,000,000, if solely for construction services; and

(B) \$5,000,000, in all other cases.

(6) EXEMPTED REQUIREMENTS.—The term “exempted requirement” means a procurement requirement solely for items that are not commercial items (as the term “commercial item” is defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

(7) PROCUREMENT REQUIREMENT.—The term “procurement requirement” means a determination by an agency that a specified good or service is needed to satisfy the mission of the agency.

* * * * *

SEC. 8.(a) * * *

* * * * *

(d)(1) * * *

* * * * *

(12) In carrying out this subsection, the Administrator shall require each prime contractor to report small business subcontract usage at all tiers based on the percentage of the total dollar amount of the contract award.

(13) In carrying out this subsection, the Administrator shall develop and maintain a password-protected database that will enable the Administration to assist small businesses in marketing to large corporations that have not achieved their small business goals.

* * * * *

SEC. 15. (a) To effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this Act shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. If a proposed procurement includes in its statement of work goods or services currently being performed by a small business, and if the proposed procurement is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects, or the solicitation involves an unnecessary or unjustified bundling of contract requirements, as determined by the Administration, the Procurement Activity shall provide a copy of the proposed procurement to the Procurement Activity's Small Business Procurement Center Representative at least 30 days prior to the solicitation's issuance along with a statement explaining (1) why the 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, [(2) why delivery schedules] (2) *the names, addresses and size of the incumbent contract holders*; (3) *a description of the industries that might be interested in bidding on the contract requirements*; (4) *the number of small businesses listed in the industry categories that could be excluded from future bidding if the contract is combined or packaged*; (5) *why 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*, [(3) why the proposed acquisition] (6) *why the proposed acquisition cannot be offered so as to make small business participation likely*, [(4) why construction] (7) *why construction cannot be procured as separate discrete projects*, or [(5) why the agency] (8) *why the agency has determined that the bundled contract (as defined in section 3(o)) is necessary and [justified.] justified*. *The statement shall also set forth the proposed procurement strategy required by subsection (e) and, if applicable, the specifications required by subsection (e)(3). The statement shall be made available to the public, including through dissemination in the Federal contracting opportunities database, concurrently with the issuance of the solicitation.* The thirty-day notification process shall occur concurrently with other processing steps required prior to issuance of the solicitation. Within 15 days after receipt of the proposed procurement and accompanying statement, if the Procurement Center

Representative believes that the procurement as proposed will render small business prime contract participation unlikely, the Representative shall recommend to the Procurement Activity alternative procurement methods which would increase small business prime contracting opportunities. **【Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.】** *If no notification of the procurement and accompanying statement is received, but the Administrator determines that there is cause to believe the contract combines requirements or a contract (single or multiple award) or task or delivery order for construction services or includes unjustified bundling, then the Administrator may request that such a statement of work goods or services be completed by the procurement activity and sent to the Procurement Center Representative and the solicitation process postponed for 10 days to allow the Administrator to review the statement and make recommendations as described in this section before the procurement is continued. If a small business concern would be adversely affected, directly or indirectly, by the procurement as proposed, and that small business concern or a trade association on behalf of that small business concern so requests, the Administrator may, in the Administrator's discretion, take action to further the interests of that small business concern. Whenever the Administration and the contracting procurement agency fail to agree, the Administrator shall submit the matter to the head of the agency for a determination. The head of the agency shall provide a written response to the Administrator. A copy of such response shall also be provided to the Committees on Small Business of the House of Representatives and Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate.* For purposes of clause (3) of the first sentence of this subsection, an industry category is a discrete group of similar goods and services. Such groups shall be determined by the Administration in accordance with the definition of a "United States industry" under the North American Industry Classification System, as established by the Office of Management and Budget, except that the Administration shall limit such an industry category to a greater extent than provided under such classification codes if the Administration receives evidence indicating that further segmentation for purposes of this paragraph is warranted due to special capital equipment needs or special labor or geographic requirements or to recognize a new industry. A market for goods or services may not be segmented under the preceding sentence due to geographic requirements unless the Government typically designates the area where work for contracts for such goods or services is to be performed and Government purchases comprise the major portion of the entire domestic market for such goods or services and, due to the fixed location of facilities, high mobilization costs, or similar economic factors, it is unreasonable to expect competition from business concerns located outside of the general areas where such concerns are located. A contract may not be awarded under this subsection if the award of the contract

would result in a cost to the awarding agency which exceeds a fair market price.

* * * * *

(g)(1) **【The President shall annually establish Government-wide goals for procurement contracts】** *The President shall before the close of each fiscal year establish new Government-wide procurement goals for the following fiscal year for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than **【23 percent】** 25 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year. The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 1 percent of the total value of all prime contract awards for fiscal year 1999, not less than 1.5 percent of the total value of all prime contract awards for fiscal year 2000, not less than 2 percent of the total value of all prime contract awards for fiscal year 2001, not less than 2.5 percent of the total value of all prime contract awards for fiscal year 2002, and not less than 3 percent of the total value of all prime contract awards for fiscal year 2003 and each fiscal year thereafter. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than **【5 percent】** 8 percent of the total value of all prime contract and subcontract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than **【5 percent】** 8 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.*

* * * * *

(4) *For purposes of this subsection and subsection (h), a small business concern shall be counted toward one additional category goal only, even if that small business concern otherwise qualifies*

under more than one category goal. In this paragraph, the term “category goal” means a goal described in paragraph (2).

(5) Before the beginning of each fiscal year, the head of each Federal agency shall submit to the Administrator of the Small Business Administration and to Congress a detailed plan explaining how the agency intends to meet the small business goals under this subsection that apply to that agency for that fiscal year.

(h)(1) * * *

* * * * *

(4) At the conclusion of each fiscal year, the head of each Federal agency shall submit to Congress a report specifying the percentage of contracts awarded by that agency for that fiscal year that were awarded to small business concerns. If the percentage is less than 25 percent, the head of the agency shall, in the report, explain why the percentage is less than 25 percent and what will be done to ensure that the percentage for the following fiscal year will not be less than 25 percent.

* * * * *

(j)(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than **[\$100,000]** *the Simplified Acquisition Threshold* shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

* * * * *

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than \$100,000 under the authority of **[subsection (a) of section 8]** *section 8, 31, or 36* of this Act, section 2323 of title 10, United States Code, section 712 of the Business Opportunity Development Reform Act of 1988 (Public Law 100–656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

* * * * *

