

DEFENDING AMERICA’S SMALL CONTRACTORS ACT OF
2016

JULY 25, 2016.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. CHABOT, from the Committee on Small Business,
submitted the following

R E P O R T

[To accompany H.R. 4341]

The Committee on Small Business, to whom was referred the bill (H.R. 4341) to amend the Small Business Act to improve transparency and clarity for small businesses, to clarify the role of small business advocates, to increase opportunities for competition in subcontracting, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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I. AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

(a) **SHORT TITLE.**—This Act may be cited as the “Defending America’s Small Contractors Act of 2016”.

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

Sec. 1. Short title.

TITLE I—IMPROVING TRANSPARENCY AND CLARITY FOR SMALL BUSINESSES

Sec. 101. Plain language rewrite of requirements for small business procurements.
 Sec. 102. Improving reporting on small business goals.
 Sec. 103. Transparency in small business goals.
 Sec. 104. Uniformity in procurement terminology.

TITLE II—CLARIFYING THE ROLES OF SMALL BUSINESS ADVOCATES

Sec. 201. Scope of review by procurement center representatives.
 Sec. 202. Responsibilities of Commercial Market Representatives.
 Sec. 203. Duties of the Office of Small and Disadvantaged Business Utilization.
 Sec. 204. Improving contractor compliance.
 Sec. 205. Responsibilities of Business Opportunity Specialists.

TITLE III—STRENGTHENING OPPORTUNITIES FOR COMPETITION IN SUBCONTRACTING

Sec. 301. Good faith in subcontracting.
 Sec. 302. Pilot program to provide opportunities for qualified subcontractors to obtain past performance ratings.

TITLE IV—MENTOR-PROTEGE PROGRAMS

Sec. 401. Amendments to the Mentor-Protege Program of the Department of Defense.
 Sec. 402. Improving cooperation between the mentor-protege programs of the Small Business Administration and the Department of Defense.

TITLE V—MISCELLANEOUS

Sec. 501. Improving education on small business regulations.
 Sec. 502. Protecting task order competition.
 Sec. 503. Improvements to size standards for small agricultural producers.
 Sec. 504. Uniformity in service-disabled veteran definitions.
 Sec. 505. GAO review of the Office of Government Contracting and Business Development of the Small Business Administration.
 Sec. 506. Required reports pertaining to capital planning and investment control.
 Sec. 507. GAO review of surety bonds.

TITLE I—IMPROVING TRANSPARENCY AND CLARITY FOR SMALL BUSINESSES

SEC. 101. PLAIN LANGUAGE REWRITE OF REQUIREMENTS FOR SMALL BUSINESS PROCUREMENTS.

Section 15(a) of the Small Business Act (15 U.S.C. 644(a)) is amended to read as follows:

“(a) **SMALL BUSINESS PROCUREMENTS.**—

“(1) **IN GENERAL.**—For purposes of this Act, small business concerns shall receive any award or contract if such award or contract is, in the determination of the Administrator and the contracting agency, in the interest of—

“(A) maintaining or mobilizing the full productive capacity of the United States;

“(B) war or national defense programs; or

“(C) assuring that a fair proportion of the total purchase and contracts for goods and services of the Government in each industry category (as described under paragraph (2)) are awarded to small business concerns.

“(2) **INDUSTRY CATEGORY DEFINED.**—

“(A) **IN GENERAL.**—In this subsection, the term ‘industry category’ means a discrete group of similar goods and services, as determined by the Administrator in accordance with the North American Industry Classification System codes used to establish small business size standards, except that the Administrator shall limit an industry category to a greater extent than provided under the North American Industry Classification codes if the Administrator receives evidence indicating that further segmentation of the industry category is warranted—

“(i) due to special capital equipment needs;

“(ii) due to special labor requirements;

“(iii) due to special geographic requirements, except as provided in subparagraph (B);

“(iv) due to unique Federal buying patterns or requirements; or

“(v) to recognize a new industry.

“(B) **EXCEPTION FOR GEOGRAPHIC REQUIREMENTS.**—The Administrator may not further segment an industry category based on geographic requirements unless—

“(i) the Government typically designates the geographic area where work for contracts for goods or services is to be performed;

“(ii) Government purchases comprise the major portion of the entire domestic market for such goods or services; and

“(iii) it is unreasonable to expect competition from business concerns located outside of the general geographic area due to the fixed location of facilities, high mobilization costs, or similar economic factors.

“(3) DETERMINATIONS WITH RESPECT TO AWARDS OR CONTRACTS.—Determinations made pursuant to paragraph (1) may be made for individual awards or contracts, any part of an award or contract or task order, or for classes of awards or contracts or task orders.

“(4) INCREASING PRIME CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS CONCERNS.—

“(A) DESCRIPTION OF COVERED PROPOSED PROCUREMENTS.—The requirements of this paragraph shall apply to a proposed procurement that includes in its statement of work goods or services currently being supplied or performed by a small business concern and, as determined by the Administrator—

“(i) is in a quantity or of an estimated dollar value which makes the participation of a small business concern as a prime contractor unlikely;

“(ii) in the case of a proposed procurement for construction, if such proposed procurement seeks to bundle or consolidate discrete construction projects; or

“(iii) is a solicitation that involves an unnecessary or unjustified bundling of contract requirements.

“(B) NOTICE TO PROCUREMENT CENTER REPRESENTATIVES.—With respect to proposed procurements described in subparagraph (A), at least 30 days before issuing a solicitation and concurrent with other processing steps required before issuing the solicitation, the contracting agency shall provide a copy of the proposed procurement to the procurement center representative of the contracting agency (as described in subsection (1)) along with a statement explaining—

“(i) why the proposed procurement cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

“(ii) why delivery schedules cannot be established on a realistic basis that will encourage the participation of small business concerns in a manner consistent with the actual requirements of the Government;

“(iii) why the proposed procurement cannot be offered to increase the likelihood of the participation of small business concerns;

“(iv) in the case of a proposed procurement for construction, why the proposed procurement cannot be offered as separate discrete projects; or

“(v) why the agency has determined that the bundling of contract requirements is necessary and justified.

“(C) ALTERNATIVES TO INCREASE PRIME CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS CONCERNS.—If the procurement center representative believes that the proposed procurement will make the participation of small business concerns as prime contractors unlikely, the procurement center representative, within 15 days after receiving the statement described in subparagraph (B), shall recommend to the contracting agency alternative procurement methods for increasing prime contracting opportunities for small business concerns.

“(D) FAILURE TO AGREE ON AN ALTERNATIVE PROCUREMENT METHOD.—If the procurement center representative and the contracting agency fail to agree on an alternative procurement method, the Administrator shall submit the matter to the head of the appropriate department or agency for a determination.

“(5) CONTRACTS FOR SALE OF GOVERNMENT PROPERTY.—With respect to a contract for the sale of Government property, small business concerns shall receive any such contract if, in the determination of the Administrator and the disposal agency, the award of such contract is in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns.

“(6) SALE OF ELECTRICAL POWER OR OTHER PROPERTY.—Nothing in this subsection 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 Federal Government.

“(7) COSTS EXCEEDING FAIR MARKET PRICE.—A contract may not be awarded under this subsection if the cost of the contract to the awarding agency exceeds a fair market price.”.

SEC. 102. IMPROVING REPORTING ON SMALL BUSINESS GOALS.

Section 15(h)(2)(E) of the Small Business Act (15 U.S.C. 644(h)(2)(E)) is amended—

- (1) in clause (i)—
 - (A) in subclause (III), by striking “and” at the end; and
 - (B) by adding at the end the following new subclauses:
 - “(V) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns for purposes of the initial contract; and
 - “(VI) that were awarded using a procurement method that restricted competition to 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, small business concerns owned and controlled by women, or a subset of any such concerns;”;
- (2) in clause (ii)—
 - (A) in subclause (IV), by striking “and” at the end; and
 - (B) by adding at the end the following new subclauses:
 - “(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by service-disabled veterans for purposes of the initial contract; and
 - “(VII) that were awarded using a procurement method that restricted competition to qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;”;
- (3) in clause (iii)—
 - (A) in subclause (V), by striking “and” at the end; and
 - (B) by adding at the end the following new subclauses:
 - “(VII) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be qualified HUBZone small business concerns for purposes of the initial contract; and
 - “(VIII) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;”;
- (4) in clause (iv)—
 - (A) in subclause (V), by striking “and” at the end; and
 - (B) by adding at the end the following new subclauses:
 - “(VII) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by socially and economically disadvantaged individuals for purposes of the initial contract; and
 - “(VIII) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by women, or a subset of any such concerns;”;
- (5) in clause (v)—
 - (A) in subclause (IV), by striking “and” at the end;
 - (B) in subclause (V), by inserting “and” at the end; and
 - (C) by adding at the end the following new subclause:
 - “(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Indian tribe other than an Alaska Native Corporation for purposes of the initial contract;”;
- (6) in clause (vi)—

- (A) in subclause (IV), by striking “and” at the end; and
- (B) by adding at the end the following new subclause:
 - “(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by a Native Hawaiian Organization for purposes of the initial contract;”;
- (7) in clause (vii)—
 - (A) in subclause (IV), by striking “and” at the end; and
 - (B) by adding at the end the following new subclause:
 - “(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Alaska Native Corporation for purposes of the initial contract; and”;
- (8) in clause (viii)—
 - (A) in subclause (VII), by striking “and” at the end;
 - (B) in subclause (VIII), by striking “and” at the end; and
 - (C) by adding at the end the following new subclauses:
 - “(IX) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by women for purposes of the initial contract; and
 - “(X) that were awarded using a procurement method that restricted competition to 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, or a subset of any such concerns; and”.

SEC. 103. TRANSPARENCY IN SMALL BUSINESS GOALS.

Section 15(g) of the Small Business Act is amended by adding at the end the following new paragraph:

- “(4) DETERMINATIONS OF THE TOTAL VALUE OF CONTRACT AWARDS.—For purposes of the goals established under paragraphs (1) and (2), the total value of contract awards for a fiscal year may not be determined in a manner that excludes the value of a contract based on—
 - “(A) where the contract is awarded;
 - “(B) where the contract is performed;
 - “(C) whether the contract is mandated by Federal law to be performed by an entity other than a small business concern;
 - “(D) whether funding for the contract is made available in an appropriations Act, if the contract is subject to the requirements of chapter 33 of title 41, United States Code, or chapter 137 of title 10, United States Code, and the Federal Acquisition Regulation; or
 - “(E) whether the contract is otherwise subject to the Federal Acquisition Regulation.”.

SEC. 104. UNIFORMITY IN PROCUREMENT TERMINOLOGY.

(a) IN GENERAL.—Section 15(j)(1) of the Small Business Act (15 U.S.C. 644(j)(1)) is amended by striking “greater than \$2,500 but not greater than \$100,000” and inserting “greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold”.

(b) TECHNICAL AMENDMENT.—Section 3(m) of the Small Business Act (15 U.S.C. 632(m)) is amended to read as follows:

“(m) DEFINITIONS PERTAINING TO CONTRACTING.—In this Act:

“(1) PRIME CONTRACT.—The term ‘prime contract’ has the meaning given such term in section 8701(4) of title 41, United States Code.

“(2) PRIME CONTRACTOR.—The term ‘prime contractor’ has the meaning given such term in section 8701(5) of title 41, United States Code.

“(3) SIMPLIFIED ACQUISITION THRESHOLD.—The term ‘simplified acquisition threshold’ has the meaning given such term in section 134 of title 41, United States Code.

“(4) MICRO-PURCHASE THRESHOLD.—The term ‘micro-purchase threshold’ has the meaning given such term in section 1902(a) of title 41, United States Code.

“(5) TOTAL PURCHASE AND CONTRACTS FOR PROPERTY AND SERVICES.—The term ‘total purchases and contracts for property and services’ shall mean total number and total dollar amount of contracts and orders for property and services.”.

TITLE II—CLARIFYING THE ROLES OF SMALL BUSINESS ADVOCATES

SEC. 201. SCOPE OF REVIEW BY PROCUREMENT CENTER REPRESENTATIVES.

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

“(9) SCOPE OF REVIEW.—The Administrator shall not limit the scope of review by the Procurement Center Representative for any solicitation of a contract or task order without regard to whether the contract or task order or part of the contract or task order is set aside for small business concerns, whether 1 or more contract or task order awards are reserved for small business concerns under a multiple award contract, or whether or not the solicitation would result in a bundled or consolidated contract (as defined in subsection (s)) or a bundled or consolidated task order.”.

SEC. 202. RESPONSIBILITIES OF COMMERCIAL MARKET REPRESENTATIVES.

Section 4(h) of the Small Business Act (as added by section 865 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92)) is amended—

(1) in the subsection heading, by striking “CERTIFICATION REQUIREMENTS FOR”;

(2) in paragraph (2), by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively (and conforming the margins accordingly);

(3) by amending clause (ii) (as so redesignated) to read as follows:

“(ii) APPLICATION.—The requirements of clause (i) shall be included in any initial job posting for the position of a commercial market representative and shall apply to any person appointed as a commercial market representative after November 25, 2015.”;

(4) in clause (i) (as so redesignated), by striking “paragraph (1)” and inserting “subparagraph (A)”;

(5) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively (and conforming the margins accordingly);

(6) in subparagraph (A) (as so redesignated), by striking “paragraph (2)” and inserting “subparagraph (B)”;

(7) by inserting before subparagraph (A) (as so redesignated) the following:

“(1) DUTIES.—The principal duties of a Commercial Market Representative employed by the Administrator and reporting to the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36 (or the designee of such official) shall be to advance the policies established in section 8(d)(1) relating to subcontracting. Such duties shall include—

“(A) helping prime contractors to find small business concerns that are capable of performing subcontracts;

“(B) for contractors awarded contracts containing the clause described in section 8(d)(3), providing—

“(i) counseling on the contractor’s responsibility to maximize subcontracting opportunities for small business concerns;

“(ii) instruction on methods and tools to identify potential subcontractors that are small business concerns; and

“(iii) assistance to increase awards to subcontractors that are small business concerns through visits, training, and reviews of past performance;

“(C) providing counseling on how a small business concern may promote its capacity to contractors awarded contracts containing the clause described in section 8(d)(3); and

“(D) conducting periodic reviews of contractors awarded contracts containing the clause described in section 8(d)(3) to assess compliance with subcontracting plans required under section 8(d)(6).

“(2) CERTIFICATION REQUIREMENTS.—”.

SEC. 203. DUTIES OF THE OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION.

Section 15(k) of the Small Business Act (15 U.S.C. 644(k)), as amended by section 870 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92), is amended—

(1) by striking “section 8, 15 or 44” and inserting “section 8, 15, 31, 36, or 44”;

(2) by striking “sections 8 and 15” each place such term appears and inserting “sections 8, 15, 31, 36, and 44”;

(3) in paragraph (10), by striking “section 8(a)” and inserting “section 8, 15, 31, or 36”;

(4) by redesignating paragraphs (15), (16), and (17) as paragraphs (16), (17), and (18), respectively;

(5) by inserting after paragraph (14) the following new paragraph:

“(15) shall review purchases made by the agency greater than the micro-purchase threshold, and less than the simplified acquisition threshold to ensure that the purchases have been made in compliance with the provisions of this Act and have been properly recorded in the Federal Procurement Data System, if the method of payment is a purchase card issued by the Department of Defense pursuant to section 2784 of title 10, United States Code, or by the head of an executive agency pursuant to section 1909 of title 41, United States Code;” and

(6) in paragraph (17) (as so redesignated)—

(A) in subparagraph (B), by striking “and” at the end;

(B) in subparagraph (C), by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following new subparagraph:

“(D) any failure of the agency to comply with section 8, 15, 31, or 36.”.

SEC. 204. IMPROVING CONTRACTOR COMPLIANCE.

(a) REQUIREMENTS FOR THE OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION.—Section 15(k) of the Small Business Act (15 U.S.C. 644(k)(8)), as amended by section 203, is further amended—

(1) by redesignating paragraphs (16), (17), and (18) as paragraphs (17), (18), and (19), respectively; and

(2) by inserting after paragraph (15) the following new paragraph:

“(16) shall provide assistance to a small business concern awarded a contract or subcontract under this Act or under title 10 or title 41, United States Code, in finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract.”.

(b) REQUIREMENTS UNDER THE MENTOR-PROTEGE PROGRAM OF THE DEPARTMENT OF DEFENSE.—Section 831(e)(1) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 104 Stat. 1607; 10 U.S.C. 2302 note) is amended—

(1) in subparagraph (B), by striking “and” at the end;

(2) in subparagraph (C), by striking the period at the end and inserting “; and”; and

(3) by inserting at the end the following new subparagraph:

“(D) the assistance the mentor firm will provide to the protege firm in understanding contract regulations of the Federal Government and the Department of Defense (including the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement) after award of a subcontract under this section, if applicable.”.

(c) RESOURCES FOR SMALL BUSINESS CONCERNS.—Section 15 of the Small Business Act (15 U.S.C. 644) is amended by adding at the end the following new subsection:

“(t) POST-AWARD COMPLIANCE RESOURCES.—The Administrator shall provide to small business development centers and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10, United States Code, and shall make available on the website of the Administration, a list of resources for small business concerns seeking education and assistance on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract.”.

(d) REQUIREMENTS FOR PROCUREMENT CENTER REPRESENTATIVES.—Section 15(1)(2) of the Small Business Act (15 U.S.C. 644(1)(2)) is amended—

(1) by redesignating subparagraph (I) as subparagraph (J);

(2) in subparagraph (H), by striking “and” at the end; and

(3) by inserting after subparagraph (H) the following new subparagraph:

“(I) assist small business concerns with finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract; and”.

(e) REQUIREMENTS UNDER THE MENTOR-PROTEGE PROGRAM OF THE SMALL BUSINESS ADMINISTRATION.—Section 45(b)(3) of the Small Business Act (15 U.S.C. 657r(b)(3)) is amended by adding at the end the following new subparagraph:

“(K) The extent to which assistance with compliance with the requirements of contracting with the Federal Government after award of a contract or subcontract under this section.”.

SEC. 205. RESPONSIBILITIES OF BUSINESS OPPORTUNITY SPECIALISTS.

Section 4(g) of the Small Business Act (as added by section 865 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92)) is amended—

- (1) in the subsection heading, by striking “CERTIFICATION REQUIREMENTS FOR”;
 - (2) in paragraph (2), by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively (and conforming the margins accordingly);
 - (3) by amending clause (ii) (as so redesignated) to read as follows:
 - “(ii) APPLICATION.—The requirements of clause (i) shall be included in any initial job posting for the position of a Business Opportunity Specialist and shall apply to any person appointed as a Business Opportunity Specialist after January 3, 2013.”;
 - (4) in clause (i) (as so redesignated), by striking “paragraph (1)” and inserting “subparagraph (A)”
 - (5) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively (and conforming the margins accordingly);
 - (6) in subparagraph (A) (as so redesignated), by striking “paragraph (2)” and inserting “subparagraph (B)”;
 - (7) by inserting before subparagraph (A) (as so redesignated) the following:
 - “(1) DUTIES.—The exclusive duties of a Business Opportunity Specialist employed by the Administrator and reporting to the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36 (or the designee of such official) shall be to implement sections 7, 8, and 45 and to complete other duties related to contracting programs under this Act. Such duties shall include—
 - “(A) with respect to small business concerns eligible to receive contracts and subcontracts pursuant to section 8(a)—
 - “(i) providing guidance, counseling, and referrals for assistance with technical, management, financial, or other matters that will improve the competitive viability of such concerns;
 - “(ii) identifying causes of success or failure of such concerns;
 - “(iii) providing comprehensive assessments of such concerns, including identifying the strengths and weaknesses of such concerns;
 - “(iv) monitoring and documenting compliance with the requirements of sections 7 and 8 and any regulations implementing those sections;
 - “(v) explaining the requirements of sections 7, 8, 15, 31, 36 and 45; and
 - “(vi) advising on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract;
 - “(B) reviewing and monitoring compliance with mentor-protégé agreements under section 45;
 - “(C) representing the interests of the Administrator and small business concerns in the award, modification, and administration of contracts and subcontracts awarded pursuant to section 8(a); and
 - “(D) reporting fraud or abuse under section 7, 8, 15, 31, 36 or 45 or any regulations implementing such sections.
- “(2) CERTIFICATION REQUIREMENTS.—”.

TITLE III—STRENGTHENING OPPORTUNITIES FOR COMPETITION IN SUBCONTRACTING

SEC. 301. GOOD FAITH IN SUBCONTRACTING.

- (a) TRANSPARENCY IN SUBCONTRACTING GOALS.—Section 8(d)(9) of the Small Business Act (15 U.S.C. 637(d)(9)) is amended—
 - (1) by striking “(9) The failure” and inserting the following:
 - “(9) MATERIAL BREACH.—The failure”;
 - (2) in subparagraph (A), by striking “or” at the end;
 - (3) in subparagraph (B), by inserting “or” at the end; and
 - (4) by inserting after subparagraph (B) the following:
 - “(C) assurances provided under paragraph (6)(E).”.
- (b) AUTHORITY OF THE ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION.—Section 8(d)(11) of the Small Business Act (15 U.S.C. 637(d)(11)) is amended—
 - (1) by striking “(11) In the case of” and inserting the following:
 - “(11) AUTHORITY OF ADMINISTRATOR.—In the case of”; and
 - (2) in subparagraph (B), by striking “, which shall be advisory in nature,”.
- (c) REVIEW AND ACCEPTANCE OF SUBCONTRACTING PLANS.—Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) is amended by adding at the end the following:

“(17) REVIEW AND ACCEPTANCE OF SUBCONTRACTING PLANS.—

“(A) DEFINITION.—In this paragraph, the term ‘covered small business concerns’ means—

- “(i) small business concerns;
- “(ii) qualified HUBZone small business concerns;
- “(iii) small business concerns owned and controlled by veterans;
- “(iv) small business concerns owned and controlled by service-disabled veterans;
- “(v) small business concerns owned and controlled by socially and economically disadvantaged individuals, as defined in paragraph (3)(C); and
- “(vi) small business concerns owned and controlled by women.

“(B) DELAYED ACCEPTANCE OF PLAN.—Except as provided in subparagraph (E), if a procurement center representative or commercial market representative determines that a subcontracting plan required under paragraph (4) or (5) fails to provide the maximum practicable opportunity for covered small business concerns to participate in the performance of the contract to which the plan applies, the representative may delay acceptance of the plan in accordance with subparagraph (C).

“(C) PROCESS FOR DELAYED ACCEPTANCE.—

“(i) IN GENERAL.—Except as provided in clause (ii), a procurement center representative or commercial market representative who makes a determination under subparagraph (B) with respect to a subcontracting plan may delay acceptance of the plan for a 30-day period by providing written notice of the determination to the head of the procuring activity of the contracting agency that includes recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph.

“(ii) EXCEPTION.—In the case of the Department of Defense—

“(I) a procurement center representative or commercial market representative who makes a determination under subparagraph (B) with respect to a subcontracting plan may delay acceptance of the plan for a 15-day period by providing written notice of the determination to appropriate personnel of the Department of Defense that includes recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph; and

“(II) the authority of a procurement center representative or commercial market representative to delay acceptance of a subcontracting plan as provided in subparagraph (B) does not include the authority to delay the award or performance of the contract concerned.

“(D) DISAGREEMENTS.—If a procurement center representative or commercial market representative delays the acceptance of a subcontracting plan under subparagraph (C) and does not reach agreement with the head of the procuring activity of the contracting agency to alter the plan to provide the maximum practicable opportunity described in subparagraph (B) not later than 30 days after the date on which written notice was provided, the disagreement shall be submitted to the head of the contracting agency by the Administrator for a final determination.

“(E) EXCEPTION.—A procurement center representative or commercial market representative may not delay the acceptance of a subcontracting plan if the head of the contracting agency certifies that the need of the agency for the supplies or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to accept the subcontracting plan.”.

(d) GOOD FAITH COMPLIANCE.—Not later than 270 days after the date of enactment of this Act, the Administrator of the Small Business Administration shall issue regulations providing examples of activities that would be considered a failure to make a good faith effort to comply with the requirements imposed on an entity (other than a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632)) that is awarded a prime contract containing the clauses required under paragraph (4) or (5) of section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

SEC. 302. PILOT PROGRAM TO PROVIDE OPPORTUNITIES FOR QUALIFIED SUBCONTRACTORS TO OBTAIN PAST PERFORMANCE RATINGS.

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)), as amended by section 301, is further amended by adding at the end the following new paragraph:

“(18) PILOT PROGRAM PROVIDING PAST PERFORMANCE RATINGS FOR OTHER SMALL BUSINESS SUBCONTRACTORS.—

“(A) ESTABLISHMENT.—The Administrator shall establish a pilot program for a small business concern performing as a first tier subcontractor for a covered contract (as defined in paragraph 13(A)) to request a past performance rating in the system used by the Federal Government to monitor or record contractor past performance.

“(B) APPLICATION.—A small business concern described in subparagraph (A) shall submit an application to the appropriate official for a past performance rating. Such application shall include written evidence of the past performance factors for which the small business concern seeks a rating and a suggested rating.

“(C) DETERMINATION.—The appropriate official shall submit the application from the small business concern to the contracting officer (or a designee of such officer) for the covered contract and to the prime contractor for review. The contracting officer (or designee) and the prime contractor shall, not later than 30 days after receipt of the application, submit to the appropriate official a response regarding the application.

“(i) AGREEMENT ON RATING.—If the contracting officer (or designee) and the prime contractor agree on a past performance rating, or if either the contracting officer (or designee) or the prime contractor fail to respond and the responding individual agrees with the rating of the applicant small business concern, the appropriate official shall enter the agreed-upon past performance rating in the system described in subparagraph (A).

“(ii) DISAGREEMENT ON RATING.—If the contracting officer (or designee) and the prime contractor fail to respond within 30 days or if they disagree about the rating, or if either the contracting officer (or designee) or the prime contractor fail to respond and the responding individual disagrees with the rating of the applicant small business concern, the contracting officer (or designee) or the prime contractor shall submit a notice contesting the application to appropriate official. The appropriate official shall follow the requirements of subparagraph (D).

“(D) PROCEDURE FOR RATING.—Not later than 14 calendar days after receipt of a notice under subparagraph (C)(ii), the appropriate official shall submit such notice to the applicant small business concern. Such concern may submit comments, rebuttals, or additional information relating to the past performance of such concern not later 14 calendar days after receipt of such notice. The appropriate official shall enter the into the system described in subparagraph (A) a rating that is neither favorable nor unfavorable along with the initial application from the small business concern, the responses of the contracting officer (or designee) and the prime contractor, and any additional information provided by the small business concern.

“(E) USE OF INFORMATION.—A small business subcontractor may use a past performance rating given under this paragraph to establish its past performance for a prime contract.

“(F) DURATION.—The pilot program established under this paragraph shall terminate 3 years after the date on which the first small business concern receives a past performance rating for performance as a first tier subcontractor.

“(G) REPORT.—The Comptroller General of the United States shall begin an assessment of the pilot program 1 year after the establishment of such program. Not later than 6 months after beginning such assessment, the Comptroller General shall submit a report to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives, which shall include—

“(i) the number of small business concerns that have received past performance ratings under the pilot program;

“(ii) the number of applications in which the contracting officer (or designee) or the prime contractor contested the application of the small business concern;

“(iii) any suggestions or recommendations the Comptroller General or the small business concerns participating in the program have to address disputes between the small business concern, the contracting officer (or designee), and the prime contractor on past performance ratings; and

“(iv) any suggestions or recommendation the Comptroller General has to improve the operation of the pilot program.

“(H) APPROPRIATE OFFICIAL DEFINED.—In this paragraph, the term ‘appropriate official’ means a Commercial Market Representative or other individual designated by the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36.”.

TITLE IV—MENTOR-PROTEGE PROGRAMS

SEC. 401. AMENDMENTS TO THE MENTOR-PROTEGE PROGRAM OF THE DEPARTMENT OF DEFENSE.

Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 104 Stat. 1607; 10 U.S.C. 2302 note) is amended—

(1) in subsection (d)—

(A) by amending paragraph (1) to read as follows:

“(1) prior to the approval of that agreement, the Administrator of the Small Business Administration had made no finding of affiliation between the mentor firm and the protege firm;”;

(B) by redesignating paragraph (2) as paragraph (3); and

(C) by inserting after paragraph (1) the following new paragraph:

“(2)(A) the Administrator of the Small Business Administration does not have a current finding of affiliation between the mentor firm and protege firm; or

“(B) the Secretary, after considering the regulations promulgated by the Administrator of the Small Business Administration regarding affiliation—

“(i) does not have reason to believe that the mentor firm affiliated with the protege firm; or

“(ii) has received a formal determination of no affiliation between the mentor firm and protege firm from the Administrator after having submitted a question of affiliation to the Administrator; and”;

(2) in subsection (n), by amending paragraph (9) to read as follows:

“(9) The term ‘affiliation’, with respect to a relationship between a mentor firm and a protege firm, means a relationship described under section 121.103 of title 13, Code of Federal Regulations (or any successor regulation).”; and

(3) in subsection (f)(6)—

(A) in subparagraph (B), by striking “or” at the end;

(B) in subparagraph (C), by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(D) women’s business centers described in section 29 of the Small Business Act (15 U.S.C. 656).”.

SEC. 402. IMPROVING COOPERATION BETWEEN THE MENTOR-PROTEGE PROGRAMS OF THE SMALL BUSINESS ADMINISTRATION AND THE DEPARTMENT OF DEFENSE.

Section 45(b)(4) of the Small Business Act (15 U.S.C. 657r(b)(4)) is amended by striking subparagraph (A) and redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

TITLE V—MISCELLANEOUS

SEC. 501. IMPROVING EDUCATION ON SMALL BUSINESS REGULATIONS.

Section 15 of the Small Business Act (15 U.S.C. 644), as amended by section 204(c), is further amended by adding at the end the following new subsection:

“(u) REGULATORY CHANGES AND TRAINING MATERIALS.—Not less than annually, the Administrator shall provide to the Defense Acquisition University (established under section 1746 of title 10, United States Code), the Federal Acquisition Institute (established under section 1201 of title 41, United States Code), the individual responsible for mandatory training and education of the acquisition workforce of each agency (described under section 1703(f)(1)(C) of title 41, United States Code), small business development centers, and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10, United States Code—

“(1) a list of all changes made in the prior year to regulations promulgated—

“(A) by the Administrator that affect Federal acquisition; and

“(B) by the Federal Acquisition Council that implement changes to this Act; and

“(2) any materials the Administrator has developed to explain, train, or assist Federal agencies or departments or small business concerns to comply with the regulations specified in paragraph (1).”.

SEC. 502. PROTECTING TASK ORDER COMPETITION.

Section 4106(f) of title 41, United States Code, is amended by striking paragraph (3).

SEC. 503. IMPROVEMENTS TO SIZE STANDARDS FOR SMALL AGRICULTURAL PRODUCERS.

(a) **AMENDMENT TO DEFINITION OF AGRICULTURAL ENTERPRISES.**—Paragraph (1) of section 18(b) of the Small Business Act (15 U.S.C. 647(b)(1)) is amended by striking “businesses” and inserting “small business concerns”.

(b) **EQUAL TREATMENT OF SMALL FARMS.**—Paragraph (1) of section 3(a) of the Small Business Act (15 U.S.C. 632(a)(1)) is amended by striking “operation: *Provided*,” and all that follows through the period at the end and inserting “operation.”.

(c) **UPDATED SIZE STANDARDS.**—

(1) **IN GENERAL.**—Not later than 18 months after the date of enactment of this section, the Administrator of the Small Business Administration shall, by rule, establish size standards in accordance with section 3 of the Small Business Act (15 U.S.C. 632) for agricultural enterprises (as such term is defined in section 18(b)(1) of such Act).

(2) **REVIEW.**—Size standards established under subsection (a) are subject to the rolling review procedures established under section 1344(a) of the Small Business Jobs Act of 2010 (15 U.S.C. 632 note).

SEC. 504. UNIFORMITY IN SERVICE-DISABLED VETERAN DEFINITIONS.

(a) **SMALL BUSINESS DEFINITION OF SMALL BUSINESS CONCERN CONSOLIDATED.**—Section 3(q) of the Small Business Act (15 U.S.C. 632(q)) is amended—

(1) by amending paragraph (2) to read as follows:

“(2) **SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.**—The term ‘small business concern owned and controlled by service-disabled veterans’ means any of the following:

“(A) A small business concern—

“(i) not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more service-disabled veterans; and

“(ii) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

“(B) A small business concern—

“(i) not less than 51 percent of which is owned by one or more service-disabled veterans with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern; or

“(ii) in the case of a publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more such veterans.

“(C)(i) During the time period described in clause (ii), a small business concern that was a small business concern described in subparagraph (A) or (B) immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, if—

“(I) the surviving spouse of the deceased veteran acquires such veteran’s ownership interest in such concern;

“(II) such veteran had a service-connected disability (as defined in section 101(16) of title 38, United States Code) rated as 100 percent disabling under the laws administered by the Secretary of Veterans Affairs or such veteran died as a result of a service-connected disability; and

“(III) immediately prior to the death of such veteran, and during the period described in clause (ii), the small business concern is included in the database described in section 8127(f) of title 38, United States Code.

“(ii) The time period described in this clause is the time period beginning on the date of the veteran’s death and ending on the earlier of—

“(I) the date on which the surviving spouse remarries;

“(II) the date on which the surviving spouse relinquishes an ownership interest in the small business concern; or

“(III) the date that is 10 years after the date of the death of the veteran.”; and

(2) by adding at the end the following new paragraphs:

“(6) ESOP.—The term ‘ESOP’ has the meaning given the term ‘employee stock ownership plan’ in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

“(7) SURVIVING SPOUSE.—The term ‘surviving spouse’ has the meaning given such term in section 101(3) of title 38, United States Code.”.

(b) VETERANS AFFAIRS DEFINITION OF SMALL BUSINESS CONCERN CONSOLIDATED.—

(1) IN GENERAL.—Section 8127 of title 38, United States Code, is amended—

(A) by striking subsection (h) and redesignating subsections (i) through

(l) as subsections (h) through (k), respectively; and

(B) in subsection (k), as so redesignated—

(i) by amending paragraph (2) to read as follows:

“(2) The term ‘small business concern owned and controlled by veterans’ has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)).”; and

(ii) by adding at the end the following new paragraph:

“(3) The term ‘small business concern owned and controlled by veterans with service-connected disabilities’ has the meaning given the term ‘small business concern owned and controlled by service-disabled veterans’ under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)).”.

(2) CONFORMING AMENDMENTS.—Such section is further amended—

(A) in subsection (b), by inserting “or a small business concern owned and controlled by veterans with service-connected disabilities” after “a small business concern owned and controlled by veterans”;;

(B) in subsection (c), by inserting “or a small business concern owned and controlled by veterans with service-connected disabilities” after “a small business concern owned and controlled by veterans”;;

(C) in subsection (d) by inserting “or small business concerns owned and controlled by veterans with service-connected disabilities” after “small business concerns owned and controlled by veterans” both places it appears; and

(D) in subsection (f)(1), by inserting “, small business concerns owned and controlled by veterans with service-connected disabilities,” after “small business concerns owned and controlled by veterans”.

(c) TECHNICAL CORRECTION.—Section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3)), is amended by adding at the end the following new subparagraph:

“(H) In this contract, the term ‘small business concern owned and controlled by service-disabled veterans’ has the meaning given that term in section 3(q).”.

(d) REGULATIONS RELATING TO DATABASE OF THE SECRETARY OF VETERANS AFFAIRS.—

(1) REQUIREMENT TO USE CERTAIN SMALL BUSINESS ADMINISTRATION REGULATIONS.—Section 8127(f)(4) of title 38, United States Code, is amended by striking “verified” and inserting “verified, using regulations issued by the Administrator of the Small Business Administration with respect to the status of the concern as a small business concern and the ownership and control of such concern.”.

(2) PROHIBITION ON SECRETARY OF VETERANS AFFAIRS ISSUING CERTAIN REGULATIONS.—Section 8127(f) of title 38, United States Code, is amended by adding at the end the following new paragraph:

“(7) The Secretary may not issue regulations related to the status of a concern as a small business concern and the ownership and control of such small business concern.”.

(e) DELAYED EFFECTIVE DATE.—The amendments made by subsections (a), (b), (c), and (d) shall take effect on the date on which the Administrator of the Small Business Administration and the Secretary of Veterans Affairs jointly issue regulations implementing such sections. Such date shall be not later than 18 months after the date of enactment of this Act.

(f) APPEALS OF INCLUSION IN DATABASE.—

(1) IN GENERAL.—Section 8127(f) of title 38, United States Code, as amended by section 504(d)(2), is further amended by adding at the end the following new paragraph:

“(8)(A) If the Secretary does not verify a concern for inclusion in the database under this subsection based on the status of the concern as a small business concern or the ownership or control of the concern, the concern may appeal the denial of verification to the Office of Hearings and Appeals of the Small Business Administration (as established under section 5(i) of the Small Business Act). The decision of the Office of Hearings and Appeals shall be considered a final agency action.

“(B)(i) If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern

owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration as described in subparagraph (A). The decision of the Office of Hearings and Appeals shall be considered final agency action.

“(ii) In this subparagraph, the term ‘interested party’ means—

“(I) the Secretary; and

“(II) in the case of a small business concern that is awarded a contract, the contracting officer of the Department or another small business concern that submitted an offer for the contract that was awarded to the small business concern that submitted an offer under clause (i).

“(C) For each fiscal year, the Secretary shall reimburse the Administrator of the Small Business Administration in an amount necessary to cover any cost incurred by the Office of Hearings and Appeals of the Small Business Administration for actions taken by the Office under this paragraph. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-award schedule contracts. Any disagreement about the amount shall be resolved by the Director of the Office of Management and Budget.”

(2) EFFECTIVE DATE.—Paragraph (8) of subsection (f) of title 38, United States Code, as added by paragraph (1), shall apply with respect to a verification decision made by the Secretary of Veterans Affairs on or after the date of the enactment of this Act.

SEC. 505. GAO REVIEW OF THE OFFICE OF GOVERNMENT CONTRACTING AND BUSINESS DEVELOPMENT OF THE SMALL BUSINESS ADMINISTRATION.

(a) STUDY.—Not later than 60 days after the date of the enactment of this Act, the Comptroller General of the United States shall initiate a review of the Office of Government Contracting and Business Development of the Small Business Administration. Such review shall examine—

(1) the extent to which the personnel of the Small Business Administration who carry out procurement and business development programs report to the Office of Government Contracting and Business Development;

(2) whether greater efficiency and consistency in the certification process of procurement and business development programs could be achieved by creating a single organizational unit of employees to process all certifications required by procurement and business development programs;

(3) whether greater efficiency and efficacy in the performance of procurement and business development programs could be achieved by improving the alignment of the field personnel assigned to such programs;

(4) how the Office of Government Contracting and Business Development could improve its staffing of regulatory drafting functions and its coordination with the Federal Acquisition Regulatory Council to ensure timely rulemaking by the Small Business Administration; and

(5) any other areas in which the Comptroller General determines that the Small Business Administration could improve its performance with respect to procurement and business development programs.

(b) REPORT.—Not later than 1 year after initiating the review required by paragraph (1), the Comptroller General shall submit a report including the results of the review, along with any recommendations for improvements or other suggestions with respect to procurement and business development programs, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate.

(c) PROCUREMENT AND BUSINESS DEVELOPMENT PROGRAM DEFINED.—In this Act, the term “procurement and business development program” means a program related to procurement or business development established under section 7, 8, 15, 31, 36, 44, 45, or 46 of the Small Business Act (15 U.S.C. 631 et seq.).

SEC. 506. REQUIRED REPORTS PERTAINING TO CAPITAL PLANNING AND INVESTMENT CONTROL.

The information described in 11302(c)(3)(B)(ii) of title 40, United States Code, shall be submitted to the Senate Committee on Small Business and Entrepreneurship and the Committee on Small Business of the House of Representatives within 10 days of transmittal to the Director.

SEC. 507. GAO REVIEW OF SURETY BONDS.

Not later than 60 days after the date of the enactment of this Act, the Comptroller General of the United States shall initiate a review of surety bonds as they apply to federal small business procurement contracts. The review shall examine how fre-

quently bonding requirements are waived by federal agencies, an explanation of the standard and process for waiving the requirements, an explanation of the review process for such waivers, and in cases when bond requirements are waived, how results compare to instances where requirements are not waived, and the process that whistleblowers go through when instances of fraud related to surety bonds are reported.

II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 4341, the “Defending America’s Small Contractors Act of 2016,” is to amend the Small Business Act (the Act)¹ and titles 10, 38 and 41 of the United States Code to reduce barriers to the participation of small businesses as prime contractors and subcontractors on federal procurements. Small business² participation brings necessary competition to the government marketplace, adds innovation, and creates new jobs. Contracting officers, however, generally prefer contractors with whom they have experience; typically, this preference hampers the ability of small businesses to obtain federal contracts. Thus, the top 100 contractors to the federal government routinely receive 25 percent of the total value of contracts spent in a fiscal year, whereas the over 300,000 small businesses competing for federal contracts struggle to eclipse the 20 percent mark. This overreliance on a limited corps of contractors is not good for the industrial base, competition, innovation, job creation, or the needs of the federal government.

H.R. 4341 seeks to promote small business contracting in five ways. First, improves transparency by ensuring that terms used throughout federal procurement are used consistently in the Act, and by improving the process by which small business participation in federal procurement are reported. Second, it clarifies the roles of the small business advocates at the Small Business Administration (SBA) and in other federal agencies, while improving compliance assistance. Third, it promotes opportunities for small subcontractors, including a pilot program to provide past performance experience to first tier subcontractors, which will assist small subcontractors seeking to transition to prime contracting. Fourth, it strengthens the mentor-protégé program at the Department of Defense (DOD), and increases coordination between the SBA mentor-protégé program and the DOD program. Finally, H.R. 4341 improves the process by which agencies are educated on small business rules, promotes competition on task orders, allows SBA to use reasonable size standards for small agricultural producers, reduces the confusion between the service-disabled veteran-owned small business (SDVOSB) contracting program run by SBA and a similar program at the Department of Veterans Affairs (VA), and asks the Comptroller General to review operational issues at SBA.

III. NEED FOR LEGISLATION

The Act finds that awarding prime contracts to small businesses serves the nation in three ways. First, small business contracting

¹Originally, title II of the Act of July 30, 1953, c. 282, 67 Stat. 232 was designated as the Small Business Act of 1953. A plethora of amendments in subsequent Congresses led to a rewrite in 1958. Pub. L. No. 85-536, § 1, 72 Stat. 384 (1958). The Act is codified at 15 U.S.C. §§ 631–657s.

²The Act uses the term “small business concern.” However, this report will use the terms “small business” and “small business concern” interchangeably unless the context requires a specific reference to the term “small business concern.”

is in “the interest of maintaining or mobilizing the Nation’s full productive capacity.”³ Second, small business contracting is “in the interest of war or national defense programs.”⁴ Third, it serves “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.”⁵ Ensuring that small businesses can compete for federal contracts offers several benefits—business growth, job creation, greater competition, lower prices, and innovation. During the 114th Congress, the Small Business Committee has held numerous hearings on small businesses in the industrial base. As shown in Chart 1, the use of small businesses is declining even as the percentage of dollars awarded to small businesses increases.⁶

³Small Business Act, § 15(a), 15 U.S.C. § 644(a).

⁴*Id.*

⁵*Id.*

⁶Additionally, it is worth noting that in obtaining its A grade, the federal government did not meet half of its numerical goals SBA, “FY 2013 Procurement Scorecard,” available at https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf.

⁷*Id.*

CHART 1. SMALL BUSINESS CONTRACTING FY10–FY14 7

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

From FY11 through FY14, the percentage of dollars awarded to small businesses increased each year, from just over 18 percent to approximately 22.25 percent.⁸ At the same time, despite a decline in overall federal spending, the dollars awarded to small businesses remained fairly constant during this period. While this would normally be heralded as a success, a deeper dive into the numbers shows that the number of small business contract actions fell by almost 60 percent and the average size of a contract action increased 230 percent. This reflects that fewer small businesses are winning contracts, but those contracts are worth more, which may indicate that some small businesses are doing very well but many others are losing opportunities to compete.

Alarming, at the Department of Defense (DoD), which is arguably a better reflection of the federal government's ability to maintain a healthy industrial base capable of supporting defense programs, the results were worse. The percentage of contract dollars awarded to small businesses at DoD increased from just over 16 percent to just over 19 percent, but the actual dollars only fluctuated by about 10 percent. The number of small business contract actions at DoD fell by almost 70 percent, and the value of those contract actions rose by nearly 290 percent.

The declining number of contract actions with small businesses cannot simply be explained by shrinking budgets or sequestration, because during the same period, the number of contract actions with large businesses increased by 8 percent. However, the dollar value of the average contract action with a small business increased 230 percent, meaning that fewer small companies are getting contracts, but the contracts they get are getting much bigger.

Furthermore, the number of companies registered to do business with the federal government has dropped by over 100,000 from 2012, so that only 273,072 small businesses are still registered to compete for federal contracts.⁹ This speaks to a greater problem in the industrial base—a declining participation rate.

Therefore, all the provisions in H.R. 4341 support the better opportunities for small contractors and the replenishment of the industrial base. However, the need for specific provisions varies, and will be discussed thematically.

A. TITLE I

1. Sections 101 and 104

First, H.R. 4341 attempts to make the Act more accessible. Indeed, the provision in the Act that explains why federal small business contracting is importation—section 15(a) of the Act—is itself well-nigh unintelligible. It exists as a series of run-on sentences in one subsection that cover issues as diverse as how industries should be defined, geographic requirements in contracting, the use of set-aside contracts, the federal government's policy on contract bundling and consolidation, the process by which bundling is appealed, contracts for the sale of federal property, sales of timber, sales of electric power, and the requirement that the government

⁸Analysis based upon FPDS, available at <https://www.fpds.gov> (last accessed January 28, 2015). Copies of reports are on file with the Committee.

⁹Data retrieved from the System for Award Management, available at www.sam.gov (last accessed January 28, 2015). This number is down by over 100,000 small businesses from 2012, when DSBS reported 382,092 active small businesses.

not pay more than fair market price. As critical as these policies are, it is nearly impossible to locate or discuss them in the current format. Likewise, the use of procurement terminology in the Act that differs from terms with the same meaning in titles 10, 38, and 41 of the United States Code and SBA's own regulations creates unnecessary confusion for small businesses. Thus, 32 years after the rest of the government decided to adopt uniform procurement terminology, sections 101 and 104 of H.R. 4341 amend the Act to make use the same words adopted by the rest of the federal government.

2. Sections 102 and 103

Second, H.R. 4341 addresses the reporting on the use of small businesses. Since the enactment of Public Law 95-507,¹⁰ the SBA has been responsible for negotiating on small business contracting and subcontracting goals with federal departments and agencies and then reporting on the attainment of these goals. These requirements became stricter in 1988, when President Reagan signed the Business Opportunity Development Reform Act of 1988 (BODRA), which for the first time established a statutorily mandated government-wide small business goal of "not less than 20 percent of the total value of all prime contract awards for each Fiscal Year." This goal was increased to 23 percent by the Small Business Reauthorization Act of 1997 (SBRA). However, there is still little transparency into how the numbers reported by SBA are achieved. Sections 102 and 103 of H.R. 4341 continue the work of the past 38 years.

H.R. 4341 does so by requiring that SBA count all dollars awarded federal prime contracts each year, rather than excluding 19 percent of those dollars before it calculates the percentage awarded to small businesses. When the concept of goals was introduced through the 1978 and 1988 legislation, none of the Congressional authors believed that the phrase "the total value of all prime contract awards for each fiscal year" needed further explanation to define the types of contracts to which the goal applied, or that agencies needed encouragement to reach the goals. However, in 1991 the Office of Federal Procurement Policy (OFPP) began allowing¹¹ DOE to count subcontracts awarded by its management and operations (M&O) contractors as if they were prime contracts awarded by the DOE.¹² This allowed DOE to count 18 percent of its prime contract dollars as being awarded to small businesses until 1999, when OFPP reversed its decision on the M&O contracts,¹³ and it became apparent that DOE had only been awarding 3 percent of its prime contract dollars to small businesses. As previously noted, over a decade later, DOE only has a goal of 6 percent small business participation, so the goals are clearly not motivating the agency to improve its performance.

¹⁰ Pub. L. No. 95-507 (1978). This Act has no common name and is simply An Act of October 24, 1978.

¹¹ OFPP Policy Letter 91-1 (1991).

¹² See, e.g., Acquisition Regulation: Implementation of Section 3021 of the Energy Policy Act of 1992, Notice of Proposed Rulemaking, 59 Fed. Reg. 35,294, 35,295 (July 11, 1994).

¹³ OFPP Policy Letter 99-1 (1999) rescinding OFPP Policy Letter 91-1.

After OFPP changed course on the inclusion of M&O sub-contracts, SBA in rules published in 2003¹⁴ began allowing agencies to exclude certain types of contracts from consideration before the goal achievements were calculated. Under this method, approximately 20 percent of all prime contract dollars are excluded from the contracting base before the goals are calculated, thus inflating the performance of all agencies. It is these exclusions that have allowed the federal government to meet the 23 percent goal.

To make the goals themselves more meaningful, the Defending America's Small Contractors Act defines what types of contracts must be included in the goaling base. Examining Fiscal Year 2014 data, this essentially adds nearly \$100 billion to the denominator and \$10 billion to the numerator when calculating small business goal achievement. Recalculating using the more appropriate universe of contracts indicates that the federal government achievement is only 22.25 percent, rather than the 24.99 percent reported by SBA.¹⁵

Likewise, the bill requires that SBA report on how the goals are achieved in two meaningful ways. First, it requires that SBA report separately on contracts counted as awards to small businesses if the company has since lost its small business status. Second, it asks the SBA to segregate dollars attributed to any of the socio-economic subgoals if a procurement preference for another program was used. Take, for example, a firm that qualifies as a SDVOSB and historically underutilized business zone (HUBZone) participant. If that firm wins an award using a SDVOSB set-aside procurement, when SBA reports the award for purposes of the HUBZone goaling report, it does not distinguish this award from one that used a HUBZone set-aside procurement. This masks important information about the health of the small business programs.

B. TITLE II

The bill also furthers the goals of the National Defense Authorization Acts (NDAA) of FY 13, 14, 15, and 16, which have attempted to elevate the roles of small business advocates within SBA and at other federal agencies.¹⁶ The FY 13 NDAA modernized the responsibilities of the Offices of Small and Disadvantaged Business Utilization and the Procurement Center Representatives (PCR).¹⁷ It further implemented minimum training standards for the PCRs and the Business Opportunity Specialists (BOS).¹⁸ Likewise, the FY 16 NDAA provided minimum requirements for the Commercial Market Representatives (CMR).¹⁹ Title II of H.R. 4341 builds on this foundation.

¹⁴SBA, GOALING GUIDELINES FOR THE SMALL BUSINESS PREFERENCE PROGRAMS FOR PRIME AND SUBCONTRACT FEDERAL PROCUREMENT GOALS AND ACHIEVEMENTS, 68 Fed. Reg. 43,566 (July 23, 2003).

¹⁵SBA, FY 2014 SCORECARD SUMMARY (2015) available at https://www.sba.gov/sites/default/files/files/FY14_Scorecard_Summary_by_Prime_Spend_Subk_and_Plan_Progress_Scores_2015-05-04.pdf.

¹⁶FY 13 NDAA, Pub. L. No. 112-239 (2013); FY 14 NDAA, Pub. L. No. 113-66 (2013); FY 15 NDAA, Pub. L. No. 113-291 (2014); FY 16 NDAA Pub. L. No. 114-92 (2015).

¹⁷FY 13 NDAA at §§ 1621, 1691.

¹⁸*Id.* at § 1622.

¹⁹FY 16 NDAA at § 865 (2015).

1. Section 201

First, H.R. 4341 addresses a problem with the regulatory functions of PCRs. The PCR is the last best defense of small businesses when contracts are being structured in a way that limits small business participation. The Committee and its Subcommittee on Contracting and Workforce have held numerous hearings exploring how contracts that include small business set-asides, partial set-asides, or small business reserves may still be harmful to small businesses and to principles of competition, specifically in cases of strategic sourcing and consolidation. Indeed, a contract may be a total small business contract and still be consolidated, meaning that many small businesses were unable to compete.

Therefore, it is problematic that SBA's regulations provide that the PCR will only "review all acquisitions that are not set-aside or reserved for small businesses above or below the Simplified Acquisition Threshold."²⁰ Thus, none of the consolidated Federal Strategic Sourcing Contracts—which have excluded thousands of small competitors—are subject to PCR review.²¹ Section 201 of H.R. 4341 terminates this prohibition.

2. Sections 202 and 205

Both the CMR and the BOS lack clear, up to date job descriptions. While, as previously mentioned, the 24 CMRs at SBA have educational requirements in the Act, there is no other job description of their roles in statute.²² Instead, their responsibilities are covered by SBA's Standard Operating Procedure (SOP) for the Subcontracting Assistance Plan.²³ Unfortunately, this job description has not been updated to reflect significant legislative changes to the subcontracting requirements. For example, the FY 13 NDAA changed the requirements for subcontracting plans.²⁴ The FY 14 NDAA allowed prime contractors to take credit for lower tier subcontracts awarded to small businesses—something the current SOP does not reflect.²⁵ The FY 15 NDAA altered subcontracting requirements for some of the largest defense contractors.²⁶ The FY 16 NDAA made senior agency executives responsible for subcontracting goals.²⁷ None of these changes are reflected in the SOP or the job description. Indeed, the SOP does not even recognize the existence of the federal subcontracting reporting system (FSRS) which has been in place for nearly ten years.

Likewise, the BOS has educational requirements imposed by statute, and is tangentially referenced in the Act without a job description or a clear statement of responsibilities.²⁸ So, like the CMR, the BOS is reduced to an out-of-date SOP to understand the full job description.²⁹ However, to understand their role, it is first

²⁰ 13 C.F.R. § 125.2(b)(i).

²¹ See, e.g., Committee Memorandum, "Contracting and Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals" 2–18 (2015), available at http://smbiz.house.gov/uploadedfiles/3-17-2015_hearing_memo.pdf.

²² 15 U.S.C. § 633(h).

²³ SBA, SOP 60–03 (2006).

²⁴ FY 13 NDAA at § 1653.

²⁵ FY 14 NDAA at § 1614.

²⁶ FY 15 NDAA at § 821.

²⁷ FY 16 NDAA at § 871.

²⁸ 15 U.S.C. § 633(g).

²⁹ SBA, SOP 80–05–3A (2008).

necessary to understand the SBA's 8(a) Business Development Program (8(a) program).

The 8(a) program is a subset of the small and disadvantaged business (SDB) program. SDBs are small businesses at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals.³⁰ Social disadvantage is presumed for members of designated groups, or may be established by a preponderance of the evidence for any other individual. Economic disadvantage is defined as a net worth of less than \$750,000, after excluding the value of the individual's ownership interest in the small business and the value of the individual's equity in a primary personal residence.³¹ A firm certifies as an SDB to either the procuring agency or to a third-party certifier, although all 8(a) firms are automatically considered SDBs.³² There is a statutory goal of awarding five percent of all prime contract and five percent of all subcontract dollars to SDBs.³³

The 8(a) program is an important subset of the SDB program. 8(a) firms are small businesses owned and controlled by socially and economically disadvantaged individuals who have applied for and been accepted into a nine-year business development program at SBA.³⁴ While the definition of social disadvantage is the same in the 8(a) program as it is in the SDB program, the definition of economic disadvantage is much stricter, with a \$250,000 cap on assets outside of the business and primary residence, and a requirement that the individual demonstrate a limited access to capital.³⁵ Participation in the 8(a) program provides important contracting preferences such as sole-source contracts up to \$4 million (\$6.5 million for manufacturing contracts) are the preferred contracting method, although competitive 8(a) awards are allowed with the permission of the SBA.³⁶

In the 8(a) program, SBA is considered the prime contractor, and the 8(a) firm is its subcontractor, which requires agencies to negotiate awards with SBA.³⁷ However, since the 1990s, SBA has been entering into Memorandums of Understanding (MOUs) with agencies, allowing agencies to bypass SBA and award contracts directly to the 8(a) firms.³⁸ The 8(a) certification is processed by SBA, and annual reviews are required throughout the nine years of program participation to ensure a firm's continued eligibility.³⁹ Unlike other small business programs, the eligibility of an 8(a) participant cannot be challenged by another 8(a) firm or any other party.⁴⁰ It is the BOS who monitors 8(a) firms to ensure their continued eligi-

³⁰ 13 C.F.R. § 124.1002.

³¹ 13 C.F.R. § 124.

³² *Id.*

³³ 15 U.S.C. § 633(g).

³⁴ 13 C.F.R. § 124.

³⁵ *Id.* at § 124.104.

³⁶ *Id.* at § 124.506.

³⁷ There is a rebuttable presumption that "Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)" are socially disadvantaged. 13 C.F.R. § 124.103.

³⁸ 15 U.S.C. § 637(a).

³⁹ 13 C.F.R. § 124.508.

⁴⁰ *Id.* at § 124.201, 124.601.

bility for the program, negotiate contracts, and otherwise protect the firms and the taxpayers.

Unlike the CMR and the PCR, there is no comprehensive list of BOS available from SBA. Instead, a small business concern must visit each district office's website. A visit to these sites reveals that while an average of two to three BOS are assigned to each office, most of these BOS are also serve as the HUBZone program liaison, veteran-owned small business liaison, and woman-owned small business liaison. However, the BOS have an incredibly important responsibility that should not be diluted: they are able to authorize sole source contracts, and last year these contracts exceeded \$9 billion.⁴¹ The BOS are the government's defense against waste, fraud and abuse in these programs—necessary as federal data shows that over \$115 million in 8(a) contracts went to companies that are not 8(a) firms.⁴²

Sections 202 and 205 remedy this issue by providing statutory job descriptions for both the CMRs and the BOSs, including lines of authority and incorporating changes made to the contracting programs in recent legislation. This should standardize the assistance provided to small businesses, make it easier to deter bad actors, and prevent SBA from diverting these individuals to fill other roles.

3. Section 203

Section 203 of the bill provides updates to the OSDBU program. When Public Law 95–507 was first enacted and created the OSDBU, there were no programs in the Act to help SDVOSB or HUBZone companies. Therefore, section 203 updates the Act to include responsibility for providing assistance to SDVOSBs and HUBZones as part of the job description for the OSDBU.

Additionally, this section provide an opportunity to limit waste, fraud and abuse. In 2015, the Senior Procurement Executive of the VA testified that the agency had intentionally concealed at least \$6 billion, and as much as \$12 billion, in purchases each year.⁴³ VA accomplished this by illegally using government purchase cards without an underlying contract vehicle for purchases above \$3,000 and below \$150,000.⁴⁴ Compounding this injury, small businesses have priority for contracts for less than \$150,000 but were excluded from even bidding on these purchases.⁴⁵ The VA OSDBU also claimed ignorance of the existence of these purchases. Therefore, section 203 allows OSDBUs to access credit card data and hopefully prevent a repeat of this travesty.

4. Section 204

Further, the PCRs, BOS, and OSDBUs exert a great deal of effort to help small businesses obtain contracts, but very little effort is made to help small businesses understand the compliance requirements that come with that contract. This can lead to the small business giving the government the good or service it desires in a successful fashion, but failing to successfully fulfill the con-

⁴¹ Data from the Federal Procurement Data System (on file with the Committee).

⁴² *Id.*

⁴³ Committee Memorandum, "Manipulation and Fraud in the Reporting of VA Small Business Goals" (2015), available at http://smbiz.house.gov/uploadedfiles/6-23-2015_hearing_memo.pdf.

⁴⁴ *Id.*

⁴⁵ 15 U.S.C. § 644(j).

tract due to a miscomprehension of regulatory peculiarities. There are private sector resources available to assist these small companies, including the Defense Industries Initiative and the Procurement Technical Assistance Center program. Therefore, section 204 of the bill requires that SBA and these advocates help small businesses connect with these resources.

C. TITLE III

1. *Section 301*

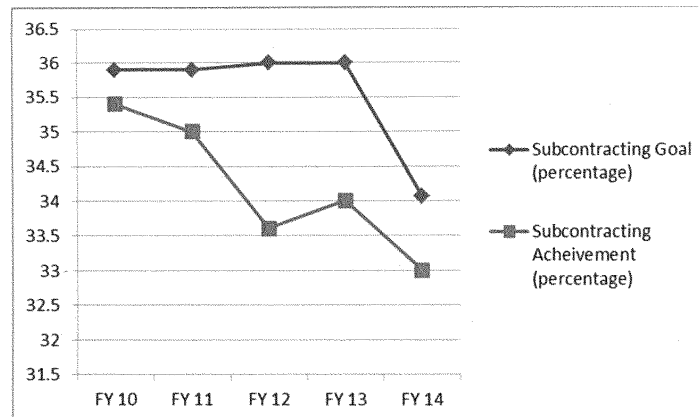
Public Law 95–507 also sought to increase subcontracting opportunities for small businesses by requiring that other than small businesses receiving prime contracts negotiate subcontracting plans with the federal government that would incorporate goals for the use of small businesses.⁴⁶ According to Committee reports, this requirement was added because small businesses were receiving only 37.5 percent of subcontract dollars.⁴⁷ Since that time, it has been the responsibility of the SBA to establish a government-wide subcontracting goal. However, the current SBA-established goal is 34.06 percent, which is more than 3 percent less than the actual results thirty-eight years ago that spurred the creation of government-wide subcontracting goals.⁴⁸

As the graph below illustrates, while SBA has steadily decreased the subcontracting goals from 36 percent to 34 percent over the last five years, subcontracting achievements have fallen from 35 percent to 33 percent. Each time SBA decreases the goals, agencies manage to subcontract less with small businesses. This results in real losses to small businesses. For example, FY 2013, small businesses received \$86.7 billion in subcontracts, which is just about \$5 billion less than they received in prime contracts. If federal agencies had met the then-goal of 36 percent, subcontract would have accounted for more dollars to small business than prime contracts. The fact that the goal keeps decreasing indicates that less and less is being provided to small subcontractors.

⁴⁶ 15 U.S.C. § 637(d).

⁴⁷ H.R. REP. NO. 95–949, at 5 (1978).

⁴⁸ FY 2014 SCORECARD SUMMARY.

Subcontracting Goals versus Results⁴⁹

To figure out why this backsliding is occurring, it is important to understand how subcontracting opportunities are established and tracked. According to the Act, any procurement exceeding \$700,000 (\$1.5 million for construction) that is awarded to an other-than-small business must include a negotiated subcontracting plan detailing opportunities for small business participation.⁵⁰ While PCRs may review these plans, they may not protest a solicitation or award on belief that the goals are inadequate. The prime contractor is then required to report its subcontracting, including the percentage awarded to each type of small business, either every six months or once a year, depending on the type of plan.⁵¹ Failure to make a good faith effort to comply with the plan can result in a prime contractor being assessed liquidated damages.⁵²

However, reviews of the data submitted to the combined federal subcontracting reporting system (FSRS) and the electronic subcontracting reporting system (eSRS) demonstrate that approximately 40 percent of companies required to have with subcontracting plans are not reporting the required data. This means that the 32 percent achievement level reported by SBA is overinflated, since it does not account for those contractors not reporting any data.

Recent audits by the DoD Inspector General (DODIG) also found discrepancies.⁵³ For example, the DODIG reviewed seven contracts

⁴⁹ Graph based on data from FY 2014 Procurement Scorecard, FY 2013 Procurement Scorecard; SBA "FY 2012 Procurement Scorecard," available at https://www.sba.gov/sites/default/files/files/FY12_Final_Scorecard_Government_Wide_2013-06-20.pdf (last accessed November 16, 2015); SBA, "FY 2011 Procurement Scorecard," available at https://www.sba.gov/sites/default/files/files/FY11%20Final%20Scorecard%20Government-Wide_2012-06-29.pdf (last accessed November 16, 2015); SBA, "FY 2010 Procurement Scorecard," available at https://www.sba.gov/sites/default/files/files/FY10%20SB%20Procurement%20Scorecard_FINAL_GOVERNMENT%20WIDE.pdf (last accessed November 16, 2015).

⁵⁰ 15 U.S.C. § 637(d).

⁵¹ FAR § 19.7.

⁵² 15 U.S.C. § 637(d).

⁵³ DODIG, SMALL BUSINESS CONTRACTING AT REGIONAL CONTRACTING OFFICE—NATIONAL CAPITAL REGION NEEDS IMPROVEMENT (DODIG-2015-095), available at <http://www.dodig.mil/pubs/documents/DODIG-2015-095.pdf> [hereinafter "NCR Report"]; DODIG, SMALL BUSINESS CONTRACTING AT MARINE CORPS SYSTEMS COMMAND NEEDS IMPROVEMENT (DODIG 2016-019), available at <http://www.dodig.mil/pubs/documents/DODIG-2016-019.pdf> [hereinafter "MCSC Report"].

at the National Capital Region (NCR) that under the Act needed to have a subcontracting plan.⁵⁴ Of these, only one contract met the statutory and regulatory requirements.⁵⁵ NCR awarded two contracts without any subcontracting plan, and two contracts that had a subcontracting plan that failed to include any small business subcontracting goals.⁵⁶ These four contracts were valued at \$58.2 million.⁵⁷ Additionally, the NCR review found that there were two contracts valued at \$790 million where the contracting officers had met the requirements to incorporate a subcontracting plan and goals only to fail to track whether the prime contractors met the subcontracting requirements.⁵⁸ The DODIG concluded that “small businesses may not have received subcontract work that large businesses were required to provide, and NCR officials may have missed an opportunity to recoup potential liquidated damages of up to \$153.5 million which they may have been entitled to.”⁵⁹

Similarly, in its review of the Marine Corps Systems Command, (MCSC), the DODIG’s results were similar. Of the 19 contracts worth \$1.3 billion reviewed, six were awarded without subcontracting plans and two were awarded without verifying that there was an approved subcontracting plan.⁶⁰ On four contracts, MCSC failed to track compliance with the subcontracting plan, and on two contracts knew the prime contractor was not meeting its small business goals but failed to inquire into why the promised subcontracting opportunities had not materialized.⁶¹ In one of these cases, the prime contractor had committed to \$19 million in subcontracts with small businesses, but delivered only \$1.3 million—less than 10 percent of the contractually agreed to amount.⁶² On the other contract, only 25 percent of the promised small business subcontracting dollars materialized.⁶³

To address these issues, section 301 makes three changes to the Act. First, it requires that failure to submit a subcontracting report may be considered a material breach of the Act. Second, it allows PCRs to protest an absent or insufficient subcontracting plan. Finally, it requires that SBA issue regulations that explain what it means to fail to make a good faith effort to comply, including the fact that failure to file a required report is itself evidence of a lack of good faith.

2. Section 302

Small subcontractors often complain that any efforts to transition to prime contractor status are hampered by the lack of a past performance rating. As such, it may only receive a neutral rating in that category, meaning that if all other factors are equal it may well lose a contract during proposal evaluations. To address this problem without creating a significant bureaucracy, H.R. 4341 cre-

⁵⁴ NCR Report at 10.

⁵⁵ *Id.*

⁵⁶ NCR Report at 10–11. One of the contracts without a subcontracting plan was a follow on to a contract that also lacked a subcontracting plan. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 10.

⁶⁰ MCSC Report at 11.

⁶¹ *Id.*

⁶² *Id.* at 15.

⁶³ *Id.* at 16.

ates a pilot program for small subcontractors seeking a past performance rating.

D. TITLE IV

1. Section 401

The FY 2016 NDAA made significant changes to the DoD mentor-protégé program established by the FY 1991 NDAA.⁶⁴ While most were positive, there were a few unintended consequences. The statutory purpose of the DoD program is “to provide incentives for major Department of Defense contractors to furnish disadvantaged small business concerns with assistance designed to enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under Department of Defense contracts and other contracts and subcontracts in order to increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.”⁶⁵ The FY 16 NDAA altered the purpose to add a requirement that the assistance “increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.”⁶⁶ This change altered the program’s purpose to better reflect the goals of the SBA and civilian mentor-protégé programs.

The DoD program allows small disadvantaged businesses, HUBZone business concerns, service-disabled veteran-owned small business concerns and women-owned small business concerns to participate as protégés.⁶⁷ These entities may participate as protégés at any time.⁶⁸ The FY 16 NDAA altered eligibility so that firms could only participate as protégés for five years after they enter their first mentor protégé agreement.⁶⁹ It also stated that protégé firms must be less than half the SBA size standard assigned to the corresponding NAICS code, and that the small business either be a nontraditional defense contractor or be currently provide goods or services in the private sector that are critical to enhancing the capabilities of the defense supplier base and fulfilling key Department of Defense needs.

Likewise, while firms with more than \$100 million in receipts are permitted to act as mentors if the “mentor firm demonstrates the capability to assist in the development of protégé firms,”⁷⁰ the FY 16 NDAA also requiree that the mentor not be affiliated with the protégé, and that the mentor demonstrate that it: (1) is qualified to provide assistance in keeping with the purposes of the program; (2) is in good financial health and has not been suspended or debarred; and (3) “can impart value to a protégé firm because of experience gained as a Department of Defense contractor or through knowledge of general business operations and government

⁶⁴ FY 2016 NDAA at § 861; FY 1991 NDAA, Pub. L. No. 101–510 § 831 (1990).

⁶⁵ 10 U.S.C. § 2302 note; Pub. L. No. 101–510 § 831(a), as amended.

⁶⁶ H.R. 1481 at § 861(a).

⁶⁷ It is worth noting that DoD considers organizations employing the severely disabled, tribal businesses, historically black colleges and universities and minority institutions of higher learning to be small disadvantaged businesses for purposes of this program. Pub. L. No. 101–510 § 831(l).

⁶⁸ *Id.* at (c)(2).

⁶⁹ FY 2016 NDAA at § 861(a).

⁷⁰ Pub. L. No. 101–510 § 831(d).

contracting.”⁷¹ The legislation continues to define affiliation using the principles delineated by the SBA in regulation. Each of these would lead to greater alignment with the SBA program, but does raise questions about having DoD determine affiliation. It is to this change that H.R. 4341 first addresses itself.

If DoD is allowed to determine affiliation of small business, and thus determine when a business is small or other-than-small, it creates the possibility of a conflict. Thus, DoD could find that a firm is unaffiliated, and therefore small, while SBA could determine that the firm was affiliated and therefore other-than-small. Such a conflict could become untenable, since it would affect which contracts are counted towards the governmentwide procurement goals, or the eligibility of these companies for other contracts. It also creates a workload for DoD’s OSDBU office, when the SBA’s Office of Hearings and Appeals (OHA) already has expertise in these areas. Therefore, section 401 allows DoD to send cases of possible affiliation to SBA rather than resolving them internally.

DoD mentor-protégé agreement must detail the assistance to be provided to the protégé.⁷² This must include a developmental plan, a program participation term, and termination procedures. The FY 16 NDAA provided greater specificity for the contents of the developmental plan. It required that the plan provide: (1) “factors to assess the protégé firm’s developmental progress;” (2) qualitative and quantitative benefits to DoD, if any; and (3) “goals for additional awards that the protégé firm can compete for” outside of the DoD program.⁷³ These measures create higher expectations for program performance.

Finally, to incentivize mentors, DoD offers reimbursements and credits. DoD reimburses mentors for progress payment or advance payment made to protégés under the program if the protégé is acting as a subcontractors on a DoD contract held by the mentor. Additionally, DoD may reimburse costs associated with six types of eligible assistance provided by the mentor. First, DoD allows the protégé to use mentor personnel to aid with, general business management, engineering and technical matters, and other areas detained in the developmental plan.⁷⁴ The statute explicitly allows business development assistance. Second, it allows the protégé to receive noncompetitive subcontracts from its mentor. Third, it allows mentors to pay progress payments for the protégé. Fourth, it allows advance payments. Fifth, it allows loans. Sixth, it allows the mentor to purchase up to ten percent of the protégé. Until the FY 2016 NDAA, mentors could be reimbursed for referring the protégé to a small business development center (SBDC), procurement technical assistance center (PTAC), or a historically Black college or university or a minority institution of higher education (HBCU/MI).⁷⁵ While H.R. 4341 leaves the exclusion for reimbursement in place for this last category of technical assistance, it does expand the sources of technical assistance to include Women’s Business Centers (WBC).

⁷¹ FY 2016 NDAA at § 861(a).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Pub. L. No. 101-510 § 831(f).

⁷⁵ FY 2016 NDAA at § 861(a).

2. Section 402

The FY 16 NDAA added reporting requirements for mentor firms and review requirements for the DoD OSDBU.⁷⁶ First, it required that mentors annual report on the assistance provided to protégé firms. Second, it required OSBP to review the reports and program participants, and terminate those not furthering the purpose of the program. This was done to bring the DoD program and objectives further in line with the government wide mentor-protégé program managed by SBA.

Currently, DoD measures success in its program by looking at three factors which it tracks for up to two years after completion of the mentor-protégé agreement.⁷⁷ First, it examines whether the dollar value of contracts, subcontracts and revenue received by the protégé has increased. Second, DoD tracks increases in number and dollar value of subcontracts awarded to protégé firms and former protégé firms by the mentor firm. Third, it looks for an increase in the employment levels of the protégé firm. As of July 31, 2015, DoD had published the following performance results for program.

FY 10–FY 14 DoD Mentor-Protégé Results ⁷⁸

FY	Program Budget	Net Revenue Gains	Net Employee Gains	Net Revenue Gains/ Company	Net Employee Gains/ Company
14	\$20.1 M	\$396 M	808	\$6.6 M	13.5
13	25.4 M	238 M	743	3.6 M	11.4
12	28.0 M	700 M	660	11.3 M	10.6
11	27.6 M	633 M	1,531	7.6 M	18.4
10	26.3 M	660 M	1,223	6.7 M	12

While this chart demonstrates growth in each category, it fails to control for the involvement of the DoD. Specifically, if DoD is paying companies to subcontract with specific small businesses, it cannot come as a surprise that those small businesses hire employees and increase their revenues. As the mentor firm was required to subcontract with small businesses in any case, would the companies receiving the subcontracts have received similar benefits without a mentor-protégé agreement? Further, since DoD continues to reward mentors for subcontracting with protégés after the protégés leave the program, tracking two years post program completion does not capture whether the benefits are sustainable.

To further promote better reconciliation of the measures of success and data sharing, H.R. 4341 amends the Act to remove the exemption previously granted to DoD.

E. TITLE V

1. Section 501

As previously noted in this document, the FY 2013–FY 2016 NDAA's contained substantial reforms to the Act. The SBA has been less than prompt in implementing these changes. As of April 14, 2016, the SBA still was missing seven proposed rules, 13 final rules, and 17 other actions. Unfortunately, once SBA issues a final

⁷⁶ *Id.*

⁷⁷ OSBP, DoD Mentor-Protégé Program 9 (2015), available at <http://www.acq.osd.mil/osbp/docs/DoD%20MPP%20Briefing-v07%20-%2031%20JUL%2015.pdf>.

⁷⁸ *Id.* at 14.

rule, the Federal Acquisition Council still needs to itself issue proposed and then final rules. At the current rate, it is taking in excess of seven years to get statutory changes fully implemented.

As expected, this has led to confusion among small contractors and contracting offices who are unsure which rules and provisions are in effect. Thus, section 501 requires the SBA to annually report to the Federal Acquisition Institute and the Defense Acquisition University on any new laws or regulations affecting small business contracting.

2. Section 502

In FY 2015, the federal government purchased more than \$186 billion in goods and services using task order contracts.⁷⁹ Since 2008, offerors have been able to protest task orders above \$10 million at the Government Accountability Office.⁸⁰ This has resulted in an increase of less than a thousand additional protests being filed per year, but provides important protections for competition.⁸¹ The FY 2012 NDAA made this authority permanent for DoD, but the authority is set to expire on September 30, 2016 for civilian agencies.⁸² This would leave over \$64 billion in procurements without protest authority.⁸³ Section 502 makes the authority permanent for civilian agencies.

3. Section 503

The SBA size standards establish the maximum size a business can be and still be considered small. Section 3(a)(1) of the Act provides that “a small business concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”⁸⁴ This definition includes “enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, agriculture, and all other farming and agricultural related industries,” although the Act never defines the term “agricultural related industries.”⁸⁵ However, the Act further states that, “notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.”⁸⁶ For all other industries, the Act authorizes the Administrator of the SBA to establish small business size standards for the purposes of the Small Business Act and any other statute.⁸⁷

Small business size standards determine whether small businesses may qualify for special treatment in the sale of goods and services to the federal government;⁸⁸ access to guaranteed loans

⁷⁹ FPDS Data (April 14, 2016).

⁸⁰ Pub. L. No. 110–181, § 843(a)(2)(C).

⁸¹ Compare GAO, GAO Bid Protest Annual Report to Congress for Fiscal Year 2015 (2015) with GAO, GAO Bid Protest Annual Report to Congress for Fiscal Year 2007 (2007).

⁸² Pub. L. No. 111–383, § 825 (2012).

⁸³ FPDS Data (April 14, 2016).

⁸⁴ 15 U.S.C. § 632(a)(1).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at § 632(a)(2). The Administrator’s size standards apply to all other federal programs unless that program contains its own definition of small business. *Id.* at § 632(a)(2)(C).

⁸⁸ There are numerous procurement programs available to small businesses that restrict competition for federal contracts or give small businesses a preference. See COMM. ON SMALL BUS., SMALL BUSINESS ACT PROGRAMS FOR SMALL FEDERAL CONTRACTORS (2013), available at http://smallbusiness.house.gov/uploadedfiles/small_business_act_programs_for_small_federal_contractors.pdf, for a discussion of small business procurement programs.

and other types of financial assistance; and obtain technical advice through various SBA resource partners. They also may be utilized by federal agencies as part of their regulatory analyses during the rulemaking process.

Before 1985, the size standard for agricultural enterprises was established by the SBA through the notice and comment rule-making process. On February 9, 1984, the SBA published a final rule establishing the size standard for agricultural producers as \$100,000.⁸⁹ However, Congress soon expressed concerns with the \$100,000 size standard for agricultural enterprises.

A report issued by the Senate Committee on Small Business in early 1985 stated, “this standard is much lower than that used for any other industry, and it excludes virtually all viable family farms in many areas of the country.”⁹⁰ The report additionally stated that while Senators Tom Harkin, Max Baucus and Dale Bumpers had offered an amendment to raise the size standard to \$500,000, they later withdrew the amendment in favor of an assurance that SBA would immediately revisit the issue.⁹¹ Later that year, the Senate Committee on Small Business recommended to the Senate Committee on the Budget that the amendment be incorporated into omnibus budget legislation and noted that the amendment would have no budgetary impact.⁹²

The recommended amendment was included in the omnibus legislation that was enacted in 1986. The definition of a small business concern was amended to state, “[p]rovided, [t]hat notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$500,000.”⁹³ The \$500,000 size standard was increased to \$750,000 in 2000.⁹⁴ The statutory size standard applies to 46 diverse categories of agricultural enterprises including: cotton farming; orange groves; tree nut farming; beef cattle ranching and farming; and shellfish farming.⁹⁵

The consequences associated with establishing a single size standard for agricultural enterprises via statute may not have been fully realized or appreciated when the decision was made 30 years ago. For example, the authors included no forcing mechanism to require periodic review of the agricultural producer size standard to determine whether it was still appropriate. Periodic review of all other size standards—at least once every five years—is now required pursuant to the Small Business Jobs Act of 2010.⁹⁶ The purpose of periodically reviewing size standards is to account for changes in industry structure and economic conditions, such as inflation.⁹⁷ Commodity prices and production inputs can fluctuate

⁸⁹ SBA, Small Business Size Standards, Final Rule, 49 Fed. Reg. 5024 (Feb. 9, 1984).

⁹⁰ S. REP. NO. 99-20, at 48 (1985).

⁹¹ *Id.*

⁹² S. REP. NO. 99-146, at 530 (1985).

⁹³ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Tit. XVIII, § 18016, 100 STAT. 82, 371 (1986).

⁹⁴ Consolidated Appropriations Act of 2001, Pub. L. No. 106-544, App. I, Tit. VIII, § 806, 114 STAT. 2763, 2763A-706 (2000). Unfortunately, there is no discussion of the provision in the accompanying report.

⁹⁵ These industry categories are delineated under the North American Industry Classification System (NAICS), which is the standard used by federal statistical agencies to classify business establishments for the purposes of collecting, analyzing, and publishing statistical data related to the United States economy. <https://www.census.gov/eos/www/naics/>.

⁹⁶ Pub. L. No. 111-240, § 1344, 124 STAT. 2504, 2545-46 (2010).

⁹⁷ SBA White Paper *supra* note 8, at 38.

dramatically. Moreover, the single standard for 46 different agricultural industry subsectors does not distinguish between the various types of agricultural enterprises that may have significantly different economic characteristics. A statutory standard leaves it up to future Congresses to review and update the standard, which has not been done with any regularity.

For non-agricultural industries, the SBA size standard methodology can best be described as a granular analysis of specific industry characteristics.⁹⁸ The agency performs a statistical analysis of primary and secondary factors to establish a size standard for a specific industry, and that standard is expressed as the number of full-time employees at the concern over 12 months, the average annual receipts of the business over three years, or as an alternate size standard that looks at the level of production.⁹⁹

The primary factors assessed by the SBA include an examination of four economic characteristics of the industry, such as average firm size, startup costs and entry barriers, industry competition, and the distribution of firms by size.¹⁰⁰ An additional factor is the impact of a size standard change on SBA's federal contract assistance to small businesses.¹⁰¹ The SBA also may assess industry specific considerations, such as technological changes and industry growth trends.¹⁰²

Upon completing its analysis, the SBA then publishes a proposed size standard in the Federal Register. Final size standards are selected after input from the public through notice and comment rulemaking. In addition, size standards are subject to periodic review and revision every five years,¹⁰³ again through notice and comment rulemaking.

In 2013, Congress enacted reforms to the Act that codify the factors SBA must consider and address when revising, modifying, or establishing size standards. As part of the notice of the proposed and final rule, the SBA must include: (1) a detailed description of the industry; (2) an analysis of the competitive environment for that industry; (3) the approach and sources of all data used to develop the proposed rulemaking; and (4) the anticipated effects of the proposed rule on the industry.¹⁰⁴ This ensures that the size standard setting process is transparent and interested parties have adequate information on which to comment.

In short, the process established by Congress as implemented by the SBA for determining size standards creates a logical method for establishing small business size standards in order to facilitate the accomplishment of federal policy objectives as they relate to small business concerns. Unfortunately, the definition of a small business agricultural enterprise does not follow the same granular analysis as it is set by statute and only would be subject to periodic review if Congress acted regularly. As the production of agricultural goods has changed and is likely to change, a static definition of small

⁹⁸ A detailed explanation of SBA's size standard methodology may be found in SBA, SBA SIZE STANDARD METHODOLOGY (2009) [hereinafter SBA White Paper], available at http://www.sba.gov/sites/default/files/size_standards_methodology.pdf.

⁹⁹ *Id.* at 10. This mirrors the grant of authorization in the statute. 15 U.S.C. § 632(a)(2)–(3).

¹⁰⁰ SBA White Paper, *supra* note 8, at 11.

¹⁰¹ *Id.* Despite the applicability of these size standards across federal agencies, the SBA does not examine the implications of such change on other federal statutes or programs.

¹⁰² *Id.* at 12.

¹⁰³ *Id.* at 1.

¹⁰⁴ FY 2013 NDAA at § 1661.

business agricultural enterprise may not achieve various policy objectives designed to help small businesses.

Specifically, the modern structure of agricultural operations has evolved so that a single dollar size standard is no longer appropriate. The United States agriculture industry continues to be defined by a large number of closely-held, family-owned operations.¹⁰⁵ Of the nation's approximately 2.1 million farms and ranches, approximately 97.6 percent of farms are family-owned.¹⁰⁶ These family farms account for 85 percent of domestic agricultural production.¹⁰⁷

However, over the past few decades, a number of factors have altered the structure of farms and industry dynamics. New technologies and production methods have increased the productivity of the agriculture sector.¹⁰⁸ This productivity also has resulted in increased competition¹⁰⁹ among producers which has resulted in more output per acre and lower relative prices for agriculture commodities.

These changes compel agricultural enterprises to achieve larger economies of scale in comparison to their predecessors in order to maintain a viable agriculture production enterprise.¹¹⁰ Achieving these economies of scale often requires the addition of more lands or livestock in order to justify investments in new production technologies.¹¹¹ As the Subcommittee previously examined at a February 2, 2012 hearing,¹¹² many individually family-owned farms have consolidated their individual operations into larger, enterprise unit family-owned operations in order to achieve economies of scale.¹¹³ However, on 86.1 percent of farms, families still provide the majority of the labor.¹¹⁴

Unfortunately, the influences of these changes may not fully be reflected in the current size standard for small agricultural enterprises. If the current definition does not encapsulate these changes in the agricultural sector, there could be negative consequences for small agricultural enterprises. An incorrect size standard may result in negative effects on federal small business policymaking ob-

¹⁰⁵ERIK J. O'DONOGHUE, ECONOMIC RESEARCH SERVICE, UNITED STATES DEP'T OF AGRICULTURE, EXPLORING ALTERNATIVE FARM DEFINITIONS: IMPLICATIONS FOR AGRICULTURAL STATISTICS AND PROGRAM ELIGIBILITY 22–23 (2009), available at <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib49.aspx>.

¹⁰⁶JAMES MACDONALD, ECONOMIC RESEARCH SERVICE, UNITED STATES DEP'T OF AGRICULTURE, FAMILY FARMING IN THE UNITED STATES (2014) [HEREINAFTER USDA FAMILY FARMS], available at <http://www.ers.usda.gov/amber-waves/2014-march/family-farming-in-the-united-states.aspx#.USK3pk1OW70>. However, it should be noted that the relative share of production these farms contribute varies depending on commodity group, with family-owned farms accounting for 96 percent of corn, cotton, wheat and soybean production, 75 percent of dairy production, and 62 percent of fruits, vegetables and nursery production. *Id.*

¹⁰⁷*Id.*

¹⁰⁸Elizabeth Bechdol, Allan Gray, and Brent Gloy, *Forces Affecting Crop Production Agriculture*, 25 CHOICES 2 (2010), available at http://www.choicesmagazine.org/magazine/pdf/article_152.pdf. In addition to increased competition, there are relatively low barriers to entry into agriculture markets. *Id.* These factors are accounted for in the SBA's size standard methodology, but not in the statutory definition.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*The Future of the Family Farm: The Effect of Proposed DOL Regulations on Small Business Producers: Before the Subcomm. on Agriculture, Energy and Trade of the H. Comm. on Small Bus.*, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg76459/pdf/CHRG-112hhrg76459.pdf>.

¹¹³CAROLYN DIMITRI, ET. AL., ECONOMIC RESEARCH SERVICE, UNITED STATES DEP'T OF AGRICULTURE, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 12 (2005), available at <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib3.aspx>.

¹¹⁴USDA Family Farms, *supra* note 16.

jectives. Primary among these are procurement opportunities, as procurement represents the sole scenario when alternative federal programs or standards are not available.¹¹⁵

In terms of contracting and procurement opportunities, a more accurate definition of small agricultural enterprises would increase competition, thereby reducing prices, and strengthen our industrial base. In FY 2014, the federal government spent nearly \$400 million on raw agricultural goods.¹¹⁶ Small businesses received over 89 percent of the awards in agricultural industries where SBA had established size standards.¹¹⁷ However, in those industries using the \$750,000 statutory size standard, small businesses received only 27 percent of awards.¹¹⁸ If more concerns were easily identifiable as small businesses, it could increase the opportunity for competition limited to small businesses, or at a minimum for outreach to small agricultural producers.

While the \$92 million in prime contracting opportunities awarded to industries with a \$750,000 size standard is not a large amount in terms of federal contract spending, a definitional change also could affect subcontracting and grant opportunities. States receive agricultural block grants may choose to prioritize purchases from small businesses, using the SBA definition. At a federal level, programs such as the Food for Peace Program¹¹⁹ may create opportunities for small business sales. Most importantly, though, are subcontracting opportunities.

Pursuant to the Act, federal prime contractors, other than small business concerns, receiving prime contracts in excess of \$650,000 must negotiate a subcontracting plan with the government detailing how they will use small businesses as subcontractors.¹²⁰ This requirement also applies to subcontractors other than small businesses who receive subcontracts in excess of \$650,000.¹²¹ This is important because in FY 2014, federal government spent \$5.8 billion on food manufacturing. This included nearly \$4 billion in contracts requiring subcontracting plans.¹²² Given that the current ad-

¹¹⁵ Generally speaking, size standards also are used to determine eligibility for SBA's loan programs, technical assistance programs, and as agencies attempt to assess the effects of regulations on small business concerns under the Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 (RFA). However, since agricultural enterprises receive the vast majority of financial and technical assistance from the United States Department of Agriculture (USDA), these are not relevant to the memorandum. See, e.g., USDA, Rural Development, Business and Industry Guaranteed Loans (2014), available at http://www.rurdev.usda.gov/bep_gar.html. Likewise, if USDA believes the size standard is incorrect for purposes of the RFA, a process exists to establish an alternative size standard. However, USDA has not utilized this process in the past ten years, and doing so would likely only create additional work for USDA. See OFFICE OF ADVOCACY, SBA: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 14 (2012), available at http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf. To the extent that agencies utilize the SBA's standard, a too low standard may lead agencies to improperly conclude and certify their proposed regulations as not affecting a substantial number of small businesses. Letter from the Hon. Donald Manzullo and the Hon. Nydia Velázquez to Gary M. Jackson, Assistant Administrator for Size Standards, SBA, Comment Proposed Rule, Proposed Rule: Small Business Size Standards: Restructuring Size Standards (July 8, 2004) (on file with the Committee Chief Counsel). The USDA's 2010 proposed livestock marketing rule is an example of an agency adopting the statutory definition of small agricultural enterprise when conducting its threshold analysis for a proposed rule. USDA, Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,348 (June 22, 2010).

¹¹⁶ Report generated on November 4, 2015, using the Federal Procurement Data System. [Hereinafter FPDS Report]. Report on file with the Committee.

¹¹⁷ *Id.* Small businesses received \$263,647, 420.29 out of \$295,699,071.59.

¹¹⁸ *Id.* Small businesses received \$25,265,178.86 out of \$92,239,568.96.

¹¹⁹ 7 U.S.C. § 1691.

¹²⁰ 15 U.S.C. § 637(d)(4).

¹²¹ *Id.*

¹²² FPDS Report, *supra* note 35.

ministratively set goal for subcontracting with small businesses is 34.06 percent of all subcontracted dollars, and food manufacturing requires that the contractor obtain raw agricultural products, the application of subcontracting rules to these contracts could result in billions of dollars of subcontracts being competed among small agricultural enterprises.¹²³ Holding all else constant, to the extent that an updated size standard increases the number of small agriculture enterprises, more small firms would be able to compete for these contracts, which would strengthen the base of small agricultural enterprises.

In the 113th Congress, the Subcommittee on Agriculture, Energy and Trade and held a hearing to examine whether the existing statutory size standard for agricultural enterprises meets the needs of small agricultural businesses.¹²⁴ The Subcommittee received testimony from the SBA, a farmer, a cattle rancher, and an agriculture industry representative. The witnesses discussed how the input and labor costs of producing crops and livestock has risen and that the annual receipts of agricultural operations can vary significantly from year to year. Furthermore, the witnesses representing agricultural enterprises recommended that Congress consider eliminating the statutory size standard and allowing the SBA to establish size standards through the rulemaking process.¹²⁵ In his testimony, Mr. John Shoraka, the Associate Administrator for Government Contracting at the SBA, stated that the agency was capable of conducting the analyses to establish size standards for agricultural enterprises, and if given the authority, the SBA would use the same notice and comment process it currently uses to establish size standards for other industries.¹²⁶ As a result, section 503 will abolish the \$750,000 size standard in favor of one regulatorily established by SBA.

4. Section 504

Both the SBA and the VA operate procurement programs for SDVOSBs. The SBA program applies to procurements at all agencies other than VA, whereas the VA program applies only to VA contracts. While both programs apply nearly identical statutory definitions of a SDVOSB, the Committee has received complaints that the application of the statutory programs is resulting in disparate decisions.

The Veterans Benefits Act of 2003 (VBA) amended the Act to create a government wide procurement program for small businesses,¹²⁷ while the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBHCITA) created the SDVOSB contracting program at VA.¹²⁸ The statutory foundations of the two

¹²³ SBA, Government-Wide Procurement Scorecard (2015), available at https://www.sba.gov/sites/default/files/files/FY14_Government-Wide_SB_Procurement_Scorecard_Public_View_2015-04-29.pdf.

¹²⁴ *Modernizing Agriculture Producer Size Standards: Before the Subcomm. on Agriculture, Energy and Trade of the H. Comm. on Small Bus.*, 113th Cong. (2014), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88924/pdf/CHRG-113hhrg88924.pdf>.

¹²⁵ *Id.* at 5–10.

¹²⁶ *Id.* at 4.

¹²⁷ Pub. L. No. 108–183, Title III, § 308, 117 Stat. 2662 (2003) (codified at 15 U.S.C. § 657f).

¹²⁸ Pub. L. No. 109–461, 120 Stat. 3431 (2006) (codified at 38 U.S.C. §§ 8127–8128). The VBHCITA also create a set-aside program for Veteran-Owned Small Businesses (VOSBs). While there is only a subcontracting goal for VOSBs under the Small Business Act, the certification

SDVOSB programs vary in three principal ways. First, the definition of a SDVOSB is slightly different. Second, the scope of the contracts to be awarded differs. Finally, the relationship between the SDVOSB program and other small business contracting programs is different.

With a few important exceptions, the VBA and the VBHCITA use the same definitions, relying on the VA's definitions of veteran or service-disabled veteran (SDV) to determine whether an individual qualifies for the program, and using the Small Business Act definitions of small business.¹²⁹ This is eminently sensible, as it entrusts to each agency that which the agency has the most experience defining. The only difference occurs when the two concepts are combined in an attempt to define SDVOSBs. Both statutes agree that the term means a small business concern that is at least 51 percent owned by one or more SDVs or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more SDVs.¹³⁰ However, there are three critical differences. First, the VBA, but not the VBHCITA, explicitly extends benefits to firms that, "in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran."¹³¹ The discrepancy regarding permanent caregivers is addressed by VA in its regulations, which extends rights to these individuals.¹³² Second, the VBHCITA but not the VBA allows the surviving spouse of a veteran to continue participating as a SDVOSB for up to ten years if, after the death of a veteran, the surviving spouse of such veteran acquires ownership rights.¹³³ Third, the VBA permits self-certification by SDVOSBs, subject to protests, while the VBHCITA requires that VA maintain a database of SDVOSBs that are certified as such by the VA.¹³⁴ While these differences may seem minor, the result is that a firm may qualify as a SDVOSB at VA but not for a contract at another agency, or vice versa. For these reasons, section 504 reconciles the definitions between the Act and title 38 of the United States Code.

Reconciling the statutory divergence is the first obstacle, as SBA and VA have both received criticism alleging that the regulatory differences between the two SDVOSB programs exceed those differences that would be expected given the statutory discrepancies. Thus, SBA and VA have undertaken joint review of the regulations governing each program and produced a chart that provides a section-by-section comparison of the existing regulations each believes are relevant (VA Chart).¹³⁵ VA has stated that this analysis demonstrates that there are only three differences between the regulations: (1) VA allows surviving spouses to inherit limited benefits;

issues described herein are generally applicable to VOSBs except for the lack of a prime contracting certification process at SBA.

¹²⁹Section 3(q) of the Small Business Act defines "veteran" in accordance with 38 U.S.C. § 101(2) and service-disabled veteran is defined per 38 U.S.C. § 101(16). VBHCITA adds the definition of small business found in Section 3(a) of the Small Business Act to 38 U.S.C. § 8127(k)(1).

¹³⁰Small Business Act, § 3(q)(2)(A); 38 U.S.C. § 8127(k)(2). *c.f.*, The VBHCITA actually requires that the service disabled veterans "are unable to manage the daily business operations of such concern," but in regulation this has been interpreted to require the management of the daily business operations. 38 C.F.R. § 74.1.

¹³¹Small Business Act, § 3(q)(2)(B).

¹³²38 C.F.R. § 74.1.

¹³³38 U.S.C. § 8127(h).

¹³⁴Small Business Act, § 36(q)(2)(B). 38 U.S.C. § 8127(f).

¹³⁵On file with the Committee.

(2) VA requires change of ownership notification; and (3) VA has a program for veteran-owned small businesses (VOSB).¹³⁶ Furthermore, VA stated that they were aware of only one interpretive difference in the application of the regulations, and that concerned a question of whether SDVs control a company with a three-person board if one SDV and one non-SDV could align against a second SDV.¹³⁷ Based on this, the conflict would appear minimal at best. However, SBA has stated “while it is true that the wording of the regulations pertaining to the VA’s and SBA’s eligibly [sic] requirements is similar, there are some key differences in interpretations.”¹³⁸

The VA Chart compares three sources of regulations—VA’s SDVOSB regulations, SBA’s SDVOSB regulations, and SBA’s 8(a) business development (8(a)) program regulations.¹³⁹ This framing of the discussion itself presents two problems. First, looking at the regulations regarding the 8(a) program may be informative, but should not be controlling since the programs have different statutory purposes. The 8(a) program is a time-limited program intended to assist socially and economically disadvantaged individuals trying to establish successful small businesses, and contracting is used as a tool in the development process.¹⁴⁰ In contrast, both SDVOSB programs are contracting programs intended to help the federal government meet its statutory goals of awarding at least 3 percent of all prime contract and subcontract dollars to SDVOSBs.¹⁴¹ When VA patterned its rules off of the 8(a) program regulations, it failed to recognize this dichotomy. This has led to situations such as that where VA requires SDVOSB living in community property states to have their spouses preemptively relinquish any interest in the firm lest the spouse be considered an owner, even though VBHCITA will allow the same spouse to qualify for the program after the SDV’s death—a requirement not found in SBA’s SDVOSB program.¹⁴² Additionally, like the 8(a) program, VA requires that SDVs receive the majority of the pay or profits of the firm.¹⁴³ SBA has not included this requirement in the SDVOSB regulations, although distribution of profits would be considered in analyzing control, because pay itself is not always determinative of control.

Perhaps more egregiously though, the VA Chart excludes the relevant SBA’s regulations that address issues fundamental to whether a SDV owns and controls a firm and whether the firm is itself small, which are found at 13 C.F.R. § 121. These regulations provide the underpinnings for the ownership and control provisions found in SBA’s SDVOSB and 8(a) programs. For example, it is this additional section of regulation that tells firms how stock ownership will be used to determine control of a company, and how board

¹³⁶ Comments of Tom Leney, Executive Director of the Veterans and Small Business Programs for VA, to VET-Force (Feb. 12, 2013).

¹³⁷ *Id.*

¹³⁸ GAO, VETERAN-OWNED SMALL BUSINESSES: PLANNING AND DATA SYSTEM FOR VA’S VERIFICATION PROGRAM NEED IMPROVEMENT 56 (2013) (GAO-13-95) (hereinafter PLANNING AND DATA).

¹³⁹ 38 C.F.R. § 74; 13 C.F.R. §§ 125.8–125.29; 13 C.F.R. § 124. See Small Business Act Programs at 4–5 for additional information on this program.

¹⁴⁰ 13 C.F.R. § 124.1.

¹⁴¹ Small Business Act, § 15(g); 38 U.S.C. § 8127(c).

¹⁴² 13 C.F.R. § 121.105(k); 38 C.F.R. § 74.3(f); *supra* note 7.

¹⁴³ 38 C.F.R. § 74.3(d).

composition affects this calculus¹⁴⁴—the very situation VA admitted caused interpretive differences.¹⁴⁵ However, these regulations go far beyond that one example—they address when agreements to act in the future will be given present effect, how to treat companies with common management, companies with substantially identical business or economic interests, companies spun off from other companies, joint ventures, companies that are unduly reliant on an ostensible subcontractor, companies with franchise and license agreements, or companies where the totality of the circumstances indicate that the business is not independently owned and controlled.¹⁴⁶ To attempt to determine if a firm is a SDVOSB without examining it in light of these regulations belies VBHCITA’s direction to use SBA’s definition of a small business, because these are the regulations that define whether a firm is small.¹⁴⁷

This has led to bright line rules at VA that do not exist at SBA. For example, VA will deny SDVOSB status if ownership in the entity carries with it the requirement that a right of first refusal to purchase the SDV’s ownership interest will be offered to another owner or third party.¹⁴⁸ While SBA does consider agreements regarding transfer of ownership, it looks at each agreement to determine whether its terms mean that the SDV does not unconditionally control the company. Similarly, VA requires that at least one SDV who “manage[s] the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business.”¹⁴⁹ SBA does not require this, as long as SDVs can prove actual ownership and control over day-to-day decisions.

Indeed, the regulatory and interpretive differences are being borne out by case law. Within SBA, any appeal regarding a firm’s size or status is heard by OHA, a body of administrative judges that provides final agency action through published decisions. Recently, OHA identified fourteen cases:

in connection with SDVO set-asides where (1) OHA determined the subject business concern was not small and thus was ineligible for the contract at issue, and (2) had the [VA regulations] been the sole governing rules, the business concern would have been eligible for the contract. In each of these 14 cases, the different outcome is owed to the operation of SBA’s affiliation rule at 13 C.F.R. § 121.103. The affiliation rule, an integral part of small business size analysis, is not a part of the DVA’s SDVO status regulations.¹⁵⁰

¹⁴⁴ 13 C.F.R. § 121.103(c). For an in depth discussion of affiliation and control issues, see Committee on Small Business, “What is a Small Business for Purpose of Federal Contracting?” 6–16 (2013), available at <http://smallbusiness.house.gov/resources/committee-publications.htm>.

¹⁴⁵ *Supra* note 17.

¹⁴⁶ 13 C.F.R. §§ 121.103(a)(5); 121.103 (d)–(i).

¹⁴⁷ *Supra* note 3.

¹⁴⁸ VA, Verification Assistance Brief—Transfer Restrictions, available at <http://www.va.gov/osdbu/veteran/transferRestrictionsBrief.asp>.

¹⁴⁹ 38 C.F.R. § 74.4(c)(4).

¹⁵⁰ Email from SBA to Committee Staff, “OHA decisions on Service-Disabled Veteran-Owned Status and Size Cases,” (Feb. 12, 2013). The cases are: Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5394 (2012); Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5344 (2012); Size Appeal of EarthCare Solutions, Inc., SBA No. SIZ-5183 (2011); Size Appeal of Specialized Veterans, LLC, SBA No. SIZ-5138 (2010); Size Appeal of A1 Procurement, LLC, SBA No. SIZ-5121 (2010); Size Appeal of J.M. Waller Associates, Inc., SBA No. SIZ-5108 (2010); Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5086 (2009); Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5085 (2009); Size Appeal of Blue Cord

These cases should not be seen as an exhaustive list, since OHA does not have the ability to review cases that VA denies, nor does OHA see each case that VA approves. However, it does illustrate how different applications of regulations by even the most well-intentioned parties can lead to regulatory and interpretive discrepancies. Therefore, section 504 requires that VA and SBA decide questions of ownership and control, but not of veteran status, using SBA's regulations.

Both SBA and VA processes for certifying SDVOSBs are imperfect. SBA relies upon a process of self-certification, but allows contracting officers, SBA, or other interested parties to raise a protest to the SBA Director of the Office of Government Contracting (DGC).¹⁵¹ The DGC then has 15 days to investigate and issue a decision.¹⁵² Appeals of the DGC's decision are heard by OHA and decided in 15 days, at which time a published decision is made publicly available.¹⁵³ While this process has the advantage of allowing nearly 13,000 SDVOSBs to quickly begin competing for contracts, it also leaves open the door for fraud.¹⁵⁴

In contrast, VA's SDVOSB program has 4,102 SDVOSBs currently certified in its database, each of which must be certified yearly.¹⁵⁵ Additionally, in fiscal year 2012, VA received 4,900 new initial applications for both the SDVOSB and VOSB program.¹⁵⁶ VA uses over 200 full time equivalents and spends \$33 million a year running a four step certification process after an application is submitted:

- VA employees screen it to ensure that it meets the minimum eligibility requirements;
- VA contractors conduct an initial evaluation and make a preliminary recommendation for approval, denial or additional review;
- VA contractors and employees review the initial recommendation, and if necessary, conduct site visits; and
- VA supervisors make a formal determination and issue a letter decision to the applicant.¹⁵⁷

This process takes approximately 85 days, and 61 percent of applicants are accepted.¹⁵⁸ Those that are rejected may appeal the decision through a Request for Consideration, which is conducted by the VA's Office of General Counsel.¹⁵⁹ Requests for reconsideration are granted on 48 percent of appeals, but generally take an additional 147 days. In contrast with SBA's process where appeals are decided by independent judges "where the standard of review

Construction, Inc., SBA No. SIZ-5077 (2009); Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-5049 (2009); Size Appeal of Heritage of America, LLC, SBA No. SIZ-5017 (2008); Size Appeal of Mission Solutions, Inc., SBA No. SIZ-4828 (2006); Size Appeal of B & M Construction, Inc., SBA No. SIZ-4805 (2006) Size Appeal of Catapult Technology, Ltd., SBA No. SIZ-4795 (2006).

¹⁵¹ 13 C.F.R. § 125.24-25.

¹⁵² 13 C.F.R. § 125.25-27.

¹⁵³ 13 C.F.R. § 134-514.

¹⁵⁴ SDVOSB numbers are taken from the SBA's Dynamic Small Business Search tool, available at www.dsbs.sba.gov; for information on fraud, see, e.g. GAO, CASE STUDIES SHOW FRAUD AND ABUSE ALLOWED INELIGIBLE FIRMS TO OBTAIN MILLIONS OF DOLLARS IN CONTRACTS (2009)(GAO-10-108) (hereinafter CASE STUDIES).

¹⁵⁵ www.vip.vetbiz.gov; 38 C.F.R. § 74.15; c.f. <http://www.va.gov/osdbu/faqs/verification.asp> (recertification is required every two years).

¹⁵⁶ PLANNING AND DATA at 44.

¹⁵⁷ PLANNING AND DATA at 8.

¹⁵⁸ *Id.* at 14, 44.

¹⁵⁹ *Id.* at 44; *supra* note 16. VA's regulations require a decision in 60 days. 38 C.F.R. § 74.11.

is whether the determination of eligibility was based on a clear error of fact or law or whether the decision was arbitrary, capricious or contrary to law[. VA] has no such appellate procedure.”¹⁶⁰ VA’s decisions are not published, and do not represent legal precedent.

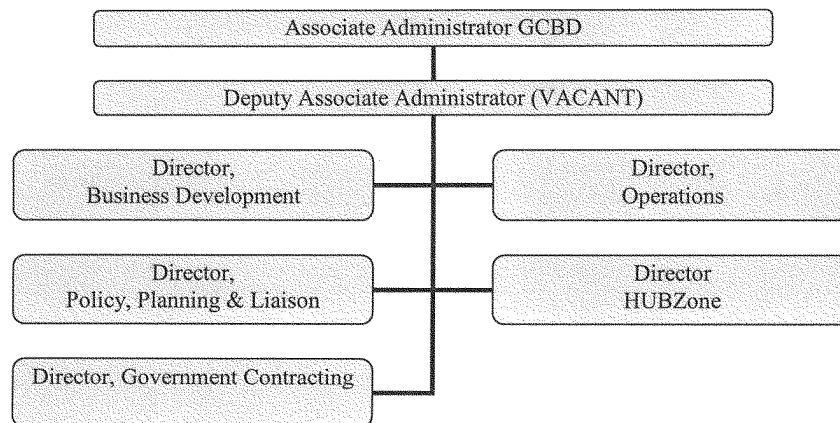
GAO and the federal courts have taken issue with VA’s process. GAO recently found that while “VA has made progress toward reducing its vulnerability to fraud and abuse,” the agency’s strategic planning and data capabilities necessary to prevent that fraud remain inadequate.¹⁶¹ The Court of Federal Claims (COFC), when examining transfer restrictions and appeals under the VA process, found that VA’s appeals process does not allow “basic procedural due process” and that the examination “contravened the minimal requirements for informal adjudication set forth in Section 555 of the [Administrative Procedures Act (APA)].”¹⁶² While the GAO finding highlighted the lack of long term planning and data systems that allow VA to monitor applications and processes to ensure consistence, the COFC holdings go to a more crucial question—whether the verification system is able to address the tension between providing due process to SDVs firms and preventing fraudulent contracting.

To insure that the new regulations are uniformly implemented and to protect the due process rights of all potential SDVOSBs, section 504 provides that OHA will hear all appeals dealing with ownership and control. VA will continue to hear appeals dealing with an individual’s status as a veteran.

5. Section 505

The Office of Government Contracts and Business Development (GCBD) at SBA is overseen by an associate administrator appointed by the President, supported by five senior executives and a head of operations. It is depicted in the following chart.

Office of Government Contracts and Business Development¹⁶³



¹⁶⁰ PLANNING AND DATA at 56.

¹⁶¹ *Id.* at 33–34.

¹⁶² *Miles Construction, LLC v. United States*, No. 12–597C 13, 25 (Fed. Cl. 2013); *see also* *KWV, Inc. v. United States*, No. 12–882C (Fed. Cl. 2013).

¹⁶³ All charts are based on information provided by SBA.

The GCBD programs exist within five suboffices: Policy, Planning and Liaison (PPL), Government Contracting (GC), Business Development (BD), HUBZone (HZ) and Operations. PPL has three primary responsibilities: (1) regulations; (2) goaling; and (3) size standards. On the regulatory front, PPL drafts all the amendments to the contracting regulations within chapter 13 of the Code of Federal Regulations.¹⁶⁴ Additionally, PPL represents SBA on the Civilian Agency Acquisition Council (CAAC). The CAAC and its defense counterpart, the Defense Acquisition Regulatory Council (DARC) draft all of the regulations promulgated as part of the Federal Acquisition Regulation, which governs almost all federal contracts.

Additionally, PPL creates specific size standards for each industry that determine which businesses qualify as small businesses. The office assigns revenue- or employee-based size standards to each of the more than 1,100 North American Industrial Classification System (NAICS) codes, as further discussed in section 502.¹⁶⁵ These size standards then govern which firms can compete for restricted contracts.

Finally, PPL develops and negotiates prime contracting and subcontracting goals with each of the federal agencies. SBA is required to report to Congress annually on the goal achievements.¹⁶⁶

The GC office oversees the contracting assistance programs and most of GCBD's field operations, including the six area offices. The best known function of GC is that its area offices house the Procurement Center Representatives (PCRs) and Commercial Market Representatives (CMRs) discussed most recently during the December 9, 2015 Subcommittee on Contracting and Workforce Hearing titled, "Supporting Success: Empowering Small Business Advocates." As explained in that hearing memorandum, the PCRs are located at major federal procurement activities and review solicitations to ensure that small businesses have the chance to compete.¹⁶⁷ Likewise, the CMRs help small businesses compete for federal subcontracts.¹⁶⁸

Additionally, GC oversees the Certificate of Competency Program, Natural Resources Assistance Program, Waivers of the Nonmanufacturer Rule, and the Small Business Size Determination Program. The Certificate of Competency Program allows contracting officers unsure of whether a small business has the ability to complete a task to refer the contract to SBA for evaluation.¹⁶⁹ The Natural Resources Assistance Program aids small businesses seeking to purchase timber from the federal government.¹⁷⁰ The nonmanufacturer rule requires that any contract for goods in which competition is limited to small businesses or a subset thereof require that the goods delivered be the product of a domestic small business unless SBA has determined that no such businesses are

¹⁶⁴ It is worth noting that position responsible for drafting regulations has been vacant since 2014, despite the high backlog of regulations waiting for SBA action.

¹⁶⁵ 15 U.S.C. § 632(a). In a few instances, other factors are also considered, such as production or assets. For further information, please see the Committee Memorandum, "What is a Small Business for Purposes of Federal Contracting?" (2013), available at http://smbiz.house.gov/uploadedfiles/what_is_a_small_business_for_purpose_of_federal_contracting.pdf.

¹⁶⁶ *Id.* at § 644(h)(2).

¹⁶⁷ Committee Staff Memorandum, Supporting Success: Empowering Small Business Advocates 1–2 (2015), available at http://smbiz.house.gov/uploadedfiles/12-09-2015_hearing_memo.pdf.

¹⁶⁸ *Id.* at 3.

¹⁶⁹ 15 U.S.C. § 637(b)(7).

¹⁷⁰ 15 U.S.C. § 644(a).

available.¹⁷¹ The Small Business Size Determinations Program applies the size standards promulgated by PPL to adjudicate whether a firm is small for purposes of a specific contract.¹⁷² C also manages four contracting programs: the small business prime contracting program, the small business subcontracting program, the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program, and the Women-Owned Small Business (WOSB) Program.

The BD Office has oversight of the 8(a) business development program (8(a) program) and the small disadvantaged business program as described in sections 202 and 205.

A HUBZone is a geographic area with high poverty or high unemployment, as defined through a complicated statutory framework.¹⁷³ HUBZone small business concerns are small businesses whose principal office is located in a HUBZone, that are at least 51 percent owned by United States citizens, and which draw at least 35 percent of their employees from HUBZones.¹⁷⁴ These firms can receive set-aside contracts if two or more HUBZone concerns are expected to make a fair and reasonable offer.¹⁷⁵ Sole-source awards are permitted for contracts below \$4 million (\$6.5 million for manufacturing contracts).¹⁷⁶ A price evaluation adjustment of 10 percent is granted when bidding on contracts offered through full and open competition.¹⁷⁷ To certify as a HUBZone firm, a small business must apply on the SBA website, recertify every three years, certify through SAM, and qualify at the time of offer and the time of award.¹⁷⁸ SBA has the authority to conduct program examinations of firms to verify their continued eligibility¹⁷⁹ or to hear appeals regarding a firm's size¹⁸⁰ or eligibility for the program.¹⁸¹ There is a statutory goal of awarding three percent of all prime contract dollars and three percent of all subcontract dollars to HUBZone firms.¹⁸² The HUBZone office at SBA publishes the lists and maps of eligible HUBZones, reviews applications, and conducts reviews of firms. SBA does not provide details of the organizational structure.

Finally, GCBBD's operations group manages the information technology and develops training to support the GCBBD offices. It provides additional administrative support to the Associate Administrator.

¹⁷¹ 15 U.S.C. § 637(a)(17); 15 U.S.C. § 657s(a)(4).

¹⁷² 13 C.F.R. §§ 121.1001 through 121.1009.

¹⁷³ 17 HUBZone are defined as any area located in a qualified census tract, qualified non-metropolitan county, within the external boundaries of an Indian reservation or an area subject to the Base Realignment and Closure Act (BRAC). 15 U.S.C. § 632(p). Qualified census tracts are tracts designated by the Department of Housing and Urban Development (HUD) in which either 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent, but no more than 20 percent of a metropolitan statistical area may qualify. 26 U.S.C. § 42(d)(5)(B)(ii). Qualified nonmetropolitan counties are those in which median household income is at less than 80 percent of the nonmetropolitan State median household income, the unemployment rate at least 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, or which is located in a difficult development area, as designated by HUD. 15 U.S.C. § 632(p).

¹⁷⁴ 15 U.S.C. § 632(p)(5).

¹⁷⁵ 48 C.F.R. § 19.1305-1307.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ 13 C.F.R. § 126.300.

¹⁷⁹ *Id.* at § 126.401.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at § 121.1001. SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's qualified HUBZone SBC status. 13 C.F.R. § 126.801.

¹⁸² 15 U.S.C. § 644(g)(1).

The recent GAO report examining challenges at SBA identified a number of open recommendations for GCBBD, but it also identified broad reaching issues within SBA that are affecting the ability of GCBBD to perform its mission.¹⁸³ The following is a brief overview of the specific open recommendations, and of the systemic issues.

In a 2011 report, GAO stated that:

[t]o help ensure that [Government Contracting Area Report (GCAR)] data are accurate and that SBA reliably can use the data to monitor PCR and CMR performance and determine whether established goals have been achieved, we recommend that SBA's Director of Government Contracting take the following two steps:

- provide clear and complete guidance to PCRs and CMRs on accurately recording and maintaining the appropriate backup documentation for accomplishments reported in the GCAR monthly report, and
- require that monthly GCAR data are verified and that documentation for PCR and CMR records are periodically reviewed for quality and completeness.”¹⁸⁴

While additional guidance has been provided, GAO in its Management Report still recommends that “[t]o help ensure that [GCAR] data are accurate and that SBA reliably can use the data to monitor [PCR] and [CMR] performance and determine whether established goals have been achieved, SBA's Director of Government Contracting should require that monthly GCAR data are verified and that documentation for PCR and CMR records are periodically reviewed for quality and completeness.”¹⁸⁵ As discussed in a 2011 hearing of this Subcommittee, GCAR data is essential for tracking instances of bundling, consolidation, and failure of contracting agencies to follow the Act.¹⁸⁶

In a 2013 report, GAO found that agencies did not understand the rule regarding bundling and consolidation and were not fully complying with the law.¹⁸⁷ GAO recommended that SBA submit the statutorily required bundling reports to Congress to increase accountability and promote compliance.¹⁸⁸ While SBA agreed, the recommendation had not been complied with at the time of the Management Report, prompting GAO to again recommend that SBA file the required reports.¹⁸⁹ Given the increased attention this Subcommittee has focused on bundling and consolidation, most recently at a March 17, 2015 hearing, and requiring in law that agencies improve their reporting on bundling and consolidation¹⁹⁰ it would improve the Committee's oversight if SBA were to provide timely reports.

¹⁸³ GAO, SMALL BUSINESS ADMINISTRATION: LEADERSHIP ATTENTION NEEDED TO OVERCOME MANAGEMENT CHALLENGES (GAO-15-347) (2015), available at <http://www.gao.gov/products/GAO-15-347> [hereinafter “GAO Management Report”].

¹⁸⁴ GAO, IMPROVEMENTS NEEDED TO HELP ENSURE RELIABILITY OF SBA'S PERFORMANCE DATA ON PROCUREMENT CENTER REPRESENTATIVES 9 (GAO-11-549R) (2011).

¹⁸⁵ Management Report at 106.

¹⁸⁶ See Helping Small Businesses Compete: Challenges Within Programs Designed to Assist Small Contractors Subcommittee on Contracting and Workforce (2011).

¹⁸⁷ GAO, SMALL BUSINESS CONTRACTING: UPDATED GUIDANCE AND REPORTING NEEDED FOR CONSOLIDATED CONTRACTS 8 (GAO-14-36) (2013).

¹⁸⁸ *Id.* at 19.

¹⁸⁹ Management Report at 106.

¹⁹⁰ The FY 2015 and FY 2016 NDAA's each included a data quality improvement plan for bundling and consolidation. See Pub. L. No. 113-291 § 822 and Pub. L. No. 114-92 § 862.

The use of third-party certifiers for WOSB and EDWOSB programs came under scrutiny in a 2014 report that led to two outstanding recommendations.¹⁹¹ Specifically, GAO found that the lack of clear guidance and oversight allowed for abuse of the program.¹⁹² However, despite language in the FY 2015 NDAA requiring SBA to move to discontinue self-certification,¹⁹³ SBA has not closed two recommendations. Specifically, the Management Report echoed the recommendation that “[t]o improve management and oversight of the [WOSB] program, and to help ensure the effective oversight of third-party certifiers, the [SBA] should establish and implement comprehensive procedures to monitor and assess performance of certifiers in accord with the requirements of the third-party certifier agreement and program regulations.”¹⁹⁴ Further, GAO recommended that “[t]o improve management and oversight of the WOSB program, and to provide reasonable assurance that only eligible businesses obtain WOSB set-aside contracts, [SBA] should enhance examination of businesses that register to participate in the WOSB program, including actions such as: (1) promptly completing the development of procedures to conduct annual eligibility examinations and implementing such procedures; (2) analyzing examination results and individual businesses found to be ineligible to better understand the cause of the high rate of ineligibility in annual reviews, and determine what actions are needed to address the causes; and (3) implementing ongoing reviews of a sample of all businesses that have represented their eligibility to participate in the program.”¹⁹⁵ If any set-aside program fails to implement the appropriate controls, it opens itself to waste, fraud and abuse. Therefore, these recommendations remain critical.

While the HUBZone program does not rely upon third-party verification programs, the outstanding GAO recommendations are very similar. Based on a 2015 report that examined lacks of controls and communication in the HUBZone program, GAO made two recommendations.¹⁹⁶ First, GAO recommended that “[t]o improve SBA’s administration and oversight of the [HUBZone] program and reduce the risk that firms that no longer meet program eligibility criteria receive HUBZone contracts, [SBA] should conduct an assessment of the recertification process and implement additional controls, such as developing criteria and guidance on using a risk-based approach to requesting and verifying firm information, allowing firms to initiate the recertification process, and ensuring that sufficient staff will be dedicated to the effort so that a significant backlog in recertifications does not recur.”¹⁹⁷ Further, GAO recommended that “SBA should establish a mechanism to better ensure that firms are notified of changes to HUBZone designations that may affect their participation in the program, such as ensuring that all certified firms and newly certified firms are signed up for the broadcast e-mail system or including more specific information in certification letters about how location in a redesignated

¹⁹¹ GAO, WOMAN-OWNED SMALL BUSINESS PROGRAM: CERTIFIER OVERSIGHT AND ADDITIONAL ELIGIBILITY CONTROLS ARE NEEDED (GAO-15-54) (2014).

¹⁹² *Id.* at 15.

¹⁹³ Pub. L. No. 113-291 § 825.

¹⁹⁴ Management Report at 106.

¹⁹⁵ *Id.*

¹⁹⁶ GAO, SMALL BUSINESS CONTRACTING: OPPORTUNITIES EXIST TO FURTHER IMPROVE HUBZONE OVERSIGHT (GAO-15-234) (2015).

¹⁹⁷ Management Report at 106.

area can affect their participation in the program.”¹⁹⁸ Given that factors such as the residences of employees can change daily, and that the HUBZone program was designed to continually shift between locations so that only the most underutilized areas would qualify, both recommendations are common sense.

In September 2011 and again in 2015, the Subcommittee on Contracting and Workforce held hearings examining mentor-protégé programs. This was spurred in part by a 2011 GAO report,¹⁹⁹ which has led to legislation reforming the mentor-protégé programs.²⁰⁰ The crux of the report was that, while well-intentioned, there was little to no tracking of protégé firms to see if the programs produced lasting benefits.²⁰¹ Thus, GAO recommended and SBA agreed that the program would benefit from post award tracking. However, nearly six years later, the recommendation that “[t]o more fully evaluate the effectiveness of their mentor-protégé programs, . . . the Mentor-Protégé Program Directors of the . . . SBA . . . should consider collecting and maintaining protege postcompletion information” remains open.²⁰² This is particularly problematic now that SBA has been given statutory authority over all civilian agency mentor-protégé programs.

In addition to the specific recommendations that were outstanding for GCBD, other agency-wide issues are posing challenges to the effectiveness of the GCBD programs and organization. Specifically, human capital, contracting and information technology and organizational structure are hampering GCBD. GAO noted in its management report that SBA’s Inspector General (OIG) “has included human capital as one of the most serious management challenges at SBA since fiscal year 2001.”²⁰³ Within GCBD, this has led to the use of Voluntary Early Retirement Authority and Voluntary Separation Incentive Payments (VERA/VSIP) programs for fiscal years 2012 and 2014.²⁰⁴ In a VERA/VSIP action, the agency pays employees up to \$25,000 to retire, but then may only replace a fraction of the retiring employees to achieve cost savings. GAO notes that “SBA officials stated that each program office was consulted to determine which positions were eligible for VERA/VSIP.”²⁰⁵ However, in GCBD the VERA/VSIP action led to the loss of statutorily mandated positions, such as PCRs, and the loss of numerous senior executives. As a consequence, GCBD has been operating without a Deputy, PPL lost its director of Policy and Research, the BD program lost its head of management and technical assistance, and numerous PCRs, BOS, and CMRs left. Sixteen months later these positions have not been filled. This has led to a backlog of regulations: based on the FY13–FY16 NDAA, SBA still needs to produce seven proposed rules, thirteen final rules, and take seventeen other actions. Fewer than fifty PCRs are responsible for over \$400 billion in contracts each year, and the majority of those PCRs carry other job assignments. GCBD’s ability to

¹⁹⁸ *Id.* at 106–107.

¹⁹⁹ GAO, MENTOR-PROTÉGÉ PROGRAMS HAVE POLICIES THAT AIM TO BENEFIT PARTICIPANTS BUT DO NOT REQUIRE POSTAGREEMENT TRACKING (GAO–11–548R) (2011).

²⁰⁰ NDAA for Fiscal Year 2013, Pub. L. No. 112–239 § 1641 (2013).

²⁰¹ MENTOR-PROTÉGÉ PROGRAMS HAVE POLICIES THAT AIM TO BENEFIT PARTICIPANTS BUT DO NOT REQUIRE POSTAGREEMENT TRACKING at 9.

²⁰² Management Report at 107.

²⁰³ Management Report at 20.

²⁰⁴ *Id.* at 49.

²⁰⁵ *Id.* at 43 footnote 103.

fulfill its mission is jeopardized, which begs the question of why GCBBD leadership approved buyouts for crucial positions.

While information technology (IT) remains a challenge for SBA generally, within GCBBD it has led to a lack of oversight of the 8(a) and HUBZone programs. Specifically, GAO cites a February 2014 report by the OIG in which SBA failed to follow contracting law when purchasing its OneTrack system.²⁰⁶ One Track was intended to track participants in the 8(a) and HUBZone programs, as well as SBA's loan programs, to reduce fraud. However, since SBA "failed to perform market research or use a modular contracting strategy intended to reduce acquisition risks" the agency was left with a system that still is not deployed and which does not meet the needs of GCBBD.²⁰⁷

In a 2003 report, GAO criticized SBA's organizational structure as creating complex overlapping relationships among offices that contributed to challenges in delivering services to small businesses.²⁰⁸ GAO again specified that the "working relationships between headquarters and field offices . . . differ from reporting relationships, potentially posing programmatic challenges."²⁰⁹ A "[d]istrict officials work[ing] with program offices at SBA's headquarters to implement the agency's programs, but [reporting] to regional administrators, who themselves report to the Office of Field Operations," GAO cited the BOS "in the district offices [who] work with [GCBBD] at SBA headquarters to assist small businesses with securing government contracts but report to district office management."²¹⁰

GAO also cited as problem that "some officials have the same duties."²¹¹ While not identified as such by GAO, within GCBBD the delineation between GC and PPL is tenuous, as illustrated by SBA's own website. PPL does not have a website, but GC does.²¹² The GC website says that it is responsible for goaling, and that it plays a major role in federal regulations on government contracting.²¹³ Indeed, PPL and GC have previously been a single organization as recently as 2015.

Given this myriad of organizational and operational issues, section 505 requires that the Comptroller General conduct a substantial review of the GCBBD and report back with recommendations on how to restructure the office to achieve greater efficiencies.

6. Section 506

Section 506 requires that reports SBA provides to the Office of Management and Budget regarding data security be provided to the Committee as well. This will help the Committee perform better oversight of important IT security issues.

7. Section 507

Surety bonds protect the government and small businesses alike by providing a third party guarantee that the prime contractor will

²⁰⁶ *Id.* at 28–29.

²⁰⁷ *Id.*

²⁰⁸ Management Report at 58, *citing* GAO, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: SBA (GAO–03–116) (2003).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² <https://www.sba.gov/offices/headquarters/ogc/about-us>.

²¹³ *Id.*

complete construction, commonly called a performance bond, and that the prime contractor will pay its suppliers and subcontractors, commonly called a payment bond. Under federal law, to bid on most federal construction and architectural or engineering projects above \$150,000, the prime contractor must provide the contracting officer with a surety bond, and both the performance and payment bonds become binding upon contract award.²¹⁴ Thus, when bonds are issued by a surety, the surety vouches for the creditworthiness and capacity of the contractor, protects the government against uncompleted projects and liens, and protects subcontractors against unscrupulous or over extended prime contractors. However, when the requirement to bond is waived, it may expose the federal government, subcontractors and taxpayers to risk. Section 507 requires that the Comptroller General assess whether better outcomes are obtained when surety bonds are required.

IV. HEARINGS

In the 114th Congress, the Committee held numerous hearings that looked at the issues covered by H.R. 4341.

In the 114th Congress, the Committee held thirteen hearings that looked at the issues covered by H.R. 4341. On February 12, 2015, the Full Committee held a hearing titled “Contracting and the Industrial Base” that examined surety bond issues. On March 7, 2015, the Subcommittee on Contracting and Workforce held a hearing titled “Contracting and the Industrial Base II: Bundling, Goaling and the Office of Hearings and Appeals” that looked at the use of subcontracting, and at the role of the PCR. On March 19, 2015, the Subcommittee on Contracting and Workforce held a hearing on “Contracting and the Industrial Base III: Reverse Auctions, Verification and the SBA’s Role in Rulemaking,” that examined the SDVOSB verification process, and GCBD organizational issues. On June 4, 2015, the Subcommittee on Contracting and Workforce held a hearing titled “Sizing Up Small Businesses: SBA’s Failure to Implement Congressional Direction,” that looked at size standards and GCBD organizational issues. On June 23, 2015, the Subcommittee on Oversight and Investigations held a joint hearing with the Veterans’ Affairs Committee of the House of Representatives (HVAC) Subcommittee on Oversight and Investigations called “Manipulation and Fraud in Reporting VA Small Business Goals” that looked at the role of the OSDBU and the use of purchase cards. On October 27, 2015, at a hearing called “Maximizing Mentoring: How are the SBA and DoD Mentor-Protégé Programs Serving Small Businesses?” the Subcommittee on Contracting and Workforce examined the DoD and SBA mentor-protégé programs. At a hearing called “An Examination of Continued Changes in VA’s Vets First Verification Process,” on November 4, 2015, the Subcommittee on Contracting and Workforce and the HVAC Subcommittee on Investigations, Oversight and Regulations examined the VA and SBA verification programs for SDVOSB contractors. On November 18, 2015, the Subcommittee on Contracting and Workforce held a hearing called “Continuing Challenges for Small Contractors,” that examined subcontracting issues and goaling and transparency challenges. The Subcommittee on Agriculture, Energy

²¹⁴ 40 USC § 3131(b).

and Trade held a hearing on size standards for agricultural producers on November 19, 2015 called “Improving Size Standards for Small Farmers and Ranchers.” The PCR, OSDBU, CMR, and BOS programs were the subject of a hearing of the Subcommittee on Contracting and Workforce on December 9, 2015 called “Supporting Success: Empowering Small Business Advocates.” On February 3, 2016, the Subcommittee on Contracting and Workforce held a hearing called “SBA Management Review: Office of Government Contracts and Business Development” that looked at the management of GCBD. On February 25, 2016, the Subcommittee on Contracting and Workforce looked at compliance with subcontracting plans in a hearing called “Hotline Truths: Issues Raised by Recent Audits of Defense Contracting.” Finally, on April 5, 2016, the Subcommittee on Contracting and Workforce held a hearing on “Challenges for Small Defense Contractors” that examined compliance challenges and other issues.

V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on January 13, 2016 and ordered H.R. 4341 reported, as amended, to the House by a voice vote at 10:36 a.m. During the markup, seven amendments were offered. All amendments were adopted. Disposition of the amendments is addressed below and is based on the order amendments were filed with the Clerk of the Committee and not necessarily in the order that they were considered at the markup.

Amendment Number One filed by Ms. Velázquez (D-NY) added section 205 to H.R. 4341 and provide the roles and responsibilities of the BOS at SBA. The amendment was adopted by voice vote at 10:16 a.m.

Amendment Number Two filed by Ms. Lawrence (D-MI) added section 506 to H.R. 4341 and requires that SBA share data on IT security with the Committee. The amendment was adopted by voice vote at 10:19 a.m.

Amendment Number Three filed by Mr. Takai (D-HI) allows mentors participating in DoD mentor-protégé programs to refer protégé firms to Women’s Business Centers for technical assistance. The amendment was adopted by voice vote at 10:22 a.m.

Amendment Number Four filed by Mr. Chabot (R-OH) made technical corrections. The amendment was adopted by voice vote at 10:35 a.m.

Amendment Number Five filed by Ms. Hahn (D-CA) clarified that a task order is a contract for purposes of section 15 of the Act. The amendment was adopted by voice vote at 10:28 a.m.

Amendment Number Six filed by Ms. Chu (D-CA) clarified that SBA may create additional industry groups and new size standards to reflect federal buying patterns. The amendment was adopted by voice vote at 10:31 a.m.

Amendment Number Seven filed by Mr. King (R-IA) required that GAO conduct a review on the use of surety bonds on small business contracts. After the adoption of a perfecting amendment by unanimous consent, the amendment was adopted by voice vote at 10:33 a.m.

VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. There were no recorded votes on H.R. 4341.

VII. SECTION-BY-SECTION ANALYSIS OF H.R. 527

SECTION-BY-SECTION ANALYSIS OF H.R. 4341 AS AMENDED

Section 1. Short title

This Section designates the bill as the “Defending America’s Small Contractors Act of 2016”

Section 2. Table of contents

This section provides the table of contents, and divided the bill into five titles.

TITLE I—IMPROVING TRANSPARENCY AND CLARITY FOR SMALL BUSINESSES

Section 101. Plain language rewrite of requirements for small business procurements

This section strikes and replaces the current section 15(a). It makes no substantive changes to the Act, but merely restructures the subsection to aid with comprehension.

Section 102. Improving reporting on small business goals

This section amends section 15(h)(2)(E) of the Act in eight paragraphs.

Paragraph (1)

Paragraph (1) amends clause (i) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (V) requires that when SBA reports on annual prime contract awards to small business, it must also report on awards to small businesses that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small businesses. The new subclause (VI) requires that when SBA reports on annual prime contract awards to small business, it must also report on awards to small businesses that were awarded using a procurement method other than a small business set-aside or full and open competition.

Paragraph (2)

Paragraph (2) amends clause (ii) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VI) requires that when SBA reports on annual prime contract awards to SDVOSBs, it must also report on awards to SDVOSBs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be SDVOSBs. The new subclause (VII) requires that when SBA reports on annual prime contract awards to SDVOSBs, it must also report on awards to SDVOSBs that were awarded using a procure-

ment method other than a SDVOSB set-aside or full and open competition.

Paragraph (3)

Paragraph (3) amends clause (iii) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VII) requires that when SBA reports on annual prime contract awards to HUBZones, it must also report on awards to SDVOSBs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be HUBZones. The new subclause (VIII) requires that when SBA reports on annual prime contract awards to HUBZones, it must also report on awards to SDVOSBs that were awarded using a procurement method other than a HUBZones set-aside or full and open competition.

Paragraph (4)

Paragraph (4) amends clause (iv) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VII) requires that when SBA reports on annual prime contract awards to SDBs, it must also report on awards to SDBs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be SDBs. The new subclause (VIII) requires that when SBA reports on annual prime contract awards to SDBs, it must also report on awards to SDBs that were awarded using a procurement method other than a preference for SDBs or full and open competition.

Paragraph (5)

Paragraph (5) amends clause (v) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VI) requires that when SBA reports on annual prime contract awards to Indian Tribes other than Alaska Native Corporations (ANC), it must also report on awards to Indian Tribes that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be Indian Tribes. The new subclause (VII) requires that when SBA reports on annual prime contract awards to Indian Tribes other than ANCs, it must also report on awards to Indian Tribes that were awarded using a procurement method other than a preference for SDBs or full and open competition.

Paragraph (6)

Paragraph (6) amends clause (vi) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VI) requires that when SBA reports on annual prime contract awards to Native Hawaiian Organizations (NHO), it must also report on awards to NHOs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be NHOs. The new subclause (VII) requires that when SBA reports on annual prime contract awards to NHOs, it must also report on awards to Indian Tribes that were awarded using a procurement method other than a preference for SDBs or full and open competition.

Paragraph (7)

Paragraph (7) amends clause (vii) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (VI) requires that when SBA reports on annual prime contract awards to ANCs, it must also report on awards to ANCs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be ANCs. The new subclause (VII) requires that when SBA reports on annual prime contract awards to ANCs, it must also report on awards to ANCs that were awarded using a procurement method other than a preference for SDBs or full and open competition.

Paragraph (8)

Paragraph (8) amends clause (viii) of section 15(h)(2)(E) of the Act by adding two new subclauses. The new subclause (IX) requires that when SBA reports on annual prime contract awards to WOSBs, it must also report on awards to WOSBs that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be WOSBs. The new subclause (X) requires that when SBA reports on annual prime contract awards to WOSBs, it must also report on awards to WOSBs that were awarded using a procurement method other than a preference for WOSBs or full and open competition.

Section 103. Transparency in small business goals

This section amends section 15(g) of the Act by adding a new paragraph (4). The new paragraph directs that the Administrator of the SBA may not, when calculating whether the federal government met the 23 percent goal for federal prime contracting, exclude contracts from the base for any of five reasons. Those reasons are based on where the contract was awarded, where it was performed, whether another law directs that the contract go to another entity, such as Federal Prison Industries, or whether funding for the contract is from fees collected by the agency rather than appropriations if the contract is subject to a bid protest, and finally whether the contract is covered by the Federal Acquisition Regulation. This will prohibit the current practice of excluding nearly twenty percent of federal contract dollars and artificially inflating the goals.

*Section 104. Uniformity in procurement terminology**Subsection (a)—In General*

This subsection amends section 15(j)(1) of the Act (15 U.S.C. 644(j)(1)) to replace the words “greater than \$2,500 but not greater than \$100,000” with the phrase “greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold.” Given that the dollar thresholds applicable to this program adjust every five years and so no longer reflect the values provided in the Act, the implementing regulations have already adopted the terms micro-purchase threshold and simplified acquisition threshold. This change keeps the statute and the regulations consistent.

Subsection (b)—Technical Amendment

This subsection amends section 3(m) of the Small Business Act to ensure that the definitions used for the terms prime contract,

prime contractor, simplified acquisition threshold, and micro-purchase threshold are given the same meaning as they are in title 41 of the United States Code. Further, it clarifies that the term “total purchase and contracts for property and services” means “total number and total dollar amount of contracts and orders for property and services.”

TITLE II—CLARIFYING THE ROLES OF SMALL BUSINESS ADVOCATES

Section 201. Scope of review by procurement center representatives

This section amends section 15(l) of the Act to add a new paragraph (9). The new paragraph directs that the SBA Administrator may not prevent PCRs from reviewing contracts and task orders that are set aside for small business concerns, partially set aside for small business concerns, contain a small business reserve, or would result in a bundled or consolidated contract.

Section 202. Responsibilities of commercial market representatives

This section amends section 4(h) of the Act.

Paragraph (1)

Paragraph (1) retitles the subsection “Commercial Market Representatives.”

Paragraph (2)

Paragraph (2) redesignates subparagraphs (A) and (B) as clauses (i) and (ii).

Paragraph (3)

Paragraph (3) amends the new clause (ii) to state the educational requirements must be included in any posting seeking to hire a CMR.

Paragraph (4)

Paragraph (4) amends the new clause (i) by striking “paragraph (2)” and inserting “paragraph (1).”

Paragraph (5)

Paragraph (5) redesignates paragraphs (1) and (2) as subparagraphs (A) and (B).

Paragraph (6)

Paragraph (6) strikes “paragraph (2)” the new subparagraph (A) and inserts “subparagraph (B).”

Paragraph (7)

Paragraph (7) by inserts a new paragraph (1). The new paragraph provides that CMR should report to GCBD. It further explains that their responsibilities are to advance the use of small business concerns on federal subcontractors, including helping prime contractors find qualified subcontractors and assisting prime contractors with meeting their responsibilities under their subcontracting plans. Further, the CMR should help small business concerns improve their capacity to perform as subcontractors.

Section 203. Duties of the Office of Small and Disadvantaged Business Utilization

This section amends section 15(k) of the Act.

Paragraph (1)

Paragraph (1) strikes the references to section 8, 15 or 44 in section 15(k) of the Act and replaces it with section 8, 15, 31, 36, or 44. This allows the OSDBU to provide assistance to SDVOSBs and HUBZones.

Paragraph (2)

Paragraph (2) strikes references to section 8 or 15 in section 15(k) of the Act and replaces it with section 8, 15, 31, 36, or 44. This allows the OSDBU to provide assistance to SDVOSBs and HUBZones and to provide assistance with bundling and consolidation.

Paragraph (3)

Paragraph (3) strikes the reference to section 8 paragraph (10) of section 15(k) of the Act and replaces it with section 8, 15, 31, 36, or 44. This allows the OSDBU to provide assistance to small businesses, SDVOSBs and HUBZones and to provide assistance with bundling and consolidation.

Paragraph (4)

Paragraph (4) redesignates paragraphs (15), (16), and (17) as paragraphs (16), (17), and (18).

Paragraph (5)

Paragraph (5) inserts as new paragraph (15) that requires the OSDBU to review purchases exceeding the micro-purchase threshold but below the simplified acquisition threshold made using purchase cards to ensure that the purchases follow the laws related to small businesses and that they have been entered into the Federal Procurement Data System.

Paragraph (6)

Paragraph (6) amends the new paragraph (17) to requires that the OSDBU annually report on any violations of the Act by their agency.

Section 204. Improving contractor compliance

Subsection (a)—Requirements for the Office of Small and Disadvantaged Business Utilization

Subsection (a) amends section 15(k) of the Act by redesignating paragraphs (16), (17), and 7 (18) as paragraphs (17), (18), and (19). It then adds a new paragraph (16) that requires that the OSDBU should assist small businesses receiving federal contracts or sub-contracts in finding resources for education and training on compliance with contracting regulations.

Subsection (b)—Requirements Under the Mentor-Protégé Program of the Department of Defense

Subsection (B) amends section 831(e)(1) of the FY 1991 NDAA by adding a new subparagraph (D). The new subparagraph requires that mentors in approved mentor-protégé agreements shall provide compliance assistance to proteges.

Subsection (c)—Resources for Small Business Concerns

This subsection amends section 15 of the Act by adding a new subsection (t), titled “Post-Award Compliance Assistance.” The new subsection requires that SBA provide small business development centers and Procurement Technical Assistance Centers a list of resources for small businesses seeking education and assistance with complying with federal procurement regulations. Further, SBA is required to put the list on its website.

Subsection (d)—Requirements for Procurement Center Representatives

This subsection amends section 15(1)(2) of the Act by adding a new subparagraph (I) to requires that PCRs assist small business concerns with finding resources for education and training on compliance with federal contracting regulations.

Subsection (e)—Requirements under the the Mentor-Protégé Program of the Department of the Small Business Administration

This subsection amends section 45(b)(3) of the Act by adding a new subparagraph (K) the new subparagraph requires that a mentor protégé agreement should address the extent to which the mentor will provide the protégé with assistance complying with federal contracting regulations.

Section 205. Responsibilities of Business Opportunity Specialists

This section amends section 4(g) of the Act.

Paragraph (1)

This paragraph changes the heading for the subsection to “Business Opportunity Specialists.”

Paragraph (2)

This paragraph makes technical amendments.

Paragraph (3)

This paragraph amends clause (ii) to require that any job advertisement for BOSs must include the educational requirements.

Paragraph (4)—Paragraph (6)

These paragraphs make technical amendments.

Paragraph (7)

This paragraph inserts a new paragraph (1) that enumerates the duties of the BOS. First, it requires that BOSs report to GCBD, not to field operations. Second, it makes it clear that the primary duties of the BOS shall be to implement the 8(a) and mentor-protégé programs. In doing so, the BOS is required to provide eligible firms

with counseling, referrals, identifying why firms succeed or fail, and assessing the strengths and weaknesses of the firms. Further, the BOS should monitor and document the firm's compliance with the program, and explain the contracting programs of the Act to participant. The BOS may also assist with post-award compliance assistance, and shall represent the SBA's interests in negotiations regarding 8(a) contracts.

TITLE III—STRENGTHENING OPPORTUNITIES FOR COMPETITION IN SUBCONTRACTING

Section 301. Good faith in subcontracting

Subsection (a)—Transparency in Subcontracting Goals

This subsection amends section 8(d)(9) of the Act to provide that failure to submit a required subcontracting report may be a material breach of the contract.

Subsection (b)—Authority of the Administrator of the Small Business Administration

This subsection amends section 8(d)(11) of the Act to state that reviews by PCRs and CMRs of subcontracting plans are not advisory in nature.

Subsection (c)—Review and Acceptance of Subcontracting Plans

This subsection adds a new subsection 8(d)(17) to the Act that provides authority for a PCR or CMR to assess whether a proposed subcontracting plan provides the maximum practicable opportunity for small business concerns to participate. If the PCR or CMR believes that the plan does not provide sufficient opportunities for small business participation, the PCR or CMR is permitted to delay acceptance of the subcontracting plan for up to 30 days. However, if the PCR or CMR fails to reach an agreement with the contracting agency's personnel on a plan to provide the maximum practicable opportunity; this subsection provides that the disagreement shall be decided by the head of the contracting agency.

Subsection (d)—Good Faith Compliance

This subsection directs the SBA to issue rules explaining what it means to fail to make a good faith effort to comply with a subcontracting plan. It directs that failure to submit a report shall be considered failure to make a good faith effort.

Section 302. Pilot program to provide opportunities for qualified subcontractors to obtain past performance ratings

This section amends section 8(d) of the Act to add a new paragraph (18). The new paragraph establishes a three year pilot program by which small first tier subcontractors may obtain a past performance rating. The pilot requires that the subcontractor make the application to SBA, and that SBA coordinate the response of the contracting agency and the prime contractor. Any dispute between the entities shall result in a neutral past performance rating. The GAO is also directed to review the success of the pilot and offer recommendations on how it could be improved.

TITLE IV—MENTOR-PROTEGE PROGRAMS

Section 401. Amendments to the Mentor-Protégé Program of the Department of Defense

This section amends section 831 of the FY 1991 NDAA.

Paragraph (1)

This paragraph amends paragraph (1) of section 831 to require that DoD ascertain that any potential protégé not have been found affiliated with the proposed mentor. It further adds a new paragraph (2) that requires that if there is any reason to believe that there may be affiliation between the potential mentor and protégé, that DoD refer the case to SBA's OHA.

Paragraph (2)

This paragraph removes the definition of behaviors that could lead to a finding of affiliation and replaces it with a reference to the SBA's affiliation regulations.

Paragraph (3)

Paragraph (3) clarifies that mentors may refer protégé firms to Women's Business Centers for technical assistance.

Section 402. Improving cooperation between the mentor-protégé programs of the Small Business Administration and the Department of Defense

This section amends section 45(b) of the Act to remove the exemption previously provided to DoD. This will require that DoD coordinate its mentor-protégé program with the SBA's government wide program.

TITLE V—MISCELLANEOUS

Section 501. Improving education on small business regulations

This section adds a new subsection (u) to section 15 of the Act. The new subsection requires that the SBA annually report to the Federal Acquisition Institute, Defense Acquisition University, small business development centers, Procurement Technical Assistance Centers, and the acquisition workforce trading coordinator in each agency on regulations promulgated during the prior year that affect small business contracting. Further, the SBA must provide any training materials it has developed.

Section 502. Protecting task order competition

This section makes permanent the authority in section 4106(f) of title 41, United States Code, that allows contractors to protest the award of task orders above \$10 million. Currently, the authority is set to expire on September 30, 2016.

*Section 503. Improvements to size standards for small agricultural producers**Subsection (a)—Amendment to definition of agricultural enterprises*

This subsection amends section 18(b) of the Act to uniformly use the term "small business concerns" rather than "small businesses."

Subsection (b)—Treatment of small farms

This subsection amends section 3(a) to remove the statutory cap of \$750,000 currently applied to small agricultural producers.

Subsection (c)—Updated size standards

This subsection directs SBA to issue new size standards for agricultural producers within 18 months. It further clarifies that these size standards shall be reviewed and updated every five years.

Section 504. Uniformity in service-disabled veteran definitions

Subsection (a)—Small business definition of small business concerns consolidated

This subsection amends the definition of SDVOSB found in section 3(q) of the Act. It changes it to clarify that ownership by an employee stock ownership plan shall not automatically disqualify a firm from the program. It further adds a provision allowing that the surviving spouse of a completely disabled veteran may continue the program for ten years or until the surviving spouse remarries, or relinquishes ownership.

Subsection (b)—Veterans Affairs definition of small business concern consolidated

This subsection amends section 8127 of title 38, United States Code. It replaces the current definition of SDVOSB and VOSB with the definitions found in section 3 of the Act.

Subsection (c)—Technical correction

This subsection corrects disparities in how the term SDVOSB is used in title 38.

Subsection (d)—Regulations relating to database of the Secretary of Veterans Affairs

This subsection requires that VA use the regulations promulgated by SBA to determine whether a firm is owned or controlled by veterans or service-disabled veterans. It allows VA to use its own regulations to determine whether individuals are veterans or service-disabled veterans.

Subsection (e)—Delayed effective date

This subsection delays the effect of these changes until the regulations are promulgated.

Subsection (f)—Appeals of inclusion in the database

This subsection allows SBA's OHA to hear appeals of a firm's eligibility as a SDVOSB or VOSB. It also requires VA to reimburse SBA for hearing these appeals.

Section 505. GAO review of the Office of Government Contracting and Business Development of the Small Business Administration

This section requires that GAO evaluate the operation of the GCBD Office at SBA. It further asks GAO to recommend improvements to the operations of this office.

Section 506. Required reports pertaining to capital planning and investment control

This section requires that SBA provide the Committees of jurisdiction with copies of reports relating to IT security.

Section 507. GAO review of surety bonds

This section requires GAO to evaluate small business contracts to assess whether the use of a surety bond increases the success of the contract, and whether waivers of surety bonds threaten performance.

VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

At the time H.R. 4341 was reported to the House, the Congressional Budget Office had not provided a cost estimate.

IX. UNFUNDED MANDATES

H.R. 4341 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

X. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures. While the Committee has not received an estimate of new budget authority contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974, the Committee does not believe that any additional appropriation will be required due to the enactment of H.R. 4341. H.R. 4341 does not direct new spending, but instead addresses the opportunity to increase competition for federal contractors. Increased competition may save taxpayer funds.

XI. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 4341 are incorporated into the descriptive portions of this report.

XII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18 and Art. IV, § 3, cl. 2 of the Constitution of the United States.

XIII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 4341 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104–1.

XIV. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 4341 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

XV. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 4341 does not contain any congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of rule XXI of the Rules of the House.

XVI. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance-related goals and objectives for this legislation:

H.R. 4341 includes a number of provisions designed to improve the competitive viability of small businesses as federal prime and subcontractors and to improve agency compliance with the Small Business Act.

XVII. 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, and existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * *

SEC. 3. DEFINITIONS.

(a) SMALL BUSINESS CONCERNS.—

(1) IN GENERAL.—For the purposes of this Act, a small-business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of [operation: *Provided*, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.] operation.

(2) ESTABLISHMENT OF SIZE STANDARDS.—

(A) IN GENERAL.—In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be

determined to be a small business concern for the purposes of this Act or any other Act.

(B) ADDITIONAL CRITERIA.—The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) REQUIREMENTS.—Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

(iii) is approved by the Administrator.

(3) VARIATION BY INDUSTRY AND CONSIDERATION OF OTHER FACTORS.—When establishing or approving any size standard pursuant to paragraph (2), the Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator.

(4) EXCLUSION OF CERTAIN SECURITY EXPENSES FROM CONSIDERATION FOR PURPOSE OF SMALL BUSINESS SIZE STANDARDS.—

(A) DETERMINATION REQUIRED.—Not later than 30 days after the date of enactment of this paragraph, the Administrator shall review the application of size standards established pursuant to paragraph (2) to small business concerns that are performing contracts in qualified areas and determine whether it would be fair and appropriate to exclude from consideration in the average annual gross receipts of such small business concerns any payments made to such small business concerns by Federal agencies to reimburse such small business concerns for the cost of subcontracts entered for the sole purpose of providing security services in a qualified area.

(B) ACTION REQUIRED.—Not later than 60 days after the date of enactment of this paragraph, the Administrator shall either—

(i) initiate an adjustment to the size standards, as described in subparagraph (A), if the Administrator

determines that such an adjustment would be fair and appropriate; or

(ii) provide a report to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives explaining in detail the basis for the determination by the Administrator that such an adjustment would not be fair and appropriate.

(C) QUALIFIED AREAS.—In this paragraph, the term “qualified area” means—

- (i) Iraq,
- (ii) Afghanistan, and
- (iii) any foreign country which included a combat zone, as that term is defined in section 112(c)(2) of the Internal Revenue Code of 1986, at the time of performance of the relevant Federal contract or subcontract.

(5) ALTERNATIVE SIZE STANDARD.—

(A) IN GENERAL.—The Administrator shall establish an alternative size standard for applicants for business loans under section 7(a) and applicants for development company loans under title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.), that uses maximum tangible net worth and average net income as an alternative to the use of industry standards.

(B) INTERIM RULE.—Until the date on which the alternative size standard established under subparagraph (A) is in effect, an applicant for a business loan under section 7(a) or an applicant for a development company loan under title V of the Small Business Investment Act of 1958 may be eligible for such a loan if—

- (i) the maximum tangible net worth of the applicant is not more than \$15,000,000; and
- (ii) the average net income after Federal income taxes (excluding any carry-over losses) of the applicant for the 2 full fiscal years before the date of the application is not more than \$5,000,000.

(6) PROPOSED RULEMAKING.—In conducting rulemaking to revise, modify or establish size standards pursuant to this section, the Administrator shall consider, and address, and make publicly available as part of the notice of proposed rulemaking and notice of final rule each of the following:

(A) a detailed description of the industry for which the new size standard is proposed;

(B) an analysis of the competitive environment for that industry;

(C) the approach the Administrator used to develop the proposed standard including the source of all data used to develop the proposed rule making; and

(D) the anticipated effect of the proposed rulemaking on the industry, including the number of concerns not currently considered small that would be considered small under the proposed rule making and the number of concerns currently considered small that would be deemed other than small under the proposed rulemaking.

(7) COMMON SIZE STANDARDS.—In carrying out this subsection, the Administrator may establish or approve a single size standard for a grouping of 4-digit North American Industry Classification System codes only if the Administrator makes publicly available, not later than the date on which such size standard is established or approved, a justification demonstrating that such size standard is appropriate for each individual industry classification included in the grouping.

(8) NUMBER OF SIZE STANDARDS.—The Administrator shall not limit the number of size standards established pursuant to paragraph (2), and shall assign the appropriate size standard to each North American Industry Classification System Code.

(9) PETITIONS FOR RECONSIDERATION OF SIZE STANDARDS.—

(A) IN GENERAL.—A person may file a petition for reconsideration with the Office of Hearings and Appeals (as established under section 5(i)) of a size standard revised, modified, or established by the Administrator pursuant to this subsection.

(B) TIME LIMIT.—A person filing a petition for reconsideration described in subparagraph (A) shall file such petition not later than 30 days after the publication in the Federal Register of the notice of final rule to revise, modify, or establish size standards described in paragraph (6).

(C) PROCESS FOR AGENCY REVIEW.—The Office of Hearings and Appeals shall use the same process it uses to decide challenges to the size of a small business concern to decide a petition for review pursuant to this paragraph.

(D) JUDICIAL REVIEW.—The publication of a final rule in the Federal Register described in subparagraph (B) shall be considered final agency action for purposes of seeking judicial review. Filing a petition for reconsideration under subparagraph (A) shall not be a condition precedent to judicial review of any such size standard.

(b) For purposes of this Act, any reference to an agency or department of the United States, and the term “Federal agency,” shall have the meaning given the term “agency” by section 551(1) of title 5, United States Code, but does not include the United States Postal Service or the General Accounting Office.

(c)(1) For purposes of this Act, a qualified employee trust shall be eligible for any loan guarantee under section 7(a) with respect to a small business concern on the same basis as if such trust were the same legal entity as such concern.

(2) For purposes of this Act, the term “qualified employee trust” means, with respect to a small business concern, a trust—

(A) which forms part of an employee stock ownership plan (as defined in section 4975(e)(7) of the Internal Revenue Code of 1954)—

(i) which is maintained by such concern, and

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities (as defined in section 4975(e)(8) of such Code) which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be

decided by a majority vote of outstanding common shares voted; and

(B) in the case of any loan guarantee under section 7(a), the trustee of which enters into an agreement with the Administrator of which enters into an agreement with the Administrator which is binding on the trust and no such small business concern and which provides that—

(i) the loan guaranteed under section 7(a) shall be used solely for the purchase of qualifying employer securities of such concern.

(ii) all funds acquired by the concern in such purchase shall be used by such concern solely for the purposes for which such loan was guaranteed,

(iii) such concern will provide such funds as may be necessary for the timely repayment of such loan, and the property of such concern shall be available as security for repayment of such loan, and

(iv) all qualifying employer securities acquired by such trust in such purchase shall be allocated to the accounts of participants in such plan who are entitled to share in such allocation, and each participant has a nonforfeitable right, not later than the date such loan is repaid, to all such qualifying employer securities which are so allocated to the participant's account.

(3) Under regulations which may be prescribed by the Administrator, a trust may be treated as a qualified employee trust with respect to a small business concern if—

(A) the trust is maintained by an employee organization which represents at least 51 percent of the employee of such concern, and

(B) such concern maintains a plan—

(i) which is an employee benefit plan which is designed to invest primarily in qualifying employer securities (as defined in section 4975(e)(8) of the Internal Revenue Code of 1954).

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be decided by a majority vote of the outstanding common shares voted,

(iii) which provides that each participant who is entitled to distribution from the plan has a right, in the case of qualifying employer securities which are not readily tradable on an established market, to require that the concern repurchase such securities under a fair valuation formula, and

(iv) which meets such other requirements (similar to requirements applicable to employee ownership plans as defined in section 4975(e)(7) of the Internal Revenue Code of 1954) as the Administrator may prescribe, and

(C) in the case of a loan guarantee under section 7(a), such organization enters into an agreement with the Administration which is described in paragraph (2)(B).

(d) For purposes of section 7 of this Act, the term “qualified Indian tribe” means an Indian tribe as defined in section 4(a) of the Indian Self-Determination and Education Assistance Act, which owns and controls 100 per centum of a small business concern.

(e) For purposes of section 7 of this Act, the term “public or private organization for the handicapped” means one—

(1) which is organized under the laws of the United States or of any State, operated in the interest of handicapped individuals, the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(2) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(3) which, in the production of commodities and in the provision of services during any fiscal year in which it received financial assistance under this subsection, employs handicapped individuals for not less than 75 per centum of the man-hours required for the production or provision of the commodities or services.

(f) For purposes of section 7 of this Act, the term “handicapped individual” means an individual—

(1) who has a physical, mental, or emotional impairment, defect, ailment, disease, or disability of a permanent nature which in any way limits the selection of any type of employment for which the person would otherwise be qualified or qualifiable; or

(2) who is a service-disabled veteran.

(g) For purposes of section 7 of this Act, the term “energy measures” includes—

(1) solar thermal energy equipment which is either of the active type based upon mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer or some combination equipment;

(2) photovoltaic cells and related equipment;

(3) a product or service the primary purpose of which is conservation of energy through devices or techniques which increase the energy through devices or techniques which increase the energy efficiency of existing equipment, methods of operation, or systems which use fossil fuels, and which is on the Energy Conservation Measures list of the Secretary of Energy or which the Administrator determines to be consistent with the intent of this subsection;

(4) equipment the primary purpose of which is production of energy from wood, biological waste, grain, or other biomass source of energy;

(5) equipment the primary purpose of which is industrial cogeneration of energy, district heating, or production of energy from industrial waste;

(6) hydroelectric power equipment;

(7) wind energy conversion equipment; and

(8) engineering, architectural, consulting, or other professional services which are necessary or appropriate to aid citizens in using any of the measures described in paragraph (1) through (7).

(h) For purposes of this Act, the term “credit elsewhere” means the availability of credit from non-Federal sources on reasonable

terms and conditions taking into consideration the prevailing rates and terms in the community in or near where the concern transacts business, or the homeowner resides, for similar purposes and periods of time.

(i) For purposes of section 7 of this Act, the term “homeowners” includes owners and lessees of residential property and also includes personal property.

(j) For the purposes of this Act, the term “small agricultural cooperative” means an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C. 1141j), whose size does not exceed the size standard established by the Administration for other similar agricultural small business concerns. In determining such size, the Administration shall regard the association as a business concern and shall not include the income or employees of any member shareholder of such cooperative.

(k)(1) For the purposes of this Act, the term “disaster” means a sudden event which causes severe damage including, but not limited to, floods, hurricanes, tornadoes, earthquakes, fires, explosions, volcanoes, windstorms, landslides or mudslides, tidal waves, commercial fishery failures or fishery resource disasters (as determined by the Secretary of Commerce under section 308(b) of the Interjurisdictional Fisheries Act of 1986), ocean conditions resulting in the closure of customary fishing waters, riots, civil disorders or other catastrophes, except it does not include economic dislocations.

(2) For purposes of section 7(b)(2), the term “disaster” includes—

(A) drought;

(B) below average water levels in the Great Lakes, or on any body of water in the United States that supports commerce by small business concerns; and

(C) ice storms and blizzards.

(l) For purposes of this Act—

(1) the term “computer crime” means—

(A) any crime committed against a small business concern by means of the use of a computer; and

(B) any crime involving the illegal use of, or tampering with, a computer owned or utilized by a small business concern.

[(m) For purposes of this Act, the term “simplified acquisition threshold” has the meaning given such term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).]

(m) *DEFINITIONS PERTAINING TO CONTRACTING.—In this Act:*

(1) *PRIME CONTRACT.—The term “prime contract” has the meaning given such term in section 8701(4) of title 41, United States Code.*

(2) *PRIME CONTRACTOR.—The term “prime contractor” has the meaning given such term in section 8701(5) of title 41, United States Code.*

(3) *SIMPLIFIED ACQUISITION THRESHOLD.—The term “simplified acquisition threshold” has the meaning given such term in section 134 of title 41, United States Code.*

(4) *MICRO-PURCHASE THRESHOLD.—The term “micro-purchase threshold” has the meaning given such term in section 1902(a) of title 41, United States Code.*

(5) *TOTAL PURCHASE AND CONTRACTS FOR PROPERTY AND SERVICES.*—The term “total purchases and contracts for property and services” shall mean total number and total dollar amount of contracts and orders for property and services.

(n) For the purposes of this Act, a small business concern is a small business concern owned and controlled by women if—

(1) at least 51 percent of small business concern is owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(2) the management and daily business operations of the business are controlled by one or more women.

(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.

(p) *DEFINITIONS RELATING TO HUBZONES.*—In this Act:

(1) *HISTORICALLY UNDERUTILIZED BUSINESS ZONE.*—The term “historically underutilized business zone” means any area located within 1 or more—

(A) qualified census tracts;

(B) qualified nonmetropolitan counties;

(C) lands within the external boundaries of an Indian reservation;

(D) redesignated areas;

(E) base closure areas; or

(F) qualified disaster areas.

(2) *HUBZONE.*—The term “HUBZone” means a historically underutilized business zone.

(3) *HUBZONE SMALL BUSINESS CONCERN.*—The term “HUBZone small business concern” means—

(A) a small business concern that is at least 51 percent owned and controlled by United States citizens;

(B) a small business concern that is—

(i) an Alaska Native Corporation owned and controlled by Natives (as determined pursuant to section

29(e)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(1)); or

(ii) a direct or indirect subsidiary corporation, joint venture, or partnership of an Alaska Native Corporation qualifying pursuant to section 29(e)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2)) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(2));

(C) a small business concern—

(i) that is wholly owned by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments; or

(ii) that is owned in part by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, if all other owners are either United States citizens or small business concerns;

(D) a small business concern—

(i) that is wholly owned by one or more Native Hawaiian Organizations (as defined in section 8(a)(15)), or by a corporation that is wholly owned by one or more Native Hawaiian Organizations; or

(ii) that is owned in part by one or more Native Hawaiian Organizations, or by a corporation that is wholly owned by one or more Native Hawaiian Organizations, if all other owners are either United States citizens or small business concerns;

(E) a small business concern that is—

(i) wholly owned by a community development corporation that has received financial assistance under part 1 of subchapter A of the Community Economic Development Act of 1981 (42 U.S.C. 9805 et seq.); or

(ii) owned in part by one or more community development corporations, if all other owners are either United States citizens or small business concerns; or

(F) a small business concern that is—

(i) a small agricultural cooperative organized or incorporated in the United States;

(ii) wholly owned by 1 or more small agricultural cooperatives organized or incorporated in the United States; or

(iii) owned in part by 1 or more small agricultural cooperatives organized or incorporated in the United States, if all owners are small business concerns or United States citizens.

(4) QUALIFIED AREAS.—

(A) QUALIFIED CENSUS TRACT.—The term “qualified census tract” has the meaning given that term in section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986.

(B) QUALIFIED NONMETROPOLITAN COUNTY.—The term “qualified nonmetropolitan county” means any county—

(i) that was not located in a metropolitan statistical area (as defined in section 143(k)(2)(B) of the Internal

Revenue Code of 1986) at the time of the most recent census taken for purposes of selecting qualified census tracts under section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986; and

(ii) in which—

(I) the median household income is less than 80 percent of the nonmetropolitan State median household income, based on the most recent data available from the Bureau of the Census of the Department of Commerce;

(II) the unemployment rate is not less than 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on the most recent data available from the Secretary of Labor; or

(III) there is located a difficult development area, as designated by the Secretary of Housing and Urban Development in accordance with section 42(d)(5)(C)(iii) of the Internal Revenue Code of 1986, within Alaska, Hawaii, or any territory or possession of the United States outside the 48 contiguous States.

(C) REDESIGNATED AREA.—The term “redesignated area” means any census tract that ceases to be qualified under subparagraph (A) and any nonmetropolitan county that ceases to be qualified under subparagraph (B), except that a census tract or a nonmetropolitan county may be a “redesignated area” only until the later of—

(i) the date on which the Census Bureau publicly releases the first results from the 2010 decennial census; or

(ii) 3 years after the date on which the census tract or nonmetropolitan county ceased to be so qualified.

(D) BASE CLOSURE AREA.—

(i) IN GENERAL.—Subject to clause (ii), the term “base closure area” means—

(I) lands within the external boundaries of a military installation that were closed through a privatization process under the authority of—

(aa) the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of division B of Public Law 101–510; 10 U.S.C. 2687 note);

(bb) title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note);

(cc) section 2687 of title 10, United States Code; or

(dd) any other provision of law authorizing or directing the Secretary of Defense or the Secretary of a military department to dispose of real property at the military installation for purposes relating to base closures of redevel-

opment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use;

(II) the census tract or nonmetropolitan county in which the lands described in subclause (I) are wholly contained;

(III) a census tract or nonmetropolitan county the boundaries of which intersect the area described in subclause (I); and

(IV) a census tract or nonmetropolitan county the boundaries of which are contiguous to the area described in subclause (II) or subclause (III).

(ii) LIMITATION.—A base closure area shall be treated as a HUBZone—

(I) with respect to a census tract or nonmetropolitan county described in clause (i), for a period of not less than 8 years, beginning on the date the military installation undergoes final closure and ending on the date the Administrator makes a final determination as to whether or not to implement the applicable designation described in subparagraph (A) or (B) in accordance with the results of the decennial census conducted after the area was initially designated as a base closure area; and

(II) if such area was treated as a HUBZone at any time after 2010, until such time as the Administrator makes a final determination as to whether or not to implement the applicable designation described in subparagraph (A) or (B), after the 2020 decennial census.

(iii) DEFINITIONS.—In this subparagraph:

(I) CENSUS TRACT.—The term “census tract” means a census tract delineated by the United States Bureau of the Census in the most recent decennial census that is not located in a nonmetropolitan county and does not otherwise qualify as a qualified census tract.

(II) NONMETROPOLITAN COUNTY.—The term “nonmetropolitan county” means a county that was not located in a metropolitan statistical area (as defined in section 143(k)(2)(B) of the Internal Revenue Code of 1986) at the time of the most recent census taken for purposes of selecting qualified census tracts and does not otherwise qualify as a qualified nonmetropolitan county.

(E) QUALIFIED DISASTER AREA.—

(i) IN GENERAL.—Subject to clause (ii), the term “qualified disaster area” means any census tract or nonmetropolitan county located in an area for which the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or located in an area in which a catastrophic incident has occurred if such census tract or nonmetropolitan county

ceased to be qualified under subparagraph (A) or (B), as applicable, during the period beginning 5 years before the date on which the President declared the major disaster or the catastrophic incident occurred and ending 2 years after such date, except that such census tract or nonmetropolitan county may be a “qualified disaster area” only—

(I) in the case of a major disaster declared by the President, during the 5-year period beginning on the date on which the President declared the major disaster for the area in which the census tract or nonmetropolitan county, as applicable, is located; and

(II) in the case of a catastrophic incident, during the 10-year period beginning on the date on which the catastrophic incident occurred in the area in which the census tract or nonmetropolitan county, as applicable, is located.

(ii) LIMITATION.—A qualified disaster area described in clause (i) shall be treated as a HUBZone for a period of not less than 8 years, beginning on the date the Administrator makes a final determination as to whether or not to implement the designations described in subparagraphs (A) and (B) in accordance with the results of the decennial census conducted after the area was initially designated as a qualified disaster area.

(5) QUALIFIED HUBZONE SMALL BUSINESS CONCERN.—

(A) IN GENERAL.—A HUBZone small business concern is “qualified”, if—

(i) the small business concern has certified in writing to the Administrator (or the Administrator otherwise determines, based on information submitted to the Administrator by the small business concern, or based on certification procedures, which shall be established by the Administration by regulation) that—

(I) it is a HUBZone small business concern—

(aa) pursuant to subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (3), and that its principal office is located in a HUBZone and not fewer than 35 percent of its employees reside in a HUBZone;

(bb) pursuant to subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (3), that its principal office is located within a base closure area and that not fewer than 35 percent of its employees reside in such base closure area or in another HUBZone; or

(cc) pursuant to paragraph (3)(C), and not fewer than 35 percent of its employees engaged in performing a contract awarded to the small business concern on the basis of a preference provided under section 31(b) reside within any Indian reservation governed by one or more of the tribal government owners,

or reside within any HUBZone adjoining any such Indian reservation;

(II) the small business concern will attempt to maintain the applicable employment percentage under subclause (I) during the performance of any contract awarded to the small business concern on the basis of a preference provided under section 31(b); and

(III) with respect to any subcontract entered into by the small business concern pursuant to a contract awarded to the small business concern under section 31, the small business concern will ensure that the requirements of section 46 are satisfied; and

(ii) no certification made or information provided by the small business concern under clause (i) has been, in accordance with the procedures established under section 31(c)(1)—

(I) successfully challenged by an interested party; or

(II) otherwise determined by the Administrator to be materially false.

(B) LIST OF QUALIFIED SMALL BUSINESS CONCERNS.—The Administrator shall establish and maintain a list of qualified HUBZone small business concerns, which list shall, to the extent practicable—

(i) once the Administrator has made the certification required by subparagraph (A)(i) regarding a qualified HUBZone small business concern and has determined that subparagraph (A)(ii) does not apply to that concern, include the name, address, and type of business with respect to each such small business concern;

(ii) be updated by the Administrator not less than annually; and

(iii) be provided upon request to any Federal agency or other entity.

(6) NATIVE AMERICAN SMALL BUSINESS CONCERNS.—

(A) ALASKA NATIVE CORPORATION.—The term “Alaska Native Corporation” has the same meaning as the term “Native Corporation” in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

(B) ALASKA NATIVE VILLAGE.—The term “Alaska Native Village” has the same meaning as the term “Native village” in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

(C) INDIAN RESERVATION.—The term “Indian reservation”—

(i) has the same meaning as the term “Indian country” in section 1151 of title 18, United States Code, except that such term does not include—

(I) any lands that are located within a State in which a tribe did not exercise governmental jurisdiction on the date of the enactment of this paragraph, unless that tribe is recognized after that date of the enactment by either an Act of Con-

gress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (part 83 of title 25, Code of Federal Regulations); and

(II) lands taken into trust or acquired by an Indian tribe after the date of the enactment of this paragraph if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status on that date of the enactment; and

(ii) in the State of Oklahoma, means lands that—

(I) are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and

(II) are recognized by the Secretary of the Interior as eligible for trust land status under part 151 of title 25, Code of Federal Regulations (as in effect on the date of the enactment of this paragraph).

(7) AGRICULTURAL COMMODITY.—The term “agricultural commodity” has the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

(q) DEFINITIONS RELATING TO VETERANS.—In this Act, the following definitions apply:

(1) SERVICE-DISABLED VETERAN.—The term “service-disabled veteran” means a veteran with a disability that is service-connected (as defined in section 101(16) of title 38, United States Code).

[(2) SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—The term “small business concern owned and controlled by service-disabled veterans” means a small business concern—

[(A) not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

[(B) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.]]

(2) *SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—The term “small business concern owned and controlled by service-disabled veterans” means any of the following:*

(A) A small business concern—

(i) not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more service-disabled veterans; and

(ii) *the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.*

(B) *A small business concern—*

(i) *not less than 51 percent of which is owned by one or more service-disabled veterans with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern; or*

(ii) *in the case of a publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more such veterans.*

(C)(i) *During the time period described in clause (ii), a small business concern that was a small business concern described in subparagraph (A) or (B) immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, if—*

(I) *the surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;*

(II) *such veteran had a service-connected disability (as defined in section 101(16) of title 38, United States Code) rated as 100 percent disabling under the laws administered by the Secretary of Veterans Affairs or such veteran died as a result of a service-connected disability; and*

(III) *immediately prior to the death of such veteran, and during the period described in clause (ii), the small business concern is included in the database described in section 8127(f) of title 38, United States Code.*

(ii) *The time period described in this clause is the time period beginning on the date of the veteran's death and ending on the earlier of—*

(I) *the date on which the surviving spouse remarries;*

(II) *the date on which the surviving spouse relinquishes an ownership interest in the small business concern; or*

(III) *the date that is 10 years after the date of the death of the veteran.*

(3) **SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY VETERANS.**—The term “small business concern owned and controlled by veterans” means a small business concern—

(A) *not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and*

(B) *the management and daily business operations of which are controlled by one or more veterans.*

(4) VETERAN.—The term “veteran” has the meaning given the term in section 101(2) of title 38, United States Code.

(5) RELIEF FROM TIME LIMITATIONS.—

(A) IN GENERAL.—Any time limitation on any qualification, certification, or period of participation imposed under this Act on any program that is available to small business concerns shall be extended for a small business concern that—

(i) is owned and controlled by—

(I) a veteran who was called or ordered to active duty under a provision of law specified in section 101(a)(13)(B) of title 10, United States Code, on or after September 11, 2001; or

(II) a service-disabled veteran who became such a veteran due to an injury or illness incurred or aggravated in the active military, naval, or air service during a period of active duty pursuant to a call or order to active duty under a provision of law referred to in subclause (I) on or after September 11, 2001; and

(ii) was subject to the time limitation during such period of active duty.

(B) DURATION.—Upon submission of proper documentation to the Administrator, the extension of a time limitation under subparagraph (A) shall be equal to the period of time that such veteran who owned or controlled such a concern was on active duty as described in that subparagraph.

(C) EXCEPTION FOR PROGRAMS SUBJECT TO FEDERAL CREDIT REFORM ACT OF 1990.—The provisions of subparagraphs (A) and (B) shall not apply to any programs subject to the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(6) ESOP.—*The term “ESOP” has the meaning given the term “employee stock ownership plan” in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).*

(7) SURVIVING SPOUSE.—*The term “surviving spouse” has the meaning given such term in section 101(3) of title 38, United States Code.*

(r) DEFINITIONS RELATING TO SMALL BUSINESS LENDING COMPANIES.—As used in section 23 of this Act:

(1) SMALL BUSINESS LENDING COMPANY.—The term “small business lending company” means a business concern that is authorized by the Administrator to make loans pursuant to section 7(a) and whose lending activities are not subject to regulation by any Federal or State regulatory agency.

(2) NON-FEDERALLY REGULATED SBA LENDER.—The term “non-Federally regulated SBA lender” means a business concern if—

(A) such concern is authorized by the Administrator to make loans under section 7;

(B) such concern is subject to regulation by a State; and

(C) the lending activities of such concern are not regulated by any Federal banking authority.

(s) MAJOR DISASTER.—In this Act, the term “major disaster” has the meaning given that term in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122).

(t) SMALL BUSINESS DEVELOPMENT CENTER.—In this Act, the term “small business development center” means a small business development center described in section 21.

(u) REGION OF THE ADMINISTRATION.—In this Act, the term “region of the Administration” means the geographic area served by a regional office of the Administration established under section 4(a).

(v) MULTIPLE AWARD CONTRACT.—In this Act, the term “multiple award contract” means—

- (1) a multiple award task order contract or delivery order contract that is entered into under the authority of sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k); and
- (2) any other indefinite delivery, indefinite quantity contract that is entered into by the head of a Federal agency with 2 or more sources pursuant to the same solicitation.

(w) PRESUMPTION.—

(1) IN GENERAL.—In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(2) DEEMED CERTIFICATIONS.—The following actions shall be deemed affirmative, willful, and intentional certifications of small business size and status:

(A) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(B) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(C) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research agreement, as a small business concern.

(3) CERTIFICATION BY SIGNATURE OF RESPONSIBLE OFFICIAL.—

(A) IN GENERAL.—Each solicitation, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract, or grant.

(B) CONTENT OF CERTIFICATIONS.—A certification that a business concern qualifies as a small business concern of the exact size and status claimed by the business concern for purposes of bidding on a Federal contract or subcontract, or applying for a Federal grant, shall contain the signature of an authorized official on the same page on which the certification is contained.

(4) REGULATIONS.—The Administrator shall promulgate regulations to provide adequate protections to individuals and business concerns from liability under this subsection in cases of unintentional errors, technical malfunctions, and other similar situations.

(x) ANNUAL CERTIFICATION.—

(1) IN GENERAL.—Each business certified as a small business concern under this Act shall annually certify its small business size and, if appropriate, its small business status, by means of a confirming entry on the Online Representations and Certifications Application database of the Administration, or any successor thereto.

(2) REGULATIONS.—Not later than 1 year after the date of enactment of this subsection, the Administrator, in consultation with the Inspector General and the Chief Counsel for Advocacy of the Administration, shall promulgate regulations to ensure that—

(A) no business concern continues to be certified as a small business concern on the Online Representations and Certifications Application database of the Administration, or any successor thereto, without fulfilling the requirements for annual certification under this subsection; and

(B) the requirements of this subsection are implemented in a manner presenting the least possible regulatory burden on small business concerns.

(y) POLICY ON PROSECUTIONS OF SMALL BUSINESS SIZE AND STATUS FRAUD.—Not later than 1 year after the date of enactment of this subsection, the Administrator, in consultation with the Attorney General, shall issue a Government-wide policy on prosecution of small business size and status fraud, which shall direct Federal agencies to appropriately publicize the policy.

(z) AQUACULTURE BUSINESS DISASTER ASSISTANCE.—Subject to section 18(a) and notwithstanding section 18(b)(1), the Administrator may provide disaster assistance under section 7(b)(2) to aquaculture enterprises that are small businesses.

(aa) VENTURE CAPITAL OPERATING COMPANY.—In this Act, the term “venture capital operating company” means an entity described in clause (i), (v), or (vi) of section 121.103(b)(5) of title 13, Code of Federal Regulations (or any successor thereto).

(bb) HEDGE FUND.—In this Act, the term “hedge fund” has the meaning given that term in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)).

(cc) PRIVATE EQUITY FIRM.—In this Act, the term “private equity firm” has the meaning given the term “private equity fund” in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)).

(dd) DEFINITIONS PERTAINING TO SUBCONTRACTING.—In this Act:

(1) SUBCONTRACT.—The term “subcontract” means a legally binding agreement between a contractor that is already under contract to another party to perform work, and a third party, hereinafter referred to as the subcontractor, for the subcontractor to perform a part, or all, of the work that the contractor has undertaken.

(2) FIRST TIER SUBCONTRACTOR.—The term “first tier subcontractor” means a subcontractor who has a subcontract directly with the prime contractor.

(3) AT ANY TIER.—The term “at any tier” means any subcontractor other than a subcontractor who is a first tier subcontractor.

SEC. 4. (a) In order to carry out the policies of this Act there is hereby created an agency under the name “Small Business Administration” (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government. The principal office of the Administration shall be located in the District of Columbia. The Administration may establish such branch and regional offices in other places in the United States as may be determined by the Administrator of the Administration. As used in this Act, the term “United States” includes the several States, the Territories and possessions of the United States, the Commonwealth of Puerto Rico, the Trust territory of the Pacific Islands, and the District of Columbia.

(b)(1) The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small business needs and problems. The Administrator shall not engage in any other business, vocation, or employment than that of serving as Administrator. In carrying out the programs administered by the Small Business Administration including its lending and guaranteeing functions, the Administrator shall not discriminate on the basis of sex or marital status against any person or small business concern applying for or receiving assistance from the Small Business Administration, and the Small Business Administration shall give special consideration to veterans of the Armed Forces of the United States and their survivors or dependents. The President also may appoint a Deputy Administrator, by and with the advice and consent of the Senate. The Administrator is authorized to appoint Associate Administrators (including the Associate Administrator specified in section 201 of the Small Business Investment Act of 1958) to assist in the execution of the functions vested in the Administration. One such Associate Administrator shall be the Associate Administrator for Veterans Business Development, who shall administer the Office of Veterans Business Development established under section 32. One of the Associate Administrators shall be designated at the time of his appointment as the Associate Administrator for Minority Small Business and Capital Ownership Development who shall be an employee in the competitive service or in the Senior Executive Service and a career appointee and shall be responsible to the Administrator for the formulation and execution of the policies and

programs under sections 7(j) and 8(a) of this Act which provide assistance to minority small business concerns. One such Associate Administrator shall be the Associate Administrator for International Trade, who shall be the head of the Office of International Trade established under section 22. One such Associate Administrator shall be the Chief Hearing Officer, who shall administer the Office of Hearings and Appeals established under section 5(i).

(2) the Administrator also shall be responsible for—

(A) establishing and maintaining an external small business economic data base for the purpose of providing the Congress and the Administration information on the economic condition and the expansion or contraction of the small business sector. To that end, the Administrator shall publish on a regular basis national small business economic indices and, to the extent feasible, regional small business economic indices, which shall include, but need not be limited to, data on—

- (i) employment layoffs, and new hires;
- (ii) number of business establishments and the types of such establishments such as sole proprietorships, corporations, and partnerships;
- (iii) number of business formation and failures;
- (iv) sales and new orders;
- (v) back orders;
- (vi) investment in plant and equipment;
- (vii) changes in inventory and rate of inventory turnover;
- (viii) sources and amounts of capital investment, including debt, equity, and internally generated funds;
- (ix) debt to equity ratios;
- (x) exports;
- (xi) number and dollar amount of mergers and acquisitions by size of acquiring and acquired firm; and
- (xii) concentration ratios; and

(B) publishing annually a report giving a comparative analysis and interpretation of the historical trends of the small business sector as reflected by the data acquired pursuant to subparagraph (A) of this subsection.

(3) RISK MANAGEMENT DATABASE.—

(A) ESTABLISHMENT.—The Administration shall establish, within the management system for the loan programs authorized by subsections (a) and (b) of section 7 of this Act and title V of the Small Business Investment Act of 1958, a management information system that will generate a database capable of providing timely and accurate information in order to identify loan underwriting, collections, recovery, and liquidation problems.

(B) INFORMATION TO BE MAINTAINED.—In addition to such other information as the Administration considers appropriate, the database established under subparagraph (A) shall, with respect to each loan program described in subparagraph (A), include information relating to—

- (i) the identity of the institution making the guaranteed loan or issuing the debenture;
- (ii) the identity of the borrower;
- (iii) the total dollar amount of the loan or debenture;

(iv) the total dollar amount of government exposure in each loan;

(v) the district of the Administration in which the borrower has its principal office;

(vi) the principal line of business of the borrower, as identified by Standard Industrial Classification Code (or any successor to that system);

(vii) the delinquency rate for each program (including number of instances and days overdue);

(viii) the number and amount of repurchases, losses, and recoveries in each program;

(ix) the number of deferrals or forbearances in each program (including days and number of instances);

(x) comparisons on the basis of loan program, lender, district and region of the Administration, for all the data elements maintained; and

(xi) underwriting characteristics of each loan that has entered into default, including term, amount and type of collateral, loan-to-value and other actual and projected ratios, line of business, credit history, and type of loan.

(C) DEADLINE FOR OPERATIONAL CAPABILITY.—The database established under subparagraph (A) shall—

(i) be operational not later than June 30, 1997; and

(ii) capture data beginning on the first day of the second quarter of fiscal year 1997 beginning after such date and thereafter.

(4)(A) The Administrator shall establish a small business computer security and education program to—

(i) provide small business concerns information regarding—

(I) utilization and management of computer technology;

(II) computer crimes committed against small business concerns; and

(III) security for computers owned or utilized by small business concerns;

(ii) provide for periodic forums for small business concerns to improve their knowledge of the matters described in clause (i); and

(iii) provide training opportunities to educate small business users on computer security techniques.

(B) The Administrator, after consultation with the Director of Institute of Computer Sciences and Technology within the Department of Commerce, shall develop information and materials to carry out the activities described in subparagraph (A) of this paragraph.

(c)(1) There are hereby established in the Treasury the following revolving funds; (A) a disaster loan fund which shall be available for financing functions performed under section 7(b)(1), 7(b)(2), 7(b)(3), 7(b)(4), 7(d)(2), and 7(m) of this Act; and (B) a business loan and investment fund which shall be available for financing functions performed under sections 5(g), 7(a), and 8(a) of this Act, and titles III, IV and V of the Small Business Investment Act of 1958.

(2) All repayments of loans and debentures, payments of interest and other receipts arising out of transactions heretofore or hereafter entered into by the Administration (A) pursuant to sections

7(b)(1), 7(b)(2), 7(b)(3), 7(b)(4), 7(b)(5), 7(b)(6), 7(b)(7), 7(b)(8), 7(d)(2), and 7(g) of this Act shall be paid into a disaster loan fund; and (B) pursuant to sections 5(g), 7(a), 7(h), 7(i), 7(l), 7(m), and 8(a) of this Act, and titles III, IV and V of the Small Business Investment Act of 1958, shall be paid into the business loan and investment fund.

(3) Unexpended balances of appropriations made to the fund pursuant to this subsection, as in effect immediately prior to the effective date of this paragraph, shall be allocated, together with related assets and liabilities, to the funds established by paragraph (1) in such amounts as the Administrator shall determine.

(4) The Administration shall submit to the Committees on Appropriations, Senate Select Committee on Small Business, and the Committee on Small Business of the House of Representatives, as soon as possible after the beginning of each calendar quarter, a full and complete report on the status of each of the funds established by paragraph (1). Business-type budgets for each of the funds established by paragraph (1) shall be prepared, transmitted to the Committees on Appropriations, the Senate Select Committee on Small Business, and the Committee on Small Business of the House of Representatives, and considered, and enacted in the manner prescribed by law (sections 102, 103, and 104 of the Government Corporation Control Act (31 U.S.C. 847–849)) for wholly owned Government corporations.

(5)(A) The Administration is authorized to make and issue notes to the Secretary of the Treasury for the purpose of obtaining funds necessary for discharging obligations under the revolving funds created by section 4(c)(1) of this Act and for authorized expenditures out of the funds. Such notes shall be in such form and denominations and have such maturities and be subject to such terms and conditions as may be prescribed by the Administration with the approval of the Secretary of the Treasury. Such notes shall bear interest at a rate fixed by the Secretary of the Treasury, taking into consideration the current average market yield of outstanding marketable obligations of the United States having maturities comparable to the notes issued by the Administration under this paragraph. The Secretary of the Treasury is authorized and directed to purchase any notes of the Administration issued hereunder, and, for that purpose, the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which such securities may be issued under such Act, as amended, are extended to include the purchase of notes issued by the Administration. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes shall be treated as public debt transactions of the United States. All borrowing authority contained herein shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts.

(B)(i) Moneys in the funds established in subsection (c)(1) not needed for current operations may be paid into miscellaneous receipts of the Treasury.

(ii) Following the close of each fiscal year, the Administration shall pay into the miscellaneous receipts of the United States Treasury the actual interest that the Administration collects during that fiscal year on all financings made under this Act.

(C) Except on those loan disbursements on which interest is paid under subsection (B)(ii), the Administration shall pay into miscellaneous receipts of the Treasury, following the close of each fiscal year, interest received by the Administration on financing functions performed under this Act and titles III and V of the Small business Investment Act of 1958 providing the capital used to perform such functions originated from appropriated funds. Such payments shall be treated by the Department of the Treasury as interest income, not as retirement of indebtedness.

(D) There are authorized to be appropriated, in any fiscal year, such sums as may be necessary for losses and interest subsidies incurred by the funds established by subsection (c)(1), but not previously reimbursed.

(d) There is hereby created the Loan Policy Board of the Small Business Administration, which shall consist of the following members, all ex officio: The Administration, as Chairman, the Secretary of the Treasury, and the Secretary of Commerce. Either of the said Secretaries may designate an officer of his Department, who has been appointed by the President by and with the advice and consent of the Senate, to act in his stead as a member of the Loan Policy Board with respect to any matter or matters. The Loan Policy Board shall establish general policies (particularly with reference to the public interest involved in the granting and denial of applications for financial assistance by the Administration and with reference to the coordination of the functions of the Administration with other activities and policies of the Government), which shall govern the granting and denial of applications for financial assistance by the Administration.

(e) PROHIBITION ON THE PROVISION OF ASSISTANCE.—Notwithstanding any other provision of law, the Administration is prohibited from providing any financial or other assistance to any business concern or other person engaged in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction.

(f) CERTIFICATION OF COMPLIANCE WITH CHILD SUPPORT OBLIGATIONS.—

(1) IN GENERAL.—For financial assistance approved after the promulgation of final regulations to implement this section, each recipient of financial assistance under this Act, including a recipient of a direct loan or a loan guarantee, shall certify that the recipient is not more than 60 days delinquent under the terms of any—

(A) administrative order;

(B) court order; or

(C) repayment agreement entered into between the recipient and the custodial parent or State agency providing child support enforcement services, that requires the recipient to pay child support, as such term is defined in section 462(b) of the Social Security Act.

(2) ENFORCEMENT.—Not later than 6 months after the date of enactment of this subsection, the Administration shall promulgate such regulations as may be necessary to enforce compliance with the requirements of this subsection.

(g) **CERTIFICATION REQUIREMENTS FOR BUSINESS OPPORTUNITY SPECIALISTS.**—

(1) *DUTIES.*—*The exclusive duties of a Business Opportunity Specialist employed by the Administrator and reporting to the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36 (or the designee of such official) shall be to implement sections 7, 8, and 45 and to complete other duties related to contracting programs under this Act. Such duties shall include—*

(A) with respect to small business concerns eligible to receive contracts and subcontracts pursuant to section 8(a)—

(i) providing guidance, counseling, and referrals for assistance with technical, management, financial, or other matters that will improve the competitive viability of such concerns;

(ii) identifying causes of success or failure of such concerns;

(iii) providing comprehensive assessments of such concerns, including identifying the strengths and weaknesses of such concerns;

(iv) monitoring and documenting compliance with the requirements of sections 7 and 8 and any regulations implementing those sections;

(v) explaining the requirements of sections 7, 8, 15, 31, 36 and 45; and

(vi) advising on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract;

(B) reviewing and monitoring compliance with mentor-protégé agreements under section 45;

(C) representing the interests of the Administrator and small business concerns in the award, modification, and administration of contracts and subcontracts awarded pursuant to section 8(a); and

(D) reporting fraud or abuse under section 7, 8, 15, 31, 36 or 45 or any regulations implementing such sections.

(2) *CERTIFICATION REQUIREMENTS.*—

[(1)] (A) *IN GENERAL.*—Consistent with the requirements of [paragraph (2)] *subparagraph (B)*, a Business Opportunity Specialist described under section 7(j)(10)(D) shall have a Level I Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that a Business Opportunity Specialist who was serving on or before January 3, 2013, may continue to serve as a Business Opportunity Specialist for a period of 5 years beginning on such date without such a certification.

[(2)] (B) *DELAY OF CERTIFICATION REQUIREMENT.*—

[(A)] (i) *TIMING.*—The certification described in [paragraph (1)] *subparagraph (A)* is not required for any person serving as a Business Opportunity Specialist until the date that is one calendar year after the date such person is appointed as a Business Opportunity Specialist.

[(B)] *APPLICATION.*—The requirements of subparagraph (A) shall—

[(i) be included in any initial job posting for the position of a Business Opportunity Specialist; and
 [(ii) apply to any person appointed as a Business Opportunity Specialist after January 3, 2013.]

(ii) *APPLICATION.—The requirements of clause (i) shall be included in any initial job posting for the position of a Business Opportunity Specialist and shall apply to any person appointed as a Business Opportunity Specialist after January 3, 2013.*

* * * * *

(h) **[CERTIFICATION REQUIREMENTS FOR] COMMERCIAL MARKET REPRESENTATIVES.—**

(1) *DUTIES.—The principal duties of a Commercial Market Representative employed by the Administrator and reporting to the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36 (or the designee of such official) shall be to advance the policies established in section 8(d)(1) relating to subcontracting. Such duties shall include—*

(A) helping prime contractors to find small business concerns that are capable of performing subcontracts;

(B) for contractors awarded contracts containing the clause described in section 8(d)(3), providing—

(i) counseling on the contractor's responsibility to maximize subcontracting opportunities for small business concerns;

(ii) instruction on methods and tools to identify potential subcontractors that are small business concerns; and

(iii) assistance to increase awards to subcontractors that are small business concerns through visits, training, and reviews of past performance;

(C) providing counseling on how a small business concern may promote its capacity to contractors awarded contracts containing the clause described in section 8(d)(3); and

(D) conducting periodic reviews of contractors awarded contracts containing the clause described in section 8(d)(3) to assess compliance with subcontracting plans required under section 8(d)(6).

(2) **CERTIFICATION REQUIREMENTS.—**

[(1)] (A) IN GENERAL.—Consistent with the requirements of paragraph (2), a commercial market representative referred to in section 15(q)(3) shall have a Level I Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that a commercial market representative who was serving on or before the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016 may continue to serve as a commercial market representative for a period of 5 years beginning on such date without such a certification.

[(2)] (B) DELAY OF CERTIFICATION REQUIREMENT.—

[(A)] (i) TIMING.—The certification described in [paragraph (1)] *subparagraph (A)* is not required for any person serving as a commercial market representative until the date that is one calendar year after the date such person is appointed as a commercial market representative.

[(B) APPLICATION.—The requirements of subparagraph (A) shall—]

[(i) be included in any initial job posting for the position of a commercial market representative; and

[(ii) apply to any person appointed as a commercial market representative after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.]

(ii) *APPLICATION.—The requirements of clause (i) shall be included in any initial job posting for the position of a commercial market representative and shall apply to any person appointed as a commercial market representative after November 25, 2015.*

* * * * *

SEC. 8. (a)(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer 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. Not later than 5 days from the date the Administration is notified of a procurement officer's adverse decision, the Administration may notify the contracting officer of the intent to appeal such adverse decision, and within 15 days of such date the Administrator shall file a written request for a reconsideration of the adverse decision with the Secretary of the department or agency head. For the purposes of this subparagraph, a procurement officer's adverse decision includes a decision not to make available for award pursuant to this subsection a particular procurement requirement or the failure to agree on the terms and conditions of a contract to be awarded noncompetitively under the authority of this subsection. Upon receipt of the notice of intent to appeal, the Secretary of the department or the agency head shall suspend further action re-

garding the procurement until a written decision on the Administrator's request for reconsideration has been issued by such Secretary or agency head, unless such officer makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a reconsideration of the adverse decision. If the Administrator's request for reconsideration is denied, the Secretary of the department or agency head shall specify the reasons why the selected firm was determined to be incapable to perform the procurement requirement, and the findings supporting such determination, which shall be made a part of the contract file for the requirement. 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;

(B) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts;

(C) to make an award to a small business concern owned and controlled by socially and economically disadvantaged individuals which has completed its period of Program Participation as prescribed by section 7(j)(15), if—

(i) the contract will be awarded as a result of an offer (including price) submitted in response to a published solicitation relating to a competition conducted pursuant to subparagraph (D); and

(ii) the prospective contract awardee was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation; and

(D)(i) A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if—

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and

(II) the anticipated award price of the contract (including options) will exceed \$5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and \$3,000,000 (including options) in the case of all other contract opportunities.

(ii) The Associate Administrator for Minority Small Business and Capital Ownership Development, on a nondelegable basis, is authorized to approve a request from an agency to award a contract opportunity under this subsection on the basis of a competition restricted to eligible Program Participants even if the anticipated award price is not expected to exceed the dollar amounts specified in clause (i)(II). Such approvals shall be granted only on a limited basis.

(2) Notwithstanding subsections (a) and (c) of the first section of the Act entitled "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 by additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work," approved August 24, 1935 (49 Stat. 793), no small business concern shall be required to provide any amount of any bond as a condition or receiving any subcontract under this subsection if the Administrator determines that such amount is inappropriate for such concern in performing such contract: *Provided*, That the Administrator shall exercise the authority granted by the paragraph only if—

(A) the Administration takes such measures as it deems appropriate for the protection of persons furnishing materials and labor to a small business receiving any benefit pursuant to this paragraph;

(B) the Administration assists, insofar as practicable, a small business receiving the benefits of this paragraph to develop, within a reasonable period of time, such financial and other capability as may be needed to obtain such bonds as the Administration may subsequently require for the successful completion of any program conducted under the authority of this subsection;

(C) the Administration finds that such small business is unable to obtain the requisite bond or bonds from a surety and that no surety is willing to issue such bond or bonds subject to the guarantee provisions of Title IV of the Small Business Investment Act of 1958; and

(D) that small business is determined to be a start-up concern and such concern has not been participating in any program conducted under the authority of this subsection for a period exceeding one year.

The authority to waive bonds provided in this paragraph (2) may not be exercised after September 30, 1988.

(3)(A) Any Program Participant selected by the Administration to perform a contract to be let noncompetitively pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

(B)(i) For purposes of paragraph (1) a "fair market price" shall be determined by the agency offering the procurement requirement to the Administration, in accordance with clauses (ii) and (iii).

(ii) The estimate of a current fair market price for a new procurement requirement, or a requirement that does not have a satisfactory procurement history, shall be derived from a price or cost analysis. Such analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. Such analysis shall consider such cost or pricing data as may be timely submitted by the Administration.

(iii) The estimate of a current fair market price for a procurement requirement that has a satisfactory procurement history shall be based on recent award prices adjusted to insure comparability. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, pack-

aging and packing costs, labor and materials costs, overhead costs, and any other additional costs which may be deemed appropriate.

(C) An agency offering a procurement requirement for potential award pursuant to this subsection shall, upon the request of the Administration, promptly submit to the Administration a written statement detailing the method used by the agency to estimate the current fair market price for such contract, identifying the information, studies, analyses, and other data used by such agency. The agency's estimate of the current fair market price (and any supporting data furnished to the Administration) shall not be disclosed to any potential offeror (other than the Administration).

(D) A small business concern selected by the Administration to perform or negotiate a contract to be let pursuant to this subsection may request the Administration to protest the agency's estimate of the fair market price for such contract pursuant to paragraph (1)(A).

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) and—

(i) which is at least 51 per centum unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—

(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I),

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II), or

(iii) Native Hawaiian organizations described in subparagraph (A)(i)(III) or subparagraph (A)(ii)(III).

(C) Each Program Participant shall certify, on an annual basis, that it meets the requirements of this paragraph regarding ownership and control.

(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(6)(A) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free en-

enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.

(B) Each Program Participant shall annually submit to the Administration—

- (i) a personal financial statement for each disadvantaged owner;
- (ii) a record of all payments made by the Program Participant to each of its disadvantaged owners or to any person or entity affiliated with such owners; and
- (iii) such other information as the Administration may deem necessary to make the determinations required by this paragraph.

(C)(i) Whenever, on the basis of information provided by a Program Participant pursuant to subparagraph (B) or otherwise, the Administration has reason to believe that the standards to establish economic disadvantage pursuant to subparagraph (A) have not been met, the Administration shall conduct a review to determine whether such Program Participant and its disadvantaged owners continue to be impaired in their ability to compete in the free enterprise system due to diminished capital and credit opportunities when compared to other concerns in the same business area, which are not socially disadvantaged.

(ii) If the Administration determines, pursuant to such review, that a Program Participant and its disadvantaged owners are no longer economically disadvantaged for the purpose of receiving assistance under this subsection, the Program Participant shall be graduated pursuant to section 7(j)(10)(G) subject to the right to a hearing as provided for under paragraph (9).

(D)(i) Whenever, on the basis of information provided by a Program Participant pursuant to subparagraph (B) or otherwise, the Administration has reason to believe that the amount of funds or other assets withdrawn from a Program Participant for the personal benefit of its disadvantaged owners or any person or entity affiliated with such owners may have been unduly excessive, the Administration shall conduct a review to determine whether such withdrawal of funds or other assets was detrimental to the achievement of the targets, objectives, and goals contained in such Program Participant's business plan.

(ii) If the Administration determines, pursuant to such review, that funds or other assets have been withdrawn to the detriment of the Program Participant's business, the Administration shall—

- (I) initiate a proceeding to terminate the Program Participant pursuant to section 7(j)(10)(F), subject to the right to a hearing under paragraph (9); or

(II) require an appropriate reinvestment of funds or other assets and such other steps as the Administration may deem necessary to ensure the protection of the concern.

(E) Whenever the Administration computes personal net worth for any purpose under this paragraph, it shall exclude from such computation—

(i) the value of investments that disadvantaged owners have in their concerns, except that such value shall be taken into account under this paragraph when comparing such concerns to other concerns in the same business area that are owned by other than socially disadvantaged persons;

(ii) the equity that disadvantaged owners have in their primary personal residences, except that any portion of such equity that is attributable to unduly excessive withdrawals from a Program Participant or a concern applying for program participation shall be taken into account.

(7)(A) No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines that with contract, financial, technical, and management support the small business concern will be able to perform contracts which may be awarded to such concern under paragraph (1)(C) and has reasonable prospects for success in competing in the private sector.

(B) Limitations established by the Administration in its regulations and procedures restricting the award of contracts pursuant to this subsection to a limited number of standard industrial classification codes in an approved business plan shall not be applied in a manner that inhibits the logical business progression by a participating small business concern into areas of industrial endeavor where such concern has the potential for success.

(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

(9)(A) Subject to the provisions of subparagraph (E), the Administration, prior to taking any action described in subparagraph (B), shall provide the small business concern that is the subject of such action, an opportunity for a hearing on the record, in accordance with chapter 5 of title 5, United States Code.

(B) The actions referred to in subparagraph (A) are—

(i) denial of program admission based upon a negative determination pursuant to paragraph (4), (5), or (6);

(ii) a termination pursuant to section 7(j)(10)(F);

(iii) a graduation pursuant to section 7(j)(10)(G); and

(iv) the denial of a request to issue a waiver pursuant to paragraph (21)(B).

(C) The Administration's proposed action, in any proceeding conducted under the authority of this paragraph, shall be sustained unless it is found to be arbitrary, capricious, or contrary to law.

(D) A decision rendered pursuant to this paragraph shall be the final decision of the Administration and shall be binding upon the Administration and those within its employ.

(E) The adjudicator selected to preside over a proceeding conducted under the authority of this paragraph shall decline to accept jurisdiction over any matter that—

(i) does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the Administration's position;

(ii) is untimely filed;

(iii) is not filed in accordance with the rules of procedure governing such proceedings; or

(iv) has been decided by or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(F) Proceedings conducted pursuant to the authority of this paragraph shall be completed and a decision rendered, insofar as practicable, within ninety days after a petition for a hearing is filed with the adjudicating office.

(10) The Administration shall develop and implement an outreach program to inform and recruit small business concerns to apply for eligibility for assistance under this subsection. Such program shall make a sustained and substantial effort to solicit applications for certification from small business concerns located in areas of concentrated unemployment or underemployment or within labor surplus areas and within States having relatively few Program Participants and from small disadvantaged business concerns in industry categories that have not substantially participated in the award of contracts let under the authority of this subsection.

(11) To the maximum extent practicable, construction subcontracts awarded by the Administration pursuant to this subsection shall be awarded within the county or State where the work is to be performed.

(12)(A) The Administration shall require each concern eligible to receive subcontracts pursuant to this subsection to annually prepare and submit to the Administration a capability statement. Such statement shall briefly describe such concern's various contract performance capabilities and shall contain the name and telephone number of the Business Opportunity Specialist assigned such concern. The Administration shall separate such statements by those primarily dependent upon local contract support and those primarily requiring a national marketing effort. Statements primarily dependent upon local contract support shall be disseminated to appropriate buying activities in the marketing area of the concern. The remaining statements shall be disseminated to the Directors of Small and Disadvantaged Business Utilization for the appropriate agencies who shall further distribute such statements to buying activities with such agencies that may purchase the types of items or services described on the capability statements.

(B) Contracting activities receiving capability statements shall, within 60 days after receipt, contact the relevant Business Opportunity Specialist to indicate the number, type, and approximate dollar value of contract opportunities that such activities may be awarding over the succeeding 12-month period and which may be appropriate to consider for award to those concerns for which it has received capability statements.

(C) Each executive agency reporting to the Federal Procurement Data System contract actions with an aggregate value in excess of \$50,000,000 in fiscal year 1988, or in any succeeding fiscal year, shall prepare a forecast of expected contract opportunities or classes of contract opportunities for the next and succeeding fiscal years that small business concerns, including those owned and controlled by socially and economically disadvantaged individuals, are capable of performing. Such forecast shall be periodically revised during such year. To the extent such information is available, the agency forecasts shall specify:

- (i) The approximate number of individual contract opportunities (and the number of opportunities within a class).
- (ii) The approximate dollar value, or range of dollar values, for each contract opportunity or class of contract opportunities.
- (iii) The anticipated time (by fiscal year quarter) for the issuance of a procurement request.
- (iv) The activity responsible for the award and administration of the contract.

(D) The head of each executive agency subject to the provisions of subparagraph (C) shall within 10 days of completion furnish such forecasts to—

- (i) the Director of the Office of Small and Disadvantaged Business Utilization established pursuant to section 15(k) for such agency; and
- (ii) the Administrator.

(E) The information reported pursuant to subparagraph (D) may be limited to classes of items and services for which there are substantial annual purchases.

(F) Such forecasts shall be available to small business concerns.

(13) For purposes of this subsection, the term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act) which—

(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or

(B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.

(14) LIMITATIONS ON SUBCONTRACTING.—A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees to satisfy the requirements of section 46.

(15) For purposes of this subsection, the term “Native Hawaiian Organization” means any community service organization serving Native Hawaiians in the State of Hawaii which—

(A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs, or any successor agency,

(B) is controlled by Native Hawaiians, and

(C) whose business activities will principally benefit such Native Hawaiians.

(16)(A) The Administration shall award sole source contracts under this section to any small business concern recommended by the procuring agency offering the contract opportunity if—

(i) the Program Participant is determined to be a responsible contractor with respect to performance of such contract opportunity;

(ii) the award of such contract would be consistent with the Program Participant's business plan; and

(iii) the award of the contract would not result in the Program Participant exceeding the requirements established by section 7(j)(10)(I).

(B) To the maximum extent practicable, the Administration shall promote the equitable geographic distribution of sole source contracts awarded pursuant to this subsection.

(17)(A) An otherwise responsible business concern that is in compliance with the requirements of subparagraph (B) shall not be denied the opportunity to submit and have considered its offer for any procurement contract, which contract has as its principal purpose the supply of a product to be let pursuant to this subsection, subsection (m), section 15(a), section 31, or section 36, solely because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract.

(B) To be in compliance with the requirements referred to in subparagraph (A), such a business concern shall—

(i) be primarily engaged in the wholesale or retail trade;

(ii) be a small business concern under the numerical size standard for the Standard Industrial Classification Code assigned to the contract solicitation on which the offer is being made;

(iii) be a regular dealer, as defined pursuant to section 35(a) of title 41, United States Code (popularly referred to as the Walsh-Healey Public Contracts Act), in the product to be offered the Government or be specifically exempted from such section by section 7(j)(13)(C); and

(iv) represent that it will supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted—

(I) by the Administrator, after reviewing a determination by the contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required of an offeror by the solicitation; or

(II) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

(C) LIMITATION.—This paragraph shall not apply to a contract that has as its principal purpose the acquisition of services or construction.

(18)(A) No person within the employ of the Administration shall, during the term of such employment and for a period of two years after such employment has been terminated, engage in any activity or transaction specified in subparagraph (B) with respect to any Program Participant during such person's term of employment, if such person participated personally (either directly or indirectly) in

decision-making responsibilities relating to such Program Participant or with respect to the administration of any assistance provided to Program Participants generally under this subsection, section 7(j)(10), or section 7(a)(20).

(B) The activities and transactions prohibited by subparagraph (A) include—

(i) the buying, selling, or receiving (except by inheritance) of any legal or beneficial ownership of stock or any other ownership interest or the right to acquire any such interest;

(ii) the entering into or execution of any written or oral agreement (whether or not legally enforceable) to purchase or otherwise obtain any right or interest described in clause (i); or

(iii) the receipt of any other benefit or right that may be an incident of ownership.

(C)(i) The employees designated in clause (ii) shall annually submit a written certification to the Administration regarding compliance with the requirements of this paragraph.

(ii) The employees referred to in clause (i) are—

(I) regional administrators;

(II) district directors;

(III) the Associate Administrator for Minority Small Business and Capital Ownership Development;

(IV) employees whose principal duties relate to the award of contracts or the provision of other assistance pursuant to this subsection or section 7(j)(10); and

(V) such other employees as the Administrator may deem appropriate.

(iii) Any present or former employee of the Administration who violates this paragraph shall be subject to a civil penalty, assessed by the Attorney General, that shall not exceed 300 per centum of the maximum amount of gain such employee realized or could have realized as a result of engaging in those activities and transactions prescribed by subparagraph (B).

(iv) In addition to any other remedy or sanction provided for under law or regulation, any person who falsely certifies pursuant to clause (i) shall be subject to a civil penalty under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–3812).

(19)(A) Any employee of the Administration who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to this subsection or section 7(j), shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees of the Administration shall expeditiously report to the Inspector General of the Administration any such action for which such employee's participation has been solicited or directed.

(B) Any employee who willfully and knowingly violates subparagraph (A) shall be subject to disciplinary action, which may consist of separation from service, reduction in grade, suspension, or reprimand.

(C) Subparagraph (A) shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting political activity.

(D) The prohibitions of subparagraph (A), and remedial measures provided for under subparagraphs (B) and (C) with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.

(20)(A) Small business concerns participating in the Program under section 7(j)(10) and eligible to receive contracts pursuant to this section shall semiannually report to their assigned Business Opportunity Specialist the following:

(i) A listing of any agents, representatives, attorneys, accountants, consultants, and other parties (other than employees) receiving compensation to assist in obtaining a Federal contract for such Program Participant.

(ii) The amount of compensation received by any person listed under clause (i) during the relevant reporting period and a description of the activities performed in return for such compensation.

(B) The Business Opportunity Specialist shall promptly review and forward such report to the Associate Administrator for Minority Small Business and Capital Ownership Development. Any report that raises a suspicion of improper activity shall be reported immediately to the Inspector General of the Administration.

(C) The failure to submit a report pursuant to the requirements of this subsection and applicable regulations shall be considered "good cause" for the initiation of a termination proceeding pursuant to section 7(j)(10)(F).

(21)(A) Subject to the provisions of subparagraph (B), a contract (including options) awarded pursuant to this subsection shall be performed by the concern that initially received such contract. Notwithstanding the provisions of the preceding sentence, if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the Government, except that no repurchase costs or other damages may be assessed against such concerns due solely to the provisions of this subparagraph.

(B) The Administrator may, on a nondelegable basis, waive the requirements of subparagraph (A) only if one of the following conditions exist:

(i) When it is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing.

(ii) The head of the contracting agency for which the contract is being performed certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions;

(iii) Ownership and control of the concern that is performing the contract will pass to another small business concern that is a program participant, but only if the acquiring firm would otherwise be eligible to receive the award directly pursuant to subsection (a);

(iv) The individuals upon whom eligibility was based are no longer able to exercise control of the concern due to incapacity or death; or

(v) When, in order to raise equity capital, it is necessary for the disadvantaged owners of the concern to relinquish ownership of a majority of the voting stock of such concern, but only if—

(I) such concern has exited the Capital Ownership Development Program;

(II) the disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(III) the disadvantaged owners will maintain control of daily business operations.

(C) The Administrator may waive the requirements of subparagraph (A) if—

(i) in the case of subparagraph (B) (i), (ii) and (iv), he is requested to do so prior to the actual relinquishment of ownership or control; and

(ii) in the case of subparagraph (B)(iii), he is requested to do so as soon as possible after the incapacity or death occurs.

(D) Concerns performing contracts awarded pursuant to this subsection shall be required to notify the Administration immediately upon entering an agreement (either oral or in writing) to transfer all or part of its stock or other ownership interest to any other party.

(E) Notwithstanding any other provision of law, for the purposes of determining ownership and control of a concern under this section, any potential ownership interests held by investment companies licensed under the Small Business Investment Act of 1958 shall be treated in the same manner as interests held by the individuals upon whom eligibility is based.

(b) It shall also be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary—

(1)(A) to provide—

(i) technical, managerial, and informational aids to small business concerns—

(I) by advising and counseling on matters in connection with Government procurement and policies, principles, and practices of good management;

(II) by cooperating and advising with—

(aa) voluntary business, professional, educational, and other nonprofit organizations, associations, and institutions (except that the Administration shall take such actions as it determines necessary to ensure that such cooperation does not constitute or imply an endorsement by the Administration of the organization or its products or services, and shall ensure that it receives appropriate recognition in all printed materials); and

(bb) other Federal and State agencies;

(III) by maintaining a clearinghouse for information on managing, financing, and operating small business enterprises; and

(IV) by disseminating such information, including through recognition events, and by other activities

that the Administration determines to be appropriate; and

(ii) through cooperation with a profit-making concern (referred to in this paragraph as a “cosponsor”), training, information, and education to small business concerns, except that the Administration shall—

(I) take such actions as it determines to be appropriate to ensure that—

(aa) the Administration receives appropriate recognition and publicity;

(bb) the cooperation does not constitute or imply an endorsement by the Administration of any product or service of the cosponsor;

(cc) unnecessary promotion of the products or services of the cosponsor is avoided; and

(dd) utilization of any one cosponsor in a marketing area is minimized; and

(II) develop an agreement, executed on behalf of the Administration by an employee of the Administration in Washington, the District of Columbia, that provides, at a minimum, that—

(aa) any printed material to announce the cosponsorship or to be distributed at the cosponsored activity, shall be approved in advance by the Administration;

(bb) the terms and conditions of the cooperation shall be specified;

(cc) only minimal charges may be imposed on any small business concern to cover the direct costs of providing the assistance;

(dd) the Administration may provide to the cosponsorship mailing labels, but not lists of names and addresses of small business concerns compiled by the Administration;

(ee) all printed materials containing the names of both the Administration and the cosponsor shall include a prominent disclaimer that the cooperation does not constitute or imply an endorsement by the Administration of any product or service of the cosponsor; and

(ff) the Administration shall ensure that it receives appropriate recognition in all cosponsorship printed materials.

(B) To establish, conduct, and publicize, and to recruit, select, and train volunteers for (and to enter into contracts, grants, or cooperative agreements therefor), volunteer programs, including a Service Corps of Retired Executives (SCORE) and an Active Corps of Executive (ACE) for the purposes of section 8(b)(1)(A) of this Act. To facilitate the implementation of such volunteer programs the Administration shall maintain at its headquarters and pay the salaries, benefits, and expenses of a volunteer and professional staff to manage and oversee the program. Any such payments made pursuant to this subparagraph shall be effective only to such extent or in such amounts as are provided in advance in appropriation

Acts. Notwithstanding any other provision of law, SCORE may solicit cash and in-kind contributions from the private sector to be used to carry out its functions under this Act, and may use payments made by the Administration pursuant to this subparagraph for such solicitation and the management of the contributions received.

(C) To allow any individual or group of persons participating with it in furtherance of the purposes of subparagraphs (A) and (B) to use the Administration's office facilities and related material and services as the Administration deems appropriate, including clerical and stenographic service:

(i) such volunteers, while carrying out activities under section 8(b)(1) of this Act shall be deemed Federal employees for the purposes of the Federal tort claims provisions in title 28, United States Code; and for the purposes of subchapter I of chapter 81 of title 5, United States Code (relative to compensation to Federal employees for work injuries) shall be deemed civil employees of the United States within the meaning of the term "employee" as defined in section 8101 of title 5, United States Code, and the provisions of that subchapter shall apply except that in computing compensation benefits for disability or death, the monthly pay of a volunteer shall be deemed that received under the entrance salary for a grade GS-11 employee:

(ii) the Administrator is authorized to reimburse such volunteers for all necessary out-of-pocket expenses incident to their provision of services under this Act, or in connection with attendance at meetings sponsored by the Administration, or for the cost of malpractice insurance, as the Administrator shall determine, in accordance with regulations which he or she shall prescribe, and, while they are carrying out such activities away from their homes or regular places of business, for travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, United States Code, for individuals serving without pay; and

(iii) such volunteers shall in no way provide services to a client of such Administration with a delinquent loan outstanding, except upon a specific request signed by such client for assistance in connection with such matter.

(D) Notwithstanding any other provision of law, no payment for supportive services or reimbursement of out-of-pocket expenses made to persons serving pursuant to section 8(b)(1) of this Act shall be subject to any tax or charge or be treated as wages or compensation for the purposes of unemployment, disability, retirement, public assistance, or similar benefit payments, or minimum wage laws.

(E) In carrying out its functions under subparagraph (A), to make grants (including contracts and cooperative agreements) to any public or private institution of higher education for the establishment and operation of a small business institute, which shall be used to provide business counseling and assistance to small business concerns through the activities of stu-

dents enrolled at the institution, which students shall be entitled to receive educational credits for their activities.

(F) Notwithstanding any other provision of law and pursuant to regulations which the Administrator shall provide, counsel may be employed and counsel fees, court costs, bail, and other expenses incidental to the defense of volunteers may be paid in judicial or Administrative proceedings arising directly out of the performance of activities pursuant to section 8(b)(1) of this Act, as amended (15 U.S.C. 637(b)(1)) to which volunteers have been made parties.

(G) In carrying out its functions under this Act and to carry out the activities authorized by title IV of the Women's Business Ownership Act of 1988, the Administration is authorized to accept, in the name of the Administration, and employ or dispose of in furtherance of the purposes of this Act, any money or property, real, personal, or mixed, tangible, or intangible, received by gift, devise, bequest, or otherwise; and, further, to accept gratuitous services and facilities.

(2) to make a complete inventory of all productive facilities of small-business concerns or to arrange for such inventory to be made by any other governmental agency which has the facilities. In making any such inventory, the appropriate agencies in the several States may be requested to furnish an inventory of the productive facilities of small-business concerns in each respective State if such an inventory is available or in prospect;

(3) to coordinate and to ascertain the means by which the productive capacity of small-business concerns can be most effectively utilized;

(4) to consult and cooperative with officers of the Government having procurement or property disposal powers, in order to utilize the potential productive capacity of plants operated by small-business concerns;

(5) to obtain information as to methods and practices which Government prime contractors utilize in letting subcontracts and to take action to encourage the letting of subcontracts by prime contractors to small-business concerns at prices and on conditions and terms which are fair and equitable;

(6) to determine within any industry the concerns, firms, persons, corporations, partnerships, cooperatives, or other business enterprises which are to be designated "small-business concerns" for the purpose of effectuating the provisions of this Act. To carry out this purpose the Administrator, when requested to do so, shall issue in response to each such request an appropriate certificate certifying an individual concern as a "small-business concern" in accordance with the criteria expressed in this Act. Any such certificate shall be subject to revocation when the concern covered thereby ceases to be a "small-business concern." Offices of the Government having procurement or lending powers, or engaging in the disposal of Federal property or allocating materials or supplies, or promulgating regulations affecting the distribution of materials or supplies, shall accept as conclusive the Administration's determination as to which enterprises are to be designated "small-

business concerns”, as authorized and directed under this paragraph;

(7)(A) to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

(B) if a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of section 35(a) of title 41, United States Code (the Walsh-Healey Public Contracts Act), he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation.

(C) in any case in which a small business concern or group of such concerns has been certified by the Administration pursuant to (A) or (B) to be a responsible or eligible Government contractor as to a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility. Notwithstanding the first sentence of this subparagraph, the Administration may not establish an exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) of this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed.

(8) to obtain from any Federal department, establishment, or agency engaged in procurement or in the financing of procurement or production such reports concerning the letting of contracts and subcontracts and the making of loans to business concerns as it may deem pertinent in carrying out its functions under this Act;

(9) to obtain from any Federal department, establishment, or agency engaged in the disposal of Federal property such reports concerning the solicitation of bids, time of sale, or otherwise as it may deem pertinent in carrying out its functions under this Act;

(10) to obtain from suppliers of materials information pertaining to the method of filling orders and the bases for allocating their supply, whenever it appears that any small business is unable to obtain materials from its normal sources;

(11) to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share of materials, supplies, and equipment to small-business concerns;

(12) to consult and cooperate with all Government agencies for the purpose of insuring that small-business concerns shall receive fair and reasonable treatment from such agencies;

(13) to establish such advisory boards and committees as may be necessary to achieve the purposes of this Act and of the Small Business Investment Act of 1958; to call meetings of such boards and committees from time to time; to pay the transportation expenses and a per diem allowance in accordance with section 5703 of title 5, United States Code, to the members of such boards and committees for travel and subsistence expenses incurred at the request of the Administration in connection with travel to points more than fifty miles distant from the homes of such members in attending the meetings of such boards and committees; and to rent temporarily, within the District of Columbia or elsewhere, such hotel or other accommodations as are needed to facilitate the conduct of such meetings;

(14) to provide at the earliest practicable time such information and assistance as may be appropriate, including information concerning eligibility for loans under section 7(b)(3), to local public agencies (as defined in section 110(h) of the Housing Act of 1949) and to small-business concerns to be displaced by federally aided urban renewal projects in order to assist such small-business concerns in reestablishing their operations;

(15) to disseminate, without regard to the provisions of section 3204 of title 39, United States Code, data and information, in such form as it shall deem appropriate, to public agencies, private organizations, and the general public;

(16) to make studies of matters materially affecting the competitive strength of small business, and of the effect on small business of Federal laws, programs, and regulations, and to make recommendations to the appropriate Federal agency or agencies for the adjustment of such programs and regulations to the needs of small business; and

(17) to make grants to, and enter into contracts and cooperative agreements with, educational institutions, private businesses, veterans' nonprofit community-based organizations, and Federal, State, and local departments and agencies for the establishment and implementation of outreach programs for disabled veterans (as defined in section 4211(3) of title 38,

United States Code), veterans, and members of a reserve component of the Armed Forces.

(c)

(d)(1) It is the policy of the United States that small business concerns, small business concerns owned and controlled by veterans, 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, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by veterans, 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.

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which—

(A) does not exceed the simplified acquisition threshold;

(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(C) is for services which are personal in nature.

(3) The clause required by paragraph (2) shall be as follows:

(A) It is the policy of the United States that small business concerns, small business concerns owned and controlled by veterans, 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 shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by veterans, 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.

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may

be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

(C) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern—

(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

(D) The term "small business concern owned and controlled by women" shall mean a small business concern—

(i) which is at least 51 per centum owned by one or more women; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more women; and

(ii) whose management and daily business operations are controlled by one or more women.

(E) The term "small business concern owned and controlled by veterans" shall mean a small business concern—

(i) which is at least 51 per centum owned by one or more eligible veterans; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more veterans; and

(ii) whose management and daily business operations are controlled by such veterans. The contractor shall treat as veterans all individuals who are veterans within the meaning of the term under section 3(q) of the Small Business Act.

(F) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, small business concern owned and controlled by veterans, small business concern owned and controlled by service-disabled veterans, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.

(G) In this contract, the term "qualified HUBZone small business concern" has the meaning given that term in section 3(p) of the Small Business Act.

(H) In this contract, the term “small business concern owned and controlled by service-disabled veterans” has the meaning given that term in section 3(q).

(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed \$1,000,000, in the case of a contract for the construction of any public facility, or \$500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, 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 the contract.

(E) Notwithstanding any other provisions of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection and for small business concerns owned and controlled by women, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the

contact: *Provided, That*, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(F)(i) Each contract subject to the requirements of this paragraph or paragraph (5) shall contain a clause for the payment of liquidated damages upon a finding that a prime contractor has failed to make a good faith effort to comply with the requirements imposed on such contractor by this subsection.

(ii) The contractor shall be afforded an opportunity to demonstrate a good faith effort regarding compliance prior to the contracting officer's final decision regarding the imposition of damages and the amount thereof. The final decision of a contracting officer regarding the contractor's obligation to pay such damages, or the amounts thereof, shall be subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(iii) Each agency shall ensure that the goals offered by the apparent successful bidder or offeror are attainable in relation to—

(I) the subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(II) the pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(III) the actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(G) The following factors shall be designated by the Federal agency as significant factors for purposes of evaluating offers for a bundled contract where the head of the agency determines that the contract offers a significant opportunity for subcontracting:

(i) A factor that is based on the rate provided under the subcontracting plan for small business participation in the performance of the contract.

(ii) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities, shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcon-

tracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include—

(A) percentage goals for the utilization as subcontractors of small business concerns, small business concerns owned and controlled by veterans, 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;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns, small business concerns owned and controlled by veterans, 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 will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,000,000 in the case of a contract for the construction of any public facility, or in excess of \$500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5), and assurances at a minimum that the offeror or bidder, and all subcontractors required to maintain subcontracting plans pursuant to this paragraph, will—

(i) review and approve subcontracting plans submitted by their subcontractors;

(ii) monitor subcontractor compliance with their approved subcontracting plans;

(iii) ensure that subcontracting reports are submitted by their subcontractors when required;

(iv) acknowledge receipt of their subcontractors' reports;

(v) compare the performance of their subcontractors to subcontracting plans and goals; and

(vi) discuss performance with subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans;

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan;

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, 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; and efforts to identify and award subcontracts to such small business concerns;

(G) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the plan established in accordance with subparagraph (D) of this paragraph, including—

(i) the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, 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; and

(ii) efforts to identify and award subcontracts to such small business concerns; and

(H) a representation that the offeror or bidder will—

(i) make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns used in preparing and submitting to the contracting agency the bid or proposal, in the same amount and quality used in preparing and submitting the bid or proposal; and

(ii) provide to the contracting officer a written explanation if the offeror or bidder fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in clause (i).

(7) The head of the contracting agency shall ensure that—

(A) the agency collects and reports data on the extent to which contractors of the agency meet the goals and objectives set forth in subcontracting plans submitted pursuant to this subsection; and

(B) the agency periodically reviews data collected and reported pursuant to subparagraph (A) for the purpose of ensuring that such contractors comply in good faith with the requirements of this subsection and subcontracting plans submitted by the contractors pursuant to this subsection.

(8) The provisions of paragraphs (4), (5), and (6) shall not apply to offerors or bidders who are small business concerns.

[(9) The failure]

(9) *MATERIAL BREACH.*—*The failure* of any contractor or subcontractor to comply in good faith with—

(A) the clause contained in paragraph (3) of this subsection, **[or]**

(B) any plan required of such contractor pursuant to the authority of this subsection to be included in its contract or subcontract, *or*

(C) *assurances provided under paragraph (6)(E)*, shall be a material breach of such contract or subcontract and may be considered in any past performance evaluation of the contractor.

(10) Nothing contained in this subsection shall be construed to supersede the requirements of Defense Manpower Policy Number 4A (32A CFR Chap. 1) or any successor policy.

[(11) In the case of]

(11) *AUTHORITY OF ADMINISTRATOR.*—*In the case of* contracts within the provisions of paragraphs (4), (5), and (6), the Administration is authorized to—

(A) assist Federal agencies and businesses in complying with their responsibilities under the provisions of this subsection, including the formulation of subcontracting plans pursuant to paragraph (4);

(B) review any solicitation for any contract to be let pursuant to paragraphs (4) and (5) to determine the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by veterans, 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 as subcontractors in the performance of any contract resulting from any solicitation, and to submit its findings**],** which shall be advisory in nature,**]** to the appropriate Federal agency; and

(C) evaluate compliance with subcontracting plans as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors having multiple contracts, on an aggregate basis.

(12) For purposes of determining the attainment of a subcontract utilization goal under any subcontracting plan entered into with any executive agency pursuant to this subsection, a mentor firm providing development assistance to a protege firm under the pilot Mentor-Protege Program established pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 10 U.S.C. 2301 note) shall be granted credit for such assistance in accordance with subsection (g) of such section.

(13) *PAYMENT OF SUBCONTRACTORS.*—

(A) *DEFINITION.*—In this paragraph, the term “covered contract” means a contract relating to which a prime contractor is required to develop a subcontracting plan under paragraph (4) or (5).

(B) *NOTICE.*—

(i) *IN GENERAL.*—A prime contractor for a covered contract shall notify in writing the contracting officer for the covered contract if the prime contractor pays a reduced price to a subcontractor for goods and services upon completion of the responsibilities of the subcontractor or the payment to a subcontractor is more than 90 days past due

for goods or services provided for the covered contract for which the Federal agency has paid the prime contractor.

(ii) CONTENTS.—A prime contractor shall include the reason for the reduction in a payment to or failure to pay a subcontractor in any notice made under clause (i).

(C) PERFORMANCE.—A contracting officer for a covered contract shall consider the unjustified failure by a prime contractor to make a full or timely payment to a subcontractor in evaluating the performance of the prime contractor.

(D) CONTROL OF FUNDS.—If the contracting officer for a covered contract determines that a prime contractor has a history of unjustified, untimely payments to contractors, the contracting officer shall record the identity of the contractor in accordance with the regulations promulgated under subparagraph (E).

(E) REGULATIONS.—Not later than 1 year after the date of enactment of this paragraph, the Federal Acquisition Regulatory Council established under section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(a)) shall amend the Federal Acquisition Regulation issued under section 25 of such Act to—

(i) describe the circumstances under which a contractor may be determined to have a history of unjustified, untimely payments to subcontractors;

(ii) establish a process for contracting officers to record the identity of a contractor described in clause (i); and

(iii) require the identity of a contractor described in clause (i) to be incorporated in, and made publicly available through, the Federal Awardee Performance and Integrity Information System, or any successor thereto.

(14) An offeror for a covered contract that intends to identify a small business concern as a potential subcontractor in a bid or proposal for the contract, or in a plan submitted pursuant to this subsection in connection with the contract, shall notify the small business concern prior to making such identification.

(15) The Administrator shall establish a reporting mechanism that allows a subcontractor or potential subcontractor to report fraudulent activity or bad faith by a contractor with respect to a subcontracting plan submitted pursuant to this subsection.

(16) CREDIT FOR CERTAIN SUBCONTRACTORS.—

(A) For purposes of determining whether or not a prime contractor has attained the percentage goals specified in paragraph (6)—

(i) if the subcontracting goals pertain only to a single contract with the executive agency, the prime contractor shall receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (6)(D) in an amount equal to the dollar value of work awarded to such small business concerns; and

(ii) if the subcontracting goals pertain to more than one contract with one or more executive agencies, or to one contract with more than one executive agency, the prime

contractor may only count first tier subcontractors that are small business concerns.

(B) Nothing in this paragraph shall abrogate the responsibility of a prime contractor to make a good-faith effort to achieve the first tier small business subcontracting goals negotiated under paragraph (6)(A), or the requirement for subcontractors with further opportunities for subcontracting to make a good-faith effort to achieve the goals established under paragraph (6)(D).

(17) REVIEW AND ACCEPTANCE OF SUBCONTRACTING PLANS.—

(A) DEFINITION.—*In this paragraph, the term “covered small business concerns” means—*

- (i) small business concerns;*
- (ii) qualified HUBZone small business concerns;*
- (iii) small business concerns owned and controlled by veterans;*
- (iv) small business concerns owned and controlled by service-disabled veterans;*
- (v) small business concerns owned and controlled by socially and economically disadvantaged individuals, as defined in paragraph (3)(C); and*
- (vi) small business concerns owned and controlled by women.*

(B) DELAYED ACCEPTANCE OF PLAN.—*Except as provided in subparagraph (E), if a procurement center representative or commercial market representative determines that a subcontracting plan required under paragraph (4) or (5) fails to provide the maximum practicable opportunity for covered small business concerns to participate in the performance of the contract to which the plan applies, the representative may delay acceptance of the plan in accordance with subparagraph (C).*

(C) PROCESS FOR DELAYED ACCEPTANCE.—

(i) IN GENERAL.—Except as provided in clause (ii), a procurement center representative or commercial market representative who makes a determination under subparagraph (B) with respect to a subcontracting plan may delay acceptance of the plan for a 30-day period by providing written notice of the determination to the head of the procuring activity of the contracting agency that includes recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph.

(ii) EXCEPTION.—In the case of the Department of Defense—

(I) a procurement center representative or commercial market representative who makes a determination under subparagraph (B) with respect to a subcontracting plan may delay acceptance of the plan for a 15-day period by providing written notice of the determination to appropriate personnel of the Department of Defense that includes recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph; and

(II) the authority of a procurement center representative or commercial market representative to delay acceptance of a subcontracting plan as provided in subparagraph (B) does not include the authority to delay the award or performance of the contract concerned.

(D) *DISAGREEMENTS.*—If a procurement center representative or commercial market representative delays the acceptance of a subcontracting plan under subparagraph (C) and does not reach agreement with the head of the procuring activity of the contracting agency to alter the plan to provide the maximum practicable opportunity described in subparagraph (B) not later than 30 days after the date on which written notice was provided, the disagreement shall be submitted to the head of the contracting agency by the Administrator for a final determination.

(E) *EXCEPTION.*—A procurement center representative or commercial market representative may not delay the acceptance of a subcontracting plan if the head of the contracting agency certifies that the need of the agency for the supplies or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to accept the subcontracting plan.

(18) *PILOT PROGRAM PROVIDING PAST PERFORMANCE RATINGS FOR OTHER SMALL BUSINESS SUBCONTRACTORS.*—

(A) *ESTABLISHMENT.*—The Administrator shall establish a pilot program for a small business concern performing as a first tier subcontractor for a covered contract (as defined in paragraph 13(A)) to request a past performance rating in the system used by the Federal Government to monitor or record contractor past performance.

(B) *APPLICATION.*—A small business concern described in subparagraph (A) shall submit an application to the appropriate official for a past performance rating. Such application shall include written evidence of the past performance factors for which the small business concern seeks a rating and a suggested rating.

(C) *DETERMINATION.*—The appropriate official shall submit the application from the small business concern to the contracting officer (or a designee of such officer) for the covered contract and to the prime contractor for review. The contracting officer (or designee) and the prime contractor shall, not later than 30 days after receipt of the application, submit to the appropriate official a response regarding the application.

(i) *AGREEMENT ON RATING.*—If the contracting officer (or designee) and the prime contractor agree on a past performance rating, or if either the contracting officer (or designee) or the prime contractor fail to respond and the responding individual agrees with the rating of the applicant small business concern, the appropriate official shall enter the agreed-upon past performance rating in the system described in subparagraph (A).

(ii) *DISAGREEMENT ON RATING.*—If the contracting officer (or designee) and the prime contractor fail to respond within 30 days or if they disagree about the rating, or if either the contracting officer (or designee) or the prime contractor fail to respond and the responding individual disagrees with the rating of the applicant small business concern, the contracting officer (or designee) or the prime contractor shall submit a notice contesting the application to appropriate official. The appropriate official shall follow the requirements of subparagraph (D).

(D) *PROCEDURE FOR RATING.*—Not later than 14 calendar days after receipt of a notice under subparagraph (C)(ii), the appropriate official shall submit such notice to the applicant small business concern. Such concern may submit comments, rebuttals, or additional information relating to the past performance of such concern not later 14 calendar days after receipt of such notice. The appropriate official shall enter the into the system described in subparagraph (A) a rating that is neither favorable nor unfavorable along with the initial application from the small business concern, the responses of the contracting officer (or designee) and the prime contractor, and any additional information provided by the small business concern.

(E) *USE OF INFORMATION.*—A small business subcontractor may use a past performance rating given under this paragraph to establish its past performance for a prime contract.

(F) *DURATION.*—The pilot program established under this paragraph shall terminate 3 years after the date on which the first small business concern receives a past performance rating for performance as a first tier subcontractor.

(G) *REPORT.*—The Comptroller General of the United States shall begin an assessment of the pilot program 1 year after the establishment of such program. Not later than 6 months after beginning such assessment, the Comptroller General shall submit a report to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives, which shall include—

(i) the number of small business concerns that have received past performance ratings under the pilot program;

(ii) the number of applications in which the contracting officer (or designee) or the prime contractor contested the application of the small business concern;

(iii) any suggestions or recommendations the Comptroller General or the small business concerns participating in the program have to address disputes between the small business concern, the contracting officer (or designee), and the prime contractor on past performance ratings; and

(iv) any suggestions or recommendation the Comptroller General has to improve the operation of the pilot program.

(H) APPROPRIATE OFFICIAL DEFINED.—In this paragraph, the term “appropriate official” means a Commercial Market Representative or other individual designated by the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36.

- (e)(1) Except as provided in subsection (g)—
 - (A) an executive agency intending to—
 - (i) solicit bids or proposals for a contract for property or services for a price expected to exceed \$25,000; or
 - (ii) place an order, expected to exceed \$25,000, under a basic agreement, basis ordering agreement, or similar arrangement,
 shall publish a notice described in subsection (f);
 - (B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f)—
 - (i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed \$10,000, but not to exceed \$25,000; and
 - (ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed \$25,000; and
 - (C) an executive agency awarding a contract for property or services for a price exceeding \$100,000, or placing an order referred to in clause (A)(ii) exceeding \$100,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.
- (2)(A) A notice of solicitation required to be published under paragraph (1) may be published—
 - (i) by electronic means that meet the accessibility requirements under section 18(a)(7) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(a)(7)); or
 - (ii) by the Secretary of Commerce in the Commerce Business Daily.
- (B) The Secretary of Commerce shall promptly publish in the Commerce Business Daily each notice or announcement received under this subsection for publication by that means.
- (3) Whenever an executive agency is required by paragraph (1)(A) to publish a notice of solicitation, such executive agency may not—
 - (A) issue the solicitation earlier than 15 days after the date on which the notice is published; or
 - (B) in the case of a contract or order estimated to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—
 - (i) in the case of an order under a basic agreement, basis ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

- (ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or
 - (iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.
- (f) Each notice of solicitation required by subparagraph (A) or (B) of subsection (e)(1) shall include—
 - (1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;
 - (2) provisions that—
 - (A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and
 - (B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which a qualification requirement may be obtained;
 - (3) the name, business address, and telephone number of the contracting officer;
 - (4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;
 - (5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source; and
 - (6) in the case of a contract in an amount estimated to be greater than \$25,000 but not greater than the simplified acquisition threshold—
 - (A) a description of the procedures to be used in awarding the contract; and
 - (B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.
- (g)(1) A notice is not required under subsection (e)(1) if—
 - (A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by—
 - (i) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and
 - (ii) permitting the public to respond to the solicitation electronically.
 - (B) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(C) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 9 of this Act;

(D) the procurement is made against an order placed under a requirements contract;

(E) the procurement is made for perishable subsistence supplies;

(F) the procurement is for utility services, other than telecommunication services, and only one source is available; or

(G) the procurement is for the services of an expert for use in any litigation or dispute (including preparation for any foreseeable litigation or dispute) that involves or could involve the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.

(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or paragraph (2), (3), (4), (5), and (7) of section 2304(c) of title 10, United States Code.

(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(h)(1) An executive agency may not award a contract using procedures other than competitive procedures unless—

(A) except as provided in paragraph (2), a written justification for the use of such procedures has been approved—

(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the advocate for competition for the procuring activity (without further delegation);

(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a member of the Armed Forces, is a general or flag officer, or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

(B) all other requirements applicable to the use of such procedures under title III of the Federal Property and Administra-

tive Services Act of 1949 (41 U.S.C. 251 et sq.) or chapter 137 of title 10, United States Code, as appropriate, have been satisfied.

(2) The same exceptions as are provided in section 303(f)(2) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(2)) or section 2304(f)(2) of title 10, United States Code, shall apply with respect to the requirements of paragraph (1)(A) of this subsection in the same manner as such exceptions apply to the requirements of section 303(f)(1) of such Act or section 2304(f)(1) of such title, as appropriate.

(i) An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice under subsection (e). An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(j) For purposes of this section, the term “executive agency” has the meaning provided such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).

(k) NOTICES OF SUBCONTRACTING OPPORTUNITIES.—

(1) IN GENERAL.—Notices of subcontracting opportunities may be submitted for publication on the appropriate Federal Web site (as determined by the Administrator) by—

(A) a business concern awarded a contract by an executive agency subject to subsection (e)(1)(C); and

(B) a business concern that is a subcontractor or supplier (at any tier) to such contractor having a subcontracting opportunity in excess of \$10,000.

(2) CONTENT OF NOTICE.—The notice of a subcontracting opportunity shall include—

(A) a description of the business opportunity that is comparable to the description specified in paragraphs (1), (2), (3), and (4) of subsection (f); and

(B) the due date for receipt of offers.

(l) MANAGEMENT ASSISTANCE FOR SMALL BUSINESSES AFFECTED BY MILITARY OPERATIONS.—The Administration shall utilize, as appropriate, its entrepreneurial development and management assistance programs, including programs involving State or private sector partners, to provide business counseling and training to any small business concern adversely affected by the deployment of units of the Armed Forces of the United States in support of a period of military conflict (as defined in section 7(n)(1)).

(m) PROCUREMENT PROGRAM FOR WOMEN-OWNED SMALL BUSINESS CONCERNS.—

(1) DEFINITIONS.—In this subsection, the following definitions apply:

(A) CONTRACTING OFFICER.—The term “contracting officer” has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)).

(B) SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY WOMEN.—The term “small business concern owned and controlled by women” has the meaning given such term in section 3(n), except that ownership shall be determined without regard to any community property law.

(2) **AUTHORITY TO RESTRICT COMPETITION.**—In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if—

(A) each of the concerns is not less than 51 percent owned by one or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(B) the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by women will submit offers for the contract;

(C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3);

(D) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price; and

(E) each of the concerns is certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the Administrator as a small business concern owned and controlled by women.

(3) **WAIVER.**—With respect to a small business concern owned and controlled by women, the Administrator may waive subparagraph (2)(A) if the Administrator determines that the concern is in an industry in which small business concerns owned and controlled by women are substantially underrepresented.

(4) **IDENTIFICATION OF INDUSTRIES.**—The Administrator shall conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.

(5) **ENFORCEMENT; PENALTIES.**—

(A) **VERIFICATION OF ELIGIBILITY.**—In carrying out this subsection, the Administrator shall establish procedures relating to—

(i) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this subsection (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern under paragraph (2)(E)); and

(ii) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under paragraph (2)(E).

(B) **EXAMINATIONS.**—The procedures established under subparagraph (A) may provide for program examinations (including random program examinations) by the Administrator of any small business concern making a certification or providing information to the Administrator under paragraph (2)(E).

(C) PENALTIES.—In addition to the penalties described in section 16(d), any small business concern that is determined by the Administrator to have misrepresented the status of that concern as a small business concern owned and controlled by women for purposes of this subsection, shall be subject to—

- (i) section 1001 of title 18, United States Code; and
- (ii) sections 3729 through 3733 of title 31, United States Code.

(6) PROVISION OF DATA.—Upon the request of the Administrator, the head of any Federal department or agency shall promptly provide to the Administrator such information as the Administrator determines to be necessary to carry out this subsection.

(7) AUTHORITY FOR SOLE SOURCE CONTRACTS FOR ECONOMICALLY DISADVANTAGED SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY WOMEN.—A contracting officer may award a sole source contract under this subsection to any small business concern owned and controlled by women described in paragraph (2)(A) and certified under paragraph (2)(E) if—

(A) such concern is determined to be a responsible contractor with respect to performance of the contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more businesses described in paragraph (2)(A) will submit offers;

(B) the anticipated award price of the contract (including options) will not exceed—

(i) \$6,500,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(ii) \$4,000,000, in the case of any other contract opportunity; and

(C) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(8) AUTHORITY FOR SOLE SOURCE CONTRACTS FOR SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY WOMEN IN SUBSTANTIALLY UNDERREPRESENTED INDUSTRIES.—A contracting officer may award a sole source contract under this subsection to any small business concern owned and controlled by women certified under paragraph (2)(E) that is in an industry in which small business concerns owned and controlled by women are substantially underrepresented (as determined by the Administrator under paragraph (3)) if—

(A) such concern is determined to be a responsible contractor with respect to performance of the contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more businesses in an industry that has received a waiver under paragraph (3) will submit offers;

(B) the anticipated award price of the contract (including options) will not exceed—

(i) \$6,500,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

- (ii) \$4,000,000, in the case of any other contract opportunity; and
- (C) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.
- (n) BUSINESS GRANTS AND COOPERATIVE AGREEMENTS.—
 - (1) IN GENERAL.—In accordance with this subsection, the Administrator may make grants to and enter into cooperative agreements with any coalition of private entities, public entities, or any combination of private and public entities—
 - (A) to expand business-to-business relationships between large and small businesses; and
 - (B) to provide businesses, directly or indirectly, with online information and a database of companies that are interested in mentor-protege programs or community-based, statewide, or local business development programs.
 - (2) MATCHING REQUIREMENT.—Subject to subparagraph (B), the Administrator may make a grant to a coalition under paragraph (1) only if the coalition provides for activities described in paragraph (1)(A) or (1)(B) an amount, either in kind or in cash, equal to the grant amount.
 - (3) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection \$6,600,000, to remain available until expended, for each of fiscal years 2001 through 2006.

* * * * *

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 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 cannot be offered so as to make small business participation likely, (4) why construction cannot be procured as separate discrete projects, or (5) why the agency has determined that the bundled contract (as defined in section 3(o)) is necessary and justified. 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. 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.】

(a) *SMALL BUSINESS PROCUREMENTS.*—

(1) *IN GENERAL.*—*For purposes of this Act, small business concerns shall receive any award or contract if such award or contract is, in the determination of the Administrator and the contracting agency, in the interest of—*

(A) *maintaining or mobilizing the full productive capacity of the United States;*

(B) *war or national defense programs; or*

(C) *assuring that a fair proportion of the total purchase and contracts for goods and services of the Government in*

each industry category (as described under paragraph (2)) are awarded to small business concerns.

(2) INDUSTRY CATEGORY DEFINED.—

(A) IN GENERAL.—In this subsection, the term “industry category” means a discrete group of similar goods and services, as determined by the Administrator in accordance with the North American Industry Classification System codes used to establish small business size standards, except that the Administrator shall limit an industry category to a greater extent than provided under the North American Industry Classification codes if the Administrator receives evidence indicating that further segmentation of the industry category is warranted—

- (i) due to special capital equipment needs;*
- (ii) due to special labor requirements;*
- (iii) due to special geographic requirements, except as provided in subparagraph (B);*
- (iv) due to unique Federal buying patterns or requirements; or*
- (v) to recognize a new industry.*

(B) EXCEPTION FOR GEOGRAPHIC REQUIREMENTS.—The Administrator may not further segment an industry category based on geographic requirements unless—

- (i) the Government typically designates the geographic area where work for contracts for goods or services is to be performed;*
- (ii) Government purchases comprise the major portion of the entire domestic market for such goods or services; and*
- (iii) it is unreasonable to expect competition from business concerns located outside of the general geographic area due to the fixed location of facilities, high mobilization costs, or similar economic factors.*

(3) DETERMINATIONS WITH RESPECT TO AWARDS OR CONTRACTS.—*Determinations made pursuant to paragraph (1) may be made for individual awards or contracts, any part of an award or contract or task order, or for classes of awards or contracts or task orders.*

(4) INCREASING PRIME CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS CONCERNS.—

(A) DESCRIPTION OF COVERED PROPOSED PROCUREMENTS.—The requirements of this paragraph shall apply to a proposed procurement that includes in its statement of work goods or services currently being supplied or performed by a small business concern and, as determined by the Administrator—

- (i) is in a quantity or of an estimated dollar value which makes the participation of a small business concern as a prime contractor unlikely;*
- (ii) in the case of a proposed procurement for construction, if such proposed procurement seeks to bundle or consolidate discrete construction projects; or*
- (iii) is a solicitation that involves an unnecessary or unjustified bundling of contract requirements.*

(B) *NOTICE TO PROCUREMENT CENTER REPRESENTATIVES.*—With respect to proposed procurements described in subparagraph (A), at least 30 days before issuing a solicitation and concurrent with other processing steps required before issuing the solicitation, the contracting agency shall provide a copy of the proposed procurement to the procurement center representative of the contracting agency (as described in subsection (l)) along with a statement explaining—

(i) why the proposed procurement cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) why delivery schedules cannot be established on a realistic basis that will encourage the participation of small business concerns in a manner consistent with the actual requirements of the Government;

(iii) why the proposed procurement cannot be offered to increase the likelihood of the participation of small business concerns;

(iv) in the case of a proposed procurement for construction, why the proposed procurement cannot be offered as separate discrete projects; or

(v) why the agency has determined that the bundling of contract requirements is necessary and justified.

(C) *ALTERNATIVES TO INCREASE PRIME CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS CONCERNS.*—If the procurement center representative believes that the proposed procurement will make the participation of small business concerns as prime contractors unlikely, the procurement center representative, within 15 days after receiving the statement described in subparagraph (B), shall recommend to the contracting agency alternative procurement methods for increasing prime contracting opportunities for small business concerns.

(D) *FAILURE TO AGREE ON AN ALTERNATIVE PROCUREMENT METHOD.*—If the procurement center representative and the contracting agency fail to agree on an alternative procurement method, the Administrator shall submit the matter to the head of the appropriate department or agency for a determination.

(5) *CONTRACTS FOR SALE OF GOVERNMENT PROPERTY.*—With respect to a contract for the sale of Government property, small business concerns shall receive any such contract if, in the determination of the Administrator and the disposal agency, the award of such contract is in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns.

(6) *SALE OF ELECTRICAL POWER OR OTHER PROPERTY.*—Nothing in this subsection 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 Federal Government.

(7) *COSTS EXCEEDING FAIR MARKET PRICE.*—A contract may not be awarded under this subsection if the cost of the contract to the awarding agency exceeds a fair market price.

(b) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under section 411 of the Small Business Investment Act of 1958 (15 U.S.C. 694(b)), the contracting procurement agency shall, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work.

(c)(1) As used in this subsection:

(A) The term "Committee" means the Committee for Purchase from the Blind and Other Severely Handicapped established under the first section of the Act entitled "An Act to create a Committee on Purchases of Blind-made Products, and for other purposes", approved June 25, 1938 (41 U.S.C. 46).

(B) The term "public or private organization for the handicapped" has the same meaning given such term in section 3(e).

(C) The term "handicapped individual" has the same meaning given such term in section 3(f).

(2)(A) During fiscal year 1995, public or private organizations for the handicapped shall be eligible to participate in programs authorized under this section in an aggregate amount not to exceed \$40,000,000.

(B) None of the amounts authorized for participation by subparagraph (A) may be placed on the procurement list maintained by the Committee pursuant to section 2 of the Act entitled "An Act to create a Committee on Purchases of Blind-made Products, and for other purposes", approved June 25, 1938 (41 U.S.C. 47).

(3) The Administrator shall monitor and evaluate such participation.

(4)(A) Not later than ten days after the announcement of a proposed award of a contract by an agency or department to a public or private organization for the handicapped, a for-profit small business concern that has experienced or is likely to experience severe economic injury as the result of the proposed award may file an appeal of the proposed award with the Administrator.

(B) If such a concern files an appeal of a proposed award under subparagraph (A) and the Administrator, after consultation with the Executive Director of the Committee, finds that the concern has experienced or is likely to experience severe economic injury as the result of the proposed award, not later than thirty days after the filing of the appeal, the Administration shall require each agency and department having procurement powers to take such action as may be appropriate to alleviate economic injury sustained or likely to be sustained by the concern.

(5) Each agency and department having procurement powers shall report to the Office of Federal Procurement Policy each time a contract subject to paragraph (2)(A) is entered into, and shall include in its report the amount of the next higher bid submitted by a for-profit small business concern. The Office of Federal Procurement Policy shall collect data reported under the preceding sentence through the Federal procurement data system and shall report to the Administration which shall notify all such agencies and departments when the maximum amount of awards authorized under paragraph (2)(A) has been made during any fiscal year.

(6) For the purpose of this subsection, a contract may be awarded only if at least 75 per centum of the direct labor performed on each

item being produced under the contract in the sheltered workshop or performed in providing each type of service under the contract by the sheltered workshop is performed by handicapped individuals.

(7) Agencies awarding one or more contracts to such an organization pursuant to the provisions of this subsection may use multiyear contracts, if appropriate.

(d) For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to small business concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

(e) **PROCUREMENT STRATEGIES; CONTRACT BUNDLING.**—

(1) **IN GENERAL.**—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, and each such Federal department or agency shall—

(A) provide opportunities for the participation of small business concerns during acquisition planning processes and in acquisition plans; and

(B) invite the participation of the appropriate Director of Small and Disadvantaged Business Utilization in acquisition planning processes and provide that Director access to acquisition plans.

(2) **MARKET RESEARCH.**—

(A) **IN GENERAL.**—Before proceeding with an acquisition strategy that could lead to a contract containing consolidated procurement requirements, the head of an agency shall conduct market research to determine whether consolidation of the requirements is necessary and justified.

(B) **FACTORS.**—For purposes of subparagraph (A), consolidation of the requirements may be determined as being necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits, including any combination of benefits that, in combination, are measurably substantial. Benefits described in the preceding sentence may include the following:

- (i) Cost savings.
- (ii) Quality improvements.
- (iii) Reduction in acquisition cycle times.

(iv) Better terms and conditions.

(v) Any other benefits.

(C) REDUCTION OF COSTS NOT DETERMINATIVE.—The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated.

(3) STRATEGY SPECIFICATIONS.—If the head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements, the head of a contracting agency shall publish a notice on a public website that such determination has been made not later than 7 days after making such determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. Along with the publication of the solicitation, the head of a contracting agency shall publish a justification for the determination, which shall include the following information:

(A) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling.

(B) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements.

(C) An assessment of—

(i) the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and

(ii) the specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

(4) CONTRACT TEAMING.—

(A) IN GENERAL.—In the case of a solicitation of offers for a bundled or consolidated contract that is issued by the head of an agency, a small business concern that provides for use of a particular team of subcontractors or a joint venture of small business concerns may submit an offer for the performance of the contract.

(B) EVALUATION OF OFFERS.—The head of the agency shall evaluate an offer described in subparagraph (A) in the same manner as other offers, with due consideration to the capabilities of all of the proposed subcontractors or members of the joint venture as follows:

(i) TEAMS.—When evaluating an offer of a small business prime contractor that includes a proposed team of small business subcontractors, the head of the agency shall consider the capabilities and past performance of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor.

(ii) JOINT VENTURES.—When evaluating an offer of a joint venture of small business concerns, if the joint

venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

(C) STATUS AS A SMALL BUSINESS CONCERN.—Participation of a small business concern in a team or a joint venture under this paragraph shall not affect the status of that concern as a small business concern for any other purpose.

(f) CONTRACTING PREFERENCE FOR SMALL BUSINESS CONCERNS IN A MAJOR DISASTER AREA.—

(1) DEFINITION.—In this subsection, the term “disaster area” means the area for which the President has declared a major disaster, during the period of the declaration.

(2) CONTRACTING PREFERENCE.—An agency shall provide a contracting preference for a small business concern located in a disaster area if the small business concern will perform the work required under the contract in the disaster area.

(3) CREDIT FOR MEETING CONTRACTING GOALS.—If an agency awards a contract to a small business concern under the circumstances described in paragraph (2), the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under subsection (g)(1)(A).

(g)

(1) GOVERNMENTWIDE GOALS.—

(A) ESTABLISHMENT.—The President shall annually establish Governmentwide goals 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 in accordance with the following:

(i) The Governmentwide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. In meeting this goal, the Government shall ensure the participation of small business concerns from a wide variety of industries and from a broad spectrum of small business concerns within each industry.

(ii) The Governmentwide 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.

(iii) The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iv) The Governmentwide 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 of the total value of all prime contract and subcontract awards for each fiscal year.

(v) The Governmentwide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(B) ACHIEVEMENT OF GOVERNMENTWIDE GOALS.—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 Small Business Administration and the Administrator for 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 Governmentwide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Such goals shall separately address prime contract awards and subcontract awards for each category of small business covered.

(B) Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of 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 perform such contracts and to perform subcontracts under such contracts.

(C) Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator for Federal Procurement Policy for final determination.

(D) After establishing goals under this paragraph for a fiscal year, the head of each Federal agency shall develop a plan for achieving such goals at both the prime contract and the subcontract level, which shall apportion responsibilities among the agency's acquisition executives and officials. In establishing goals

under this paragraph, the head of each Federal agency shall make a consistent effort to annually expand participation by small business concerns from each industry category in procurement contracts and subcontracts of such agency, including participation by 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.

(E) The head of each Federal agency, in attempting to attain expanded participation under subparagraph (D), shall consider—

(i) contracts awarded as the result of unrestricted competition; and

(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 8(a).

(F)(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving goals established under subparagraph (A).

(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.

(3) First tier subcontracts that are awarded by Management and Operating contractors sponsored by the Department of Energy to small business concerns, small businesses 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, shall be considered toward the annually established agency and Government-wide goals for procurement contracts awarded.

(4) *DETERMINATIONS OF THE TOTAL VALUE OF CONTRACT AWARDS.—For purposes of the goals established under paragraphs (1) and (2), the total value of contract awards for a fiscal year may not be determined in a manner that excludes the value of a contract based on—*

(A) where the contract is awarded;

(B) where the contract is performed;

(C) whether the contract is mandated by Federal law to be performed by an entity other than a small business concern;

(D) whether funding for the contract is made available in an appropriations Act, if the contract is subject to the requirements of chapter 33 of title 41, United States Code, or chapter 137 of title 10, United States Code, and the Federal Acquisition Regulation; or

(E) whether the contract is otherwise subject to the Federal Acquisition Regulation.

(h) REPORTING ON GOALS FOR PROCUREMENT CONTRACTS AWARDED TO SMALL BUSINESS CONCERNS.—

(1) AGENCY REPORTS.—At the conclusion of each fiscal year, the head of each Federal agency shall submit to the Administrator a report describing—

(A) the extent of the participation by small business concerns, small business concerns owned and controlled by veterans (including 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 in the procurement contracts of such agency during such fiscal year;

(B) whether the agency achieved the goals established for the agency under subsection (g)(2) with respect to such fiscal year;

(C) any justifications for a failure to achieve such goals; and

(D) a remediation plan with proposed new practices to better meet such goals, including analysis of factors leading to any failure to achieve such goals.

(2) REPORTS BY ADMINISTRATOR.—Not later than 60 days after receiving a report from each Federal agency under paragraph (1) with respect to a fiscal year, the Administrator shall submit to the President and Congress, and to make available on a public Web site, a report that includes—

(A) a copy of each report submitted to the Administrator under paragraph (1);

(B) a determination of whether each goal established by the President under subsection (g)(1) for such fiscal year was achieved;

(C) a determination of whether each goal established by the head of a Federal agency under subsection (g)(2) for such fiscal year was achieved;

(D) the reasons for any failure to achieve a goal established under paragraph (1) or (2) of subsection (g) for such fiscal year and a description of actions planned by the applicable agency to address such failure, including the Administrator's comments and recommendations on the proposed remediation plan; and

(E) for the Federal Government and each Federal agency, an analysis of the number and dollar amount of prime contracts awarded during such fiscal year to—

(i) small business concerns—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns; **[and]**

(IV) through unrestricted competition;

(V) *that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns for purposes of the initial contract; and*

(VI) *that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-dis-*

abled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;

(ii) small business concerns owned and controlled by service-disabled veterans—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by service-disabled veterans; **[and]**

(V) through unrestricted competition;

(VI) *that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by service-disabled veterans for purposes of the initial contract; and*

(VII) *that were awarded using a procurement method that restricted competition to qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;*

(iii) qualified HUBZone small business concerns—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to qualified HUBZone small business concerns;

(V) through unrestricted competition where a price evaluation preference was used; **[and]**

(VI) through unrestricted competition where a price evaluation preference was not used;

(VII) *that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be qualified HUBZone small business concerns for purposes of the initial contract; and*

(VIII) *that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;*

(iv) small business concerns owned and controlled by socially and economically disadvantaged individuals—

- (I) in the aggregate;
- (II) through sole source contracts;
- (III) through competitions restricted to small business concerns;
- (IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals;
- (V) through unrestricted competition; **[and]**
- (VI) by reason of that concern's certification as a small business owned and controlled by socially and economically disadvantaged individuals;
- (VII) *that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by socially and economically disadvantaged individuals for purposes of the initial contract; and*

(VIII) *that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by women, or a subset of any such concerns;*

(v) small business concerns owned by an Indian tribe (as such term is defined in section 8(a)(13)) other than an Alaska Native Corporation—

- (I) in the aggregate;
- (II) through sole source contracts;
- (III) through competitions restricted to small business concerns;
- (IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals; **[and]**
- (V) through unrestricted competition; *and*
- (VI) *that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Indian tribe other than an Alaska Native Corporation for purposes of the initial contract;*

(vi) small business concerns owned by a Native Hawaiian Organization—

- (I) in the aggregate;
- (II) through sole source contracts;
- (III) through competitions restricted to small business concerns;
- (IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals; **[and]**
- (V) through unrestricted competition; *and*

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by a Native Hawaiian Organization for purposes of the initial contract;

(vii) small business concerns owned by an Alaska Native Corporation—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals; **and**

(V) through unrestricted competition; and

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Alaska Native Corporation for purposes of the initial contract; and

(viii) small business concerns owned and controlled by women—

(I) in the aggregate;

(II) through competitions restricted to small business concerns;

(III) through competitions restricted using the authority under section 8(m)(2);

(IV) through competitions restricted using the authority under section 8(m)(2) and in which the waiver authority under section 8(m)(3) was used;

(V) through sole source contracts awarded using the authority under subsection 8(m)(7);

(VI) through sole source contracts awarded using the authority under section 8(m)(8);

(VII) by industry for contracts described in subclause (III), (IV), (V), or (VI); **and**

(VIII) through unrestricted competition; **and**

(IX) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by women for purposes of the initial contract; and

(X) that were awarded using a procurement method that restricted competition to 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, or a subset of any such concerns; and

(F) for the Federal Government, the number, dollar amount, and distribution with respect to the North American Industry Classification System of subcontracts award-

ed during such fiscal year 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, provided that such information is publicly available through data systems developed pursuant to the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109–282), or otherwise available as provided in paragraph (3).

(3) ACCESS TO DATA.—

(A) FEDERAL PROCUREMENT DATA SYSTEM.—To assist in the implementation of this section, the Administration shall have access to information collected through the Federal Procurement Data System, Federal Subcontracting Reporting System, or any new or successor system.

(B) AGENCY PROCUREMENT DATA SOURCES.—To assist in the implementation of this section, the head of each contracting agency shall provide, upon request of the Administration, procurement information collected through agency data collection sources in existence at the time of the request. Contracting agencies shall not be required to establish new data collection systems to provide such data.

(i) Nothing in this Act or any other provision of law precludes exclusive small business set-asides for procurements of architectural and engineering services, research, development, test and evaluation, and each Federal agency is authorized to develop such set-asides to further the interests of small business in those areas.

(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] *greater than the micro-purchase threshold, but not greater than 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.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(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 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.

(k) There is hereby established in each Federal agency having procurement powers an office to be known as the “Office of Small and Disadvantaged Business Utilization”. The management of each such office shall be vested in an officer or employee of such agency, with experience serving in any combination of the following roles: program manager, deputy program manager, or assistant program manager for Federal acquisition program; chief engineer, systems

engineer, assistant engineer, or product support manager for Federal acquisition program; Federal contracting officer; small business technical advisor; contracts administrator for Federal Government contracts; attorney specializing in Federal procurement law; small business liaison officer; officer or employee who managed Federal Government contracts for a small business; or individual whose primary responsibilities were for the functions and duties of [section 8, 15 or 44] *section 8, 15, 31, 36, or 44* of this Act. Such officer or employee—

(1) shall be known as the “Director of Small and Disadvantaged Business Utilization” for such agency;

(2) shall be appointed by the head of such agency to a position that is a Senior Executive Service position (as such term is defined under section 3132(a) of title 5, United States Code), except that, for any agency in which the positions of Chief Acquisition Officer and senior procurement executive (as such terms are defined under section 44(a) of this Act) are not Senior Executive Service positions, the Director of Small and Disadvantaged Business Utilization may be appointed to a position compensated at not less than the minimum rate of basic pay payable for grade GS-15 of the General Schedule under section 5332 of such title (including comparability payments under section 5304 of such title);

(3) shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head of such agency or to the deputy of such head, except that the Director for the Office of the Secretary of Defense shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, such Secretary or the Secretary’s designee;

(4) shall be responsible for the implementation and execution of the functions and duties under [sections 8 and 15] *sections 8, 15, 31, 36, and 44* of this Act which relate to such agency;

(5) shall 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;

(6) shall assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of title 31, United States Code, or any other protection for contractors or subcontractors (including suppliers) that is included in the Federal Acquisition Regulation or any individual agency supplement to such Government-wide regulation;

(7) shall have supervisory authority over personnel of such agency to the extent that the functions and duties of such personnel relate to functions and duties under [sections 8 and 15] *sections 8, 15, 31, 36, and 44* of this Act;

(8) shall assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative—

(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at the activity; and

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to [sections 8 and 15] *sections 8, 15, 31, 36, and 44* of this Act,

(9) shall cooperate, and consult on a regular basis, with the Administration with respect to carrying out the functions and duties described in paragraph (4) of this subsection;

(10) shall make recommendations to contracting officers as to whether a particular contract requirement should be awarded pursuant to subsection (a), [section 8(a)] *section 8, 15, 31, or 36* of this Act, or section 2323 of title 10, United States Code, which shall be made with due regard to the requirements of subsection (m), and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file;

(11) shall review and advise such agency on any decision to convert an activity performed by a small business concern to an activity performed by a Federal employee;

(12) shall provide to the Chief Acquisition Officer and senior procurement executive of such agency advice and comments on acquisition strategies, market research, and justifications related to section 44 of this Act;

(13) may provide training to small business concerns and contract specialists, except that such training may only be provided to the extent that the training does not interfere with the Director carrying out other responsibilities under this subsection;

(14) shall receive unsolicited proposals and, when appropriate, forward such proposals to personnel of the activity responsible for reviewing such proposals;

(15) shall review purchases made by the agency greater than the micro-purchase threshold, and less than the simplified acquisition threshold to ensure that the purchases have been made in compliance with the provisions of this Act and have been properly recorded in the Federal Procurement Data System, if the method of payment is a purchase card issued by the Department of Defense pursuant to section 2784 of title 10, United States Code, or by the head of an executive agency pursuant to section 1909 of title 41, United States Code;

(16) shall provide assistance to a small business concern awarded a contract or subcontract under this Act or under title 10 or title 41, United States Code, in finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract.

[(15)] (17) shall carry out exclusively the duties enumerated in this Act, and shall, while the Director, not hold any other

title, position, or responsibility, except as necessary to carry out responsibilities under this subsection;

[(16)] (18) shall submit, each fiscal year, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

(A) the training provided by the Director under paragraph (13) in the most recently completed fiscal year;

(B) the percentage of the budget of the Director used for such training in the most recently completed fiscal year; and

(C) the percentage of the budget of the Director used for travel in the most recently completed fiscal year; and

[(17)] (19) shall, when notified by a small business concern prior to the award of a contract that the small business concern believes that a solicitation, request for proposal, or request for quotation unduly restricts the ability of the small business concern to compete for the award—

(A) submit the notice of the small business concern to the contracting officer and, if necessary, recommend ways in which the solicitation, request for proposal, or request for quotation may be altered to increase the opportunity for competition;

(B) inform the advocate for competition of such agency (as established under section 1705 of title 41, United States Code, or section 2318 of title 10, United States Code) of such notice; [and]

(C) ensure that the small business concern is aware of other resources and processes available to address unduly restrictive provisions in a solicitation, request for proposal, or request for quotation, even if such resources and processes are provided by such agency, the Administration, the Comptroller General, or a procurement technical assistance program established under chapter 142 of title 10, United States Code[.]; and

(D) any failure of the agency to comply with section 8, 15, 31, or 36.

This subsection shall not apply to the Administration.

(1) PROCUREMENT CENTER REPRESENTATIVES.—

(1) ASSIGNMENT AND ROLE.—The Administrator shall assign to each major procurement center a procurement center representative with such assistance as may be appropriate.

(2) ACTIVITIES.—A procurement center representative is authorized to—

(A) attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be procured through other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(B) review, at any time, barriers to small business participation in Federal contracting previously imposed on goods and services through acquisition method coding or similar procedures, and recommend to personnel of the appropriate activity the prompt reevaluation of such barriers;

(C) review barriers to small business participation in Federal contracting arising out of restrictions on the rights of the United States in technical data, and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(D) review any bundled or consolidated solicitation or contract in accordance with this Act;

(E) have access to procurement records and other data of the procurement center commensurate with the level of such representative's approved security clearance classification, with such data provided upon request in electronic format, when available;

(F) receive unsolicited proposals from small business concerns and transmit such proposals to personnel of the activity responsible for reviewing such proposals, who shall furnish the procurement center representative with information regarding the disposition of any such proposal;

(G) consult with the Director the Office of Small and Disadvantaged Business Utilization of that agency and the agency personnel described in paragraph (7) and (8) of subsection (k) with regard to agency insourcing decisions covered by subsection (k)(11);

(H) be an advocate for the maximum practicable utilization of small business concerns in Federal contracting, including by advocating against the consolidation or bundling of contract requirements when not justified; **[and]**

(I) assist small business concerns with finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract; and

[(I)] *(J) carry out any other responsibility assigned by the Administrator.*

(3) APPEALS.—A procurement center representative is authorized to appeal the failure to act favorably on any recommendation made pursuant to paragraph (2). Such appeal shall be filed and processed in the same manner and subject to the same conditions and limitations as an appeal filed by the Administrator pursuant to subsection (a).

(4) The Administration shall assign and co-locate at least two small business technical advisers to each major procurement center in addition to such other advisers as may be authorized from time to time. The sole duties of such advisers shall be to assist the procurement center representative for the center to which such advisers are assigned in carrying out the functions described in paragraph (2) and the representatives referred to in subsection (k)(6).

(5) POSITION REQUIREMENTS.—

(A) IN GENERAL.—A procurement center representative assigned under this subsection shall—

(i) be a full-time employee of the Administration;

(ii) be fully qualified, technically trained, and familiar with the goods and services procured by the major procurement center to which that representative is assigned; and

(iii) have the certification described in subparagraph (C).

(B) COMPENSATION.—The Administrator shall establish personnel positions for procurement center representatives assigned under this subsection, which are classified at a grade level of the General Schedule sufficient to attract and retain highly qualified personnel.

(C) CERTIFICATION REQUIREMENTS.—

(i) IN GENERAL.—Consistent with the requirements of clause (ii), a procurement center representative shall have a Level III Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that any person serving in such a position on or before January 3, 2013, may continue to serve in that position for a period of 5 years without the required certification.

(ii) DELAY OF CERTIFICATION REQUIREMENTS.—

(I) TIMING.—The certification described in clause (i) is not required for any person serving as a procurement center representative until the date that is one calendar year after the date such person is appointed as a procurement center representative.

(II) APPLICATION.—The requirements of subclause (I) shall—

(aa) be included in any initial job posting for the position of a procurement center representative; and

(bb) apply to any person appointed as a procurement center representative after January 3, 2013.

(6) MAJOR PROCUREMENT CENTER DEFINED.—For purposes of this subsection, the term “major procurement center” means a procurement center that, in the opinion of the Administrator, purchases substantial dollar amounts of goods or services, including goods or services that are commercially available.

(7) TRAINING.—

(A) AUTHORIZATION.—At such times as the Administrator deems appropriate, the breakout procurement center representative shall conduct familiarization sessions for contracting officers and other appropriate personnel of the procurement center to which such representative is assigned. Such sessions shall acquaint the participants with the provisions of this subsection and shall instruct them in methods designed to further the purposes of such subsection.

(B) LIMITATION.—A procurement center representative may provide training under subparagraph (A) only to the extent that the training does not interfere with the representative carrying out other activities under this subsection.

(8) ANNUAL BRIEFING AND REPORT.—A procurement center representative shall prepare and personally deliver an annual briefing and report to the head of the procurement center to

which such representative is assigned. Such briefing and report shall detail the past and planned activities of the representative and shall contain such recommendations for improvement in the operation of the center as may be appropriate. The head of such center shall personally receive such briefing and report and shall, within 60 calendar days after receipt, respond, in writing, to each recommendation made by such representative.

(9) *SCOPE OF REVIEW.*—*The Administrator shall not limit the scope of review by the Procurement Center Representative for any solicitation of a contract or task order without regard to whether the contract or task order or part of the contract or task order is set aside for small business concerns, whether 1 or more contract or task order awards are reserved for small business concerns under a multiple award contract, or whether or not the solicitation would result in a bundled or consolidated contract (as defined in subsection (s)) or a bundled or consolidated task order.*

(m)(1) Each agency subject to the requirements of section 2323 of title 10, United States Code, shall, when implementing such requirements—

(A) establish policies and procedures that insure that there will be no reduction in the number of dollar value of contracts awarded pursuant to this section and section 8(a) in order to achieve any goal or other program objective; and

(B) assure that such requirements will not alter or change the procurement process used to implement this section or section 8(a).

(2) All procurement center representatives (including those referred to in subsection (k)(6)), in addition to such other duties as may be assigned by the Administrator, shall—

(A) monitor the performance of the procurement activities to which they are assigned to ascertain the degree of compliance with the requirements of paragraph (1);

(B) report to their immediate supervisors all instances of noncompliance with such requirements; and

(C) increase, insofar as possible, the number and dollar value of procurements that may be used for the programs established under this section, section 8(a), and section 2323 of title 10, United States Code.

(n) For purposes of this section, the determination of labor surplus areas shall be made on the basis of the criteria in effect at the time of the determination, except that any minimum population criteria shall not exceed twenty-five thousand. Such determination, as modified by the preceding sentence, shall be made by the Secretary of Labor.

(o) *LIMITATIONS ON SUBCONTRACTING.*—A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees to satisfy the requirements of section 46.

(p) *ACCESS TO DATA.*—

(1) *BUNDLED CONTRACT DEFINED.*—In this subsection, the term “bundled contract” has the meaning given such term in section 3(o)(1).

(2) *DATABASE.*—

(A) IN GENERAL.—Not later than 180 days after the date of the enactment of this subsection, the Administrator of the Small Business Administration shall develop and shall thereafter maintain a database containing data and information regarding—

(i) each bundled contract awarded by a Federal agency; and

(ii) each small business concern that has been displaced as a prime contractor as a result of the award of such a contract.

(3) ANALYSIS.—For each bundled contract that is to be re-competed as a bundled contract, the Administrator shall determine—

(A) the amount of savings and benefits (in accordance with subsection (e)) achieved under the bundling of contract requirements; and

(B) whether such savings and benefits will continue to be realized if the contract remains bundled, and whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(4) ANNUAL REPORT ON CONTRACT BUNDLING.—

(A) IN GENERAL.—Not later than 1 year after the date of the enactment of this paragraph, and annually in March thereafter, the Administration shall transmit a report on contract bundling to the Committees on Small Business of the House of Representatives and the Senate.

(B) CONTENTS.—Each report transmitted under subparagraph (A) shall include—

(i) data on the number, arranged by industrial classification, of small business concerns displaced as prime contractors as a result of the award of bundled contracts by Federal agencies; and

(ii) a description of the activities with respect to previously bundled contracts of each Federal agency during the preceding year, including—

(I) data on the number and total dollar amount of all contract requirements that were bundled; and

(II) with respect to each bundled contract, data or information on—

(aa) the justification for the bundling of contract requirements;

(bb) the cost savings realized by bundling the contract requirements over the life of the contract;

(cc) the extent to which maintaining the bundled status of contract requirements is projected to result in continued cost savings;

(dd) the extent to which the bundling of contract requirements complied with the contracting agency's small business subcontracting plan, including the total dollar value awarded to small business concerns as subcontractors and the total dollar value pre-

viously awarded to small business concerns as prime contractors; and

(ee) the impact of the bundling of contract requirements on small business concerns unable to compete as prime contractors for the consolidated requirements and on the industries of such small business concerns, including a description of any changes to the proportion of any such industry that is composed of small business concerns.

(5) ACCESS TO DATA.—

(A) FEDERAL PROCUREMENT DATA SYSTEM.—To assist in the implementation of this section, the Administration shall have access to information collected through the Federal Procurement Data System.

(B) AGENCY PROCUREMENT DATA SOURCES.—To assist in the implementation of this section, the head of each contracting agency shall provide, upon request of the Administration, procurement information collected through existing agency data collection sources.

(q) REPORTS RELATED TO PROCUREMENT CENTER REPRESENTATIVES.—

(1) TEAMING AND JOINT VENTURE REQUIREMENTS.—

(A) IN GENERAL.—Each Federal agency shall include in each solicitation for any multiple award contract above the substantial bundling threshold of the Federal agency a provision soliciting bids from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.

(B) TEAMS.—When evaluating an offer of a small business prime contractor that includes a proposed team of small business subcontractors for any multiple award contract above the substantial bundling threshold of the Federal agency, the head of the agency shall consider the capabilities and past performance of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor.

(C) JOINT VENTURES.—When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

(2) POLICIES ON REDUCTION OF CONTRACT BUNDLING.—

(A) IN GENERAL.—Not later than 1 year after the date of enactment of this subsection, the Federal Acquisition Regulatory Council established under section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 4219(a)) shall amend the Federal Acquisition Regulation issued under section 25 of such Act to—

(i) establish a Government-wide policy regarding contract bundling, including regarding the solicitation

of teaming and joint ventures under paragraph (1); and

(ii) require that the policy established under clause (i) be published on the website of each Federal agency.

(B) RATIONALE FOR CONTRACT BUNDLING.—Not later than 30 days after the date on which the head of a Federal agency submits data certifications to the Administrator for Federal Procurement Policy, the head of the Federal agency shall publish on the website of the Federal agency a list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.

(3) REPORTING.—Not later than 90 days after the date of enactment of this subsection, and every 3 years thereafter, the Administrator shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report regarding procurement center representatives and commercial market representatives, which shall—

(A) identify each area for which the Administration has assigned a procurement center representative or a commercial market representative;

(B) explain why the Administration selected the areas identified under subparagraph (A); and

(C) describe the activities performed by procurement center representatives and commercial market representatives.

(r) MULTIPLE AWARD CONTRACTS.—Not later than 1 year after the date of enactment of this subsection, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, at their discretion—

(1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)), set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

(s) DATA QUALITY IMPROVEMENT PLAN.—

(1) IN GENERAL.—Not later than October 1, 2015, the Administrator of the Small Business Administration, in consultation with the Small Business Procurement Advisory Council, the Administrator for Federal Procurement Policy, and the Administrator of General Services, shall develop a plan to improve the quality of data reported on bundled or consolidated con-

tracts in the Federal procurement data system (described in section 1122(a)(4)(A) of title 41, United States Code).

(2) PLAN REQUIREMENTS.—The plan shall—

(A) describe the roles and responsibilities of the Administrator of the Small Business Administration, each Director of Small and Disadvantaged Business Utilization, the Administrator for Federal Procurement Policy, the Administrator of General Services, senior procurement executives, and Chief Acquisition Officers in—

(i) improving the quality of data reported on bundled or consolidated contracts in the Federal procurement data system; and

(ii) contributing to the annual report required by subsection (p)(4);

(B) recommend changes to policies and procedures, including training procedures of relevant personnel, to properly identify and mitigate the effects of bundled or consolidated contracts;

(C) recommend requirements for periodic and statistically valid data verification and validation; and

(D) recommend clear data verification responsibilities.

(3) PLAN SUBMISSION.—The Administrator of the Small Business Administration shall submit the plan to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate not later than December 1, 2016.

(4) IMPLEMENTATION.—Not later than October 1, 2016, the Administrator of the Small Business Administration shall implement the plan described in this subsection.

(5) CERTIFICATION.—The Administrator shall annually provide to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a certification of the accuracy and completeness of data reported on bundled and consolidated contracts.

(6) DEFINITIONS.—In this subsection, the following definitions apply:

(A) CHIEF ACQUISITION OFFICER; SENIOR PROCUREMENT EXECUTIVE.—The terms “Chief Acquisition Officer” and “senior procurement executive” have the meanings given such terms in section 44(a) of this Act.

(B) BUNDLED OR CONSOLIDATED CONTRACT.—The term “bundled or consolidated contract” means a bundled contract (as defined in section 3(o)) or a contract resulting from the consolidation of contracting requirements (as defined in section 44(a)(2)).

(t) POST-AWARD COMPLIANCE RESOURCES.—*The Administrator shall provide to small business development centers and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10, United States Code, and shall make available on the website of the Administration, a list of resources for small business concerns seeking education and assistance on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract.*

(u) *REGULATORY CHANGES AND TRAINING MATERIALS.*—Not less than annually, the Administrator shall provide to the Defense Acquisition University (established under section 1746 of title 10, United States Code), the Federal Acquisition Institute (established under section 1201 of title 41, United States Code), the individual responsible for mandatory training and education of the acquisition workforce of each agency (described under section 1703(f)(1)(C) of title 41, United States Code), small business development centers, and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10, United States Code—

(1) a list of all changes made in the prior year to regulations promulgated—

(A) by the Administrator that affect Federal acquisition; and

(B) by the Federal Acquisition Council that implement changes to this Act; and

(2) any materials the Administrator has developed to explain, train, or assist Federal agencies or departments or small business concerns to comply with the regulations specified in paragraph (1).

* * * * *

SEC. 18. (a) The Administration shall not duplicate the work or activity of any other department or agency of the Federal Government, and nothing contained in this Act shall be construed to authorize any such duplication unless such work or activity is expressly provided for in this Act. If loan applications are being refused or loans denied by such other department or agency responsible for such work or activity due to administrative withholding from obligation or withholding from apportionment, or due to administratively declared moratorium, then, for purposes of this section, no duplication shall be deemed to have occurred.

(b) As used in this Act—

(1) “agricultural enterprises” means those [businesses] *small business concerns* engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries; and

(2) “credit elsewhere” means the availability of sufficient credit from non-Federal sources at reasonable rates and terms, taking into consideration prevailing private rates and terms in the community in or near where the concern transacts business for similar purposes and periods of time.

* * * * *

SEC. 45. MENTOR-PROTEGE PROGRAMS.

(a) ADMINISTRATION PROGRAM.—

(1) AUTHORITY.—The Administrator is authorized to establish a mentor-protege program for all small business concerns.

(2) MODEL FOR PROGRAM.—The mentor-protege program established under paragraph (1) shall be identical to the mentor-protege program of the Administration for small business concerns that participate in the program under section 8(a) (as in effect on the date of enactment of this section), except that the Administrator may modify the program to the extent necessary

given the types of small business concerns included as proteges.

(b) PROGRAMS OF OTHER AGENCIES.—

(1) APPROVAL REQUIRED.—Except as provided in paragraph (4), a Federal department or agency may not carry out a mentor-protege program for small business concerns unless—

(A) the head of the department or agency submits a plan to the Administrator for the program; and

(B) the Administrator approves such plan.

(2) BASIS FOR APPROVAL.—The Administrator shall approve or disapprove a plan submitted under paragraph (1) based on whether the program proposed—

(A) will assist proteges to compete for Federal prime contracts and subcontracts; and

(B) complies with the regulations issued under paragraph (3).

(3) REGULATIONS.—Not later than 270 days after the date of enactment of this section, the Administrator shall issue, subject to notice and comment, regulations with respect to mentor-protege programs, which shall ensure that such programs improve the ability of proteges to compete for Federal prime contracts and subcontracts and which shall address, at a minimum, the following:

(A) Eligibility criteria for program participants, including any restrictions on the number of mentor-protege relationships permitted for each participant.

(B) The types of developmental assistance to be provided by mentors, including how the assistance provided shall improve the competitive viability of the proteges.

(C) Whether any developmental assistance provided by a mentor may affect the status of a program participant as a small business concern due to affiliation.

(D) The length of mentor-protege relationships.

(E) The effect of mentor-protege relationships on contracting.

(F) Benefits that may accrue to a mentor as a result of program participation.

(G) Reporting requirements during program participation.

(H) Postparticipation reporting requirements.

(I) The need for a mentor-protege pair, if accepted to participate as a pair in a mentor-protege program of any Federal department or agency, to be accepted to participate as a pair in all Federal mentor-protege programs.

(J) Actions to be taken to ensure benefits for proteges and to protect a protege against actions by a mentor that—

(i) may adversely affect the protege's status as a small business concern; or

(ii) provide disproportionate economic benefits to the mentor relative to those provided the protege.

(K) *The extent to which assistance with compliance with the requirements of contracting with the Federal Government after award of a contract or subcontract under this section.*

(4) LIMITATION ON APPLICABILITY.—Paragraph (1) does not apply to the following:

[(A) Any mentor-protege program of the Department of Defense.]

[(B)] (A) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program.

[(C)] (B) Until the date that is 1 year after the date on which the Administrator issues regulations under paragraph (3), any Federal department or agency operating a mentor-protege program in effect on the date of enactment of this section.

(c) REPORTING.—

(1) IN GENERAL.—Not later than 2 years after the date of enactment of this section, and annually thereafter, the Administrator shall submit to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report that—

(A) identifies each Federal mentor-protege program;

(B) specifies the number of participants in each such program, including the number of participants that are—

(i) small business concerns;

(ii) small business concerns owned and controlled by service-disabled veterans;

(iii) qualified HUBZone small business concerns;

(iv) small business concerns owned and controlled by socially and economically disadvantaged individuals;

or

(v) small business concerns owned and controlled by women;

(C) describes the type of assistance provided to proteges under each such program;

(D) describes the benefits provided to mentors under each such program; and

(E) describes the progress of proteges under each such program with respect to competing for Federal prime contracts and subcontracts.

(2) PROVISION OF INFORMATION.—The head of each Federal department or agency carrying out a mentor-protege program shall provide to the Administrator, on an annual basis, the information necessary for the Administrator to submit a report required under paragraph (1).

(d) DEFINITIONS.—In this section, the following definitions apply:

(1) MENTOR.—The term “mentor” means a for-profit business concern, of any size, that—

(A) has the ability to assist and commits to assisting a protege to compete for Federal prime contracts and subcontracts; and

(B) satisfies any other requirements imposed by the Administrator.

(2) MENTOR-PROTEGE PROGRAM.—The term “mentor-protege program” means a program that pairs a mentor with a protege for the purpose of assisting the protege to compete for Federal prime contracts and subcontracts.

(3) **PROTEGE.**—The term “protege” means a small business concern that—

(A) is eligible to enter into Federal prime contracts and subcontracts; and

(B) satisfies any other requirements imposed by the Administrator.

(e) **CURRENT MENTOR PROTEGE AGREEMENTS.**—Mentors and proteges with approved agreement in a program operating pursuant to subsection (b)(4)(C) shall be permitted to continue their relationship according to the terms specified in their agreement until the expiration date specified in the agreement.

(f) **SUBMISSION OF AGENCY PLANS.**—Agencies operating mentor protege programs pursuant to subsection (b)(4)(C) shall submit the plans specified in subsection (b)(1)(A) to the Administrator within 6 months of the promulgation of rules required by subsection (b)(3). The Administrator shall provide initial comments on each plan within 60 days of receipt, and final approval or denial of each plan within 180 days after receipt.

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NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1991

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DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

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TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

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PART D—MISCELLANEOUS

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SEC. 831. MENTOR-PROTEGE PILOT PROGRAM.

(a) **ESTABLISHMENT OF PILOT PROGRAM.**—The Secretary of Defense shall establish a pilot program to be known as the “Mentor-Protege Program”.

(b) **PURPOSE.**—The purpose of the program is to provide incentives for major Department of Defense contractors to furnish disadvantaged small business concerns with assistance designed to—

(1) enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under Department of Defense contracts and other contracts and subcontracts; and

(2) increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.

(c) **PROGRAM PARTICIPANTS.**—(1) A business concern meeting the eligibility requirements set out in subsection (d) may enter into agreements under subsection (e) and furnish assistance to disadvantaged small business concerns upon making application to

the Secretary of Defense and being approved for participation in the pilot program by the Secretary. A business concern participating in the pilot program pursuant to such an approval shall be known, for the purposes of the program, as a “mentor firm”.

(2) A disadvantaged small business concern eligible for the award of Federal contracts may obtain assistance from a mentor firm upon entering into an agreement with the mentor firm as provided in subsection (e). A disadvantaged small business concern may not be a party to more than one agreement concurrently, and the authority to enter into agreements under subsection (e) shall only be available to such concern during the 5-year period beginning on the date such concern enters into the first such agreement. A disadvantaged small business concern receiving such assistance shall be known, for the purposes of the program, as a “protege firm”.

(3) In entering into an agreement pursuant to subsection (e), a mentor firm may rely in good faith on a written representation of a business concern that such business concern is a disadvantaged small business concern. The Small Business Administration shall determine the status of such business concern as a disadvantaged small business concern in the event of a protest regarding the status of such business concern. If at any time the business concern is determined by the Small Business Administration not to be a disadvantaged small business concern, assistance furnished such business concern by the mentor firm after the date of the determination may not be considered assistance furnished under the program.

(d) MENTOR FIRM ELIGIBILITY.—Subject to subsection (c)(1), a mentor firm eligible for award of Federal contracts may enter into an agreement with one or more protege firms under subsection (e) and provide assistance under the program pursuant to that agreement if—

[(1) the mentor firm is not affiliated with the protege firm prior to the approval of that agreement; and]

(1) prior to the approval of that agreement, the Administrator of the Small Business Administration had made no finding of affiliation between the mentor firm and the protege firm;

(2)(A) the Administrator of the Small Business Administration does not have a current finding of affiliation between the mentor firm and protege firm; or

(B) the Secretary, after considering the regulations promulgated by the Administrator of the Small Business Administration regarding affiliation—

(i) does not have reason to believe that the mentor firm affiliated with the protege firm; or

(ii) has received a formal determination of no affiliation between the mentor firm and protege firm from the Administrator after having submitted a question of affiliation to the Administrator; and

[(2)] (3) the mentor firm demonstrates that it—

(A) is qualified to provide assistance that will contribute to the purpose of the program;

(B) is of good financial health and character and does not appear on a Federal list of debarred or suspended contractors; and

(C) can impart value to a protege firm because of experience gained as a Department of Defense contractor or through knowledge of general business operations and government contracting, as demonstrated by evidence that—

(i) during the fiscal year preceding the fiscal year in which the mentor firm enters into the agreement, the total amount of the Department of Defense contracts awarded such mentor firm and the subcontracts awarded such mentor firm under Department of Defense contracts was equal to or greater than \$100,000,000; or

(ii) the mentor firm demonstrates the capability to assist in the development of protege firms, and is approved by the Secretary of Defense pursuant to criteria specified in the regulations prescribed pursuant to subsection (k).

(e) MENTOR-PROTEGE AGREEMENT.—Before providing assistance to a protege firm under the program, a mentor firm shall enter into a mentor-protege agreement with the protege firm regarding the assistance to be provided by the mentor firm. The agreement shall include the following:

(1) A developmental program for the protege firm, in such detail as may be reasonable, including—

(A) factors to assess the protege firm's developmental progress under the program;

(B) a description of the quantitative and qualitative benefits to the Department of Defense from the agreement, if applicable; [and]

(C) goals for additional awards that protege firm can compete for outside the Mentor-Protege Program[.]; and

(D) *the assistance the mentor firm will provide to the protege firm in understanding contract regulations of the Federal Government and the Department of Defense (including the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement) after award of a sub-contract under this section, if applicable.*

(2) A program participation term for any period of not more than three years, except that the term may be a period of up to five years if the Secretary of Defense determines in writing that unusual circumstances justify a program participation term in excess of three years.

(3) Procedures for the protege firm to terminate the agreement voluntarily and for the mentor firm to terminate the agreement for cause.

(f) FORMS OF ASSISTANCE.—A mentor firm may provide a protege firm the following:

(1) Assistance, by using mentor firm personnel, in—

(A) general business management, including organizational management, financial management, and personnel management, marketing, and overall business planning;

(B) engineering and technical matters such as production, inventory control, and quality assurance; and

(C) any other assistance designed to develop the capabilities of the protege firm under the developmental program referred to in subsection (e).

(2) Award of subcontracts on a noncompetitive basis to the protege firm under the Department of Defense or other contracts.

(3) Payment of progress payments for performance of the protege firm under such a subcontract in amounts as provided for in the subcontract, but in no event may any such progress payment exceed 100 percent of the costs incurred by the protege firm for the performance.

(4) Advance payments under such subcontracts.

(5) Loans.

(6) Assistance obtained by the mentor firm for the protege firm from one or more of the following—

(A) small business development centers established pursuant to section 21 of the Small Business Act (15 U.S.C. 648);

(B) entities providing procurement technical assistance pursuant to chapter 142 of title 10, United States Code; [or]

(C) a historically Black college or university or a minority institution of higher education[.]; or

(D) *women's business centers described in section 29 of the Small Business Act (15 U.S.C. 656).*

(g) INCENTIVES FOR MENTOR FIRMS.—(1) The Secretary of Defense may provide to a mentor firm reimbursement for the total amount of any progress payment or advance payment made under the program by the mentor firm to a protege firm in connection with a Department of Defense contract awarded the mentor firm.

(2)(A) The Secretary of Defense may provide to a mentor firm reimbursement for the costs of the assistance furnished to a protege firm pursuant to paragraphs (1) and (6) of subsection (f) (except as provided in subparagraph (D)) as provided for in a line item in a Department of Defense contract under which the mentor firm is furnishing products or services to the Department, subject to a maximum amount of reimbursement specified in such contract, except that this sentence does not apply in a case in which the Secretary of Defense determines in writing that unusual circumstances justify reimbursement using a separate contract.

(B) The determinations made in annual performance reviews of a mentor firm's mentor-protege agreement shall be a major factor in the determinations of amounts of reimbursement, if any, that the mentor firm is eligible to receive in the remaining years of the program participation term under the agreement.

(C) The total amount reimbursed under this paragraph to a mentor firm for costs of assistance furnished in a fiscal year to a protege firm may not exceed \$1,000,000, except in a case in which the Secretary of Defense determines in writing that unusual circumstances justify a reimbursement of a higher amount.

(D) The Secretary may not reimburse any fee assessed by the mentor firm for services provided to the protege firm pursuant to subsection (f)(6) or for business development expenses incurred by the mentor firm under a contract awarded to the mentor firm while participating in a joint venture with the protege firm.

(3)(A) Costs incurred by a mentor firm in providing assistance to a protege firm that are not reimbursed pursuant to

paragraph (2) shall be recognized as credit in lieu of subcontract awards for purposes of determining whether the mentor firm attains a subcontracting participation goal applicable to such mentor firm under a Department of Defense contract, under a contract with another executive agency, or under a divisional or company-wide subcontracting plan negotiated with the Department of Defense or another executive agency.

(B) The amount of the credit given a mentor firm for any such unreimbursed costs shall be equal to—

- (i) four times the total amount of such costs attributable to assistance provided by entities described in subsection (f)(6);
- (ii) three times the total amount of such costs attributable to assistance furnished by the mentor firm's employees; and
- (iii) two times the total amount of any other such costs.

(C) Under regulations prescribed pursuant to subsection (k), the Secretary of Defense shall adjust the amount of credit given a mentor firm pursuant to subparagraphs (A) and (B) if the Secretary determines that the firm's performance regarding the award of subcontracts to disadvantaged small business concerns has declined without justifiable cause.

(4) A mentor firm shall receive credit toward the attainment of a subcontracting participation goal applicable to such mentor firm for each subcontract for a product or service awarded under such contract by a mentor firm to a business concern that, except for its size, would be a small business concern owned and controlled by socially and economically disadvantaged individuals, but only if—

(A) the size of such business concern is not more than two times the maximum size specified by the Administrator of the Small Business Administration for purposes of determining whether a business concern furnishing such product or service is a small business concern; and

(B) the business concern formerly had a mentor-protege agreement with such mentor firm that was not terminated for cause.

(h) RELATIONSHIP TO SMALL BUSINESS ACT.—(1) For purposes of the Small Business Act (15 U.S.C. 631 et seq.), no determination of affiliation or control (either direct or indirect) may be found between a protege firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protege firm pursuant to a mentor-protege agreement any form of developmental assistance described in subsection (f).

(2) Notwithstanding section 8 of the Small Business Act (15 U.S.C. 637), the Small Business Administration may not determine a disadvantaged small business concern to be ineligible to receive any assistance authorized under the Small Business Act on the basis that such business concern has participated in the Mentor-Protege Program or has received assistance pursuant to any developmental assistance agreement authorized under such program.

(3) The Small Business Administration may not require a firm that is entering into, or has entered into, an agreement under subsection (e) as a protege firm to submit the agreement, or any other document required by the Secretary of Defense in the administration of the Mentor-Protege Program, to

the Small Business Administration for review, approval, or any other purpose.

(i) PARTICIPATION IN MENTOR-PROTEGE PROGRAM NOT TO BE A CONDITION FOR AWARD OF A CONTRACT OR SUBCONTRACT.—A mentor firm may not require a business concern to enter into an agreement with the mentor firm pursuant to subsection (e) as a condition for being awarded a contract by the mentor firm, including a subcontract under a contract awarded to the mentor firm.

(j) EXPIRATION OF AUTHORITY.—(1) No mentor-protege agreement may be entered into under subsection (e) after September 30, 2018.

(2) No reimbursement may be paid, and no credit toward the attainment of a subcontracting goal may be granted, under subsection (g) for any cost incurred after September 30, 2021.

(k) REGULATIONS.—The Secretary of Defense shall prescribe regulations to carry out the pilot Mentor-Protege Program. Such regulations shall include the requirements set forth in section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and shall prescribe procedures by which mentor firms may terminate participation in the program. The Secretary shall publish the proposed regulations not later than the date 180 days after the date of the enactment of this Act. The Secretary shall promulgate the final regulations not later than the date 270 days after the date of the enactment of this Act. The Department of Defense policy regarding the pilot Mentor-Protege Program shall be published and maintained as an appendix to the Department of Defense Supplement to the Federal Acquisition Regulation.

(l) REPORT BY MENTOR FIRMS.—To comply with section 8(d)(7) of the Small Business Act (15 U.S.C. 637(d)(7)), each mentor firm shall submit a report to the Secretary not less than once each fiscal year that includes, for the preceding fiscal year—

(1) all technical or management assistance provided by mentor firm personnel for the purposes described in subsection (f)(1);

(2) any new awards of subcontracts on a competitive or noncompetitive basis to the protege firm under Department of Defense contracts or other contracts, including the value of such subcontracts;

(3) any extensions, increases in the scope of work, or additional payments not previously reported for prior awards of subcontracts on a competitive or noncompetitive basis to the protege firm under Department of Defense contracts or other contracts, including the value of such subcontracts;

(4) the amount of any payment of progress payments or advance payments made to the protege firm for performance under any subcontract made under the Mentor-Protege Program;

(5) any loans made by mentor firm to the protege firm;

(6) all Federal contracts awarded to the mentor firm and the protege firm as a joint venture, designating whether the award was a restricted competition or a full and open competition;

(7) any assistance obtained by the mentor firm for the protege firm from one or more—

(A) small business development centers established pursuant to section 21 of the Small Business Act (15 U.S.C. 648);

- (B) entities providing procurement technical assistance pursuant to chapter 142 of title 10, United States Code; or
 - (C) historically Black colleges or universities or minority institutions of higher education;
 - (8) whether there have been any changes to the terms of the mentor-protege agreement; and
 - (9) a narrative describing the success assistance provided under subsection (f) has had in addressing the developmental needs of the protege firm, the impact on Department of Defense contracts, and addressing any problems encountered.
- (m) REVIEW OF REPORT BY THE OFFICE OF SMALL BUSINESS PROGRAMS.—The Office of Small Business Programs of the Department of Defense shall review the report required by subsection (l) and, if the Office finds that the mentor-protege agreement is not furthering the purpose of the Mentor-Protege Program, decide not to approve any continuation of the agreement.
- (n) DEFINITIONS.—In this section:
- (1) The term “small business concern” has the meaning given such term under section 3 of the Small Business Act (15 U.S.C. 632).
 - (2) The term “disadvantaged small business concern” means a firm that has less than half the size standard corresponding to its primary North American Industry Classification System code, is not owned or managed by individuals or entities that directly or indirectly have stock options or convertible securities in the mentor firm, and is—
 - (A) a small business concern owned and controlled by socially and economically disadvantaged individuals;
 - (B) a business entity owned and controlled by an Indian tribe as defined by section 8(a)(13) of the Small Business Act (15 U.S.C. 637(a)(13));
 - (C) a business entity owned and controlled by a Native Hawaiian Organization as defined by section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15));
 - (D) a qualified organization employing severely disabled individuals;
 - (E) a small business concern owned and controlled by women, as defined in section 8(d)(3)(D) of the Small Business Act (15 U.S.C. 637(d)(3)(D));
 - (F) a small business concern owned and controlled by service-disabled veterans (as defined in section 8(d)(3) of the Small Business Act); and
 - (G) a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act (15 U.S.C. 632(p)); or
 - (H) a small business concern that—
 - (i) is a nontraditional defense contractor, as such term is defined in section 2302 of title 10, United States Code; or
 - (ii) currently provides goods or services in the private sector that are critical to enhancing the capabilities of the defense supplier base and fulfilling key Department of Defense needs.
 - (3) The term “small business concern owned and controlled by socially and economically disadvantaged individuals” has

the meaning given such term in section 8(d)(3)(C) of the Small Business Act (15 U.S.C. 637(d)(3)(C)).

(4) The term “historically Black college and university” means any of the historically Black colleges and universities referred to in section 2323 of title 10, United States Code.

(5) The term “minority institution of higher education” means an institution of higher education with a student body that reflects the composition specified in section 312(b)(3), (4), and (5) of the Higher Education Act of 1965 (20 U.S.C. 1058(b)(3), (4), and (5)).

(6) The term “subcontracting participation goal”, with respect to a Department of Defense contract, means a goal for the extent of the participation by disadvantaged small business concerns in the subcontracts awarded under such contract, as established pursuant to section 2323 of title 10, United States Code, and section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

(7) The term “qualified organization employing the severely disabled” means a business entity operated on a for-profit or nonprofit basis that—

(A) uses rehabilitative engineering to provide employment opportunities for severely disabled individuals and integrates severely disabled individuals into its workforce;

(B) employs severely disabled individuals at a rate that averages not less than 20 percent of its total workforce;

(C) employs each severely disabled individual in its workforce generally on the basis of 40 hours per week; and

(D) pays not less than the minimum wage prescribed pursuant to section 6 of the Fair Labor Standards Act (29 U.S.C. 206) to those employees who are severely disabled individuals.

(8) The term “severely disabled individual” means an individual who is blind (as defined in section 8501 of title 41, United States Code) or a severely disabled individual (as defined in such section).

[(9) The term “affiliated”, with respect to the relationship between a mentor firm and a protege firm, means—

[(A) the mentor firm shares, directly or indirectly, with the protege firm ownership or management of the protege firm;

[(B) the mentor firm has an agreement, at the time the mentor firm enters into a mentor-protege agreement under subsection (e), to merge with the protege firm;

[(C) the owners and managers of the mentor firm are the parent, child, spouse, sibling, aunt, uncle, niece, nephew, grandparent, grandchild, or first cousin of an owner or manager of the protege firm;

[(D) the mentor firm has, during the 2-year period before entering into a mentor-protege agreement, employed any officer, director, principal stock holder, managing member, or key employee of the protege firm;

[(E) the mentor firm has engaged in a joint venture with the protege firm during the 2-year period before entering into a mentor-protege agreement, unless such joint venture

was approved by the Small Business Administration prior to making any offer on a contract;

[(F) the mentor firm is, directly or indirectly, the primary party providing contracts to the protege firm, as measured by the dollar value of the contracts; and

[(G) the Small Business Administration has made a determination of affiliation or control under subsection (h).]

(9) *The term “affiliation”, with respect to a relationship between a mentor firm and a protege firm, means a relationship described under section 121.103 of title 13, Code of Federal Regulations (or any successor regulation).*

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TITLE 41, UNITED STATES CODE

SUBTITLE I—FEDERAL PROCUREMENT POLICY

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CHAPTER 41—TASK AND DELIVERY ORDER CONTRACTS

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§ 4106. Orders

(a) APPLICATION.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) ACTIONS NOT REQUIRED FOR ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) MULTIPLE AWARD CONTRACTS.—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because

it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

(d) **ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.**—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

(e) **STATEMENT OF WORK.**—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(f) **PROTESTS.**—

(1) **PROTEST NOT AUTHORIZED.**—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) **JURISDICTION OVER PROTESTS.**—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

[(3) **EFFECTIVE PERIOD.**—Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.]

(g) **TASK AND DELIVERY ORDER OMBUDSMAN.**—

(1) **APPOINTMENT OR DESIGNATION AND RESPONSIBILITIES.**—The head of each executive agency who awards multiple task or delivery order contracts under section 4103(d)(1)(B) or 4105(f) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on those contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (c).

(2) **WHO IS ELIGIBLE.**—The task and delivery order ombudsman shall be a senior agency official who is independent of the

contracting officer for the contracts and may be the executive agency's advocate for competition.

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TITLE 38, UNITED STATES CODE

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PART VI—ACQUISITION AND DISPOSITION OF PROPERTY

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CHAPTER 81—ACQUISITION AND OPERATION OF HOSPITAL AND DOMICILIARY FACILITIES; PROCUREMENT AND SUPPLY; ENHANCED-USE LEASES OF REAL PROPERTY

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SUBCHAPTER II—PROCUREMENT AND SUPPLY

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§ 8127. Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans or

a small business concern owned and controlled by veterans with service-connected disabilities for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) **SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.**—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans *or a small business concern owned and controlled by veterans with service-connected disabilities* using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed \$5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) **USE OF RESTRICTED COMPETITION.**—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans *or small business concerns owned and controlled by veterans with service-connected disabilities* if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans *or small business concerns owned and controlled by veterans with service-connected disabilities* will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) **ELIGIBILITY OF SMALL BUSINESS CONCERNS.**—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) **DATABASE OF VETERAN-OWNED BUSINESSES.**—(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans, *small business concerns owned and controlled by veterans with service-connected disabilities*, and the veteran owners of such business concerns.

(2)(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be

verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has **[verified]** *verified, using regulations issued by the Administrator of the Small Business Administration with respect to the status of the concern as a small business concern and the ownership and control of such concern, that—*

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(7) *The Secretary may not issue regulations related to the status of a concern as a small business concern and the ownership and control of such small business concern.*

(8)(A) *If the Secretary does not verify a concern for inclusion in the database under this subsection based on the status of the concern as a small business concern or the ownership or control of the concern, the concern may appeal the denial of verification to the Office of Hearings and Appeals of the Small Business Administration (as established under section 5(i) of the Small Business Act). The decision of the Office of Hearings and Appeals shall be considered a final agency action.*

(B)(i) *If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration as described in subparagraph (A). The decision of the Office of Hearings and Appeals shall be considered final agency action.*

(ii) *In this subparagraph, the term “interested party” means—*

(I) *the Secretary; and*

(II) *in the case of a small business concern that is awarded a contract, the contracting officer of the Department or another small business concern that submitted an offer for the contract that was awarded to the small business concern that submitted an offer under clause (i).*

(C) For each fiscal year, the Secretary shall reimburse the Administrator of the Small Business Administration in an amount necessary to cover any cost incurred by the Office of Hearings and Appeals of the Small Business Administration for actions taken by the Office under this paragraph. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-award schedule contracts. Any disagreement about the amount shall be resolved by the Director of the Office of Management and Budget.

(g) ENFORCEMENT PENALTIES FOR MISREPRESENTATION.—(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

[(h) TREATMENT OF BUSINESSES AFTER DEATH OF VETERAN-OWNER.—(1) Subject to paragraph (3), if the death of a veteran causes a small business concern to be less than 51 percent owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans.]

[(2) The period referred to in paragraph (1) is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

[(A) The date on which the surviving spouse remarries.

[(B) The date on which the surviving spouse relinquishes an ownership interest in the small business concern.

[(C) The date that is ten years after the date of the veteran's death.

[(3) Paragraph (1) only applies to a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability.]]

[(i)] (h) PRIORITY FOR CONTRACTING PREFERENCES.—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

[(j)] (i) **APPLICABILITY OF REQUIREMENTS TO CONTRACTS.**—(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

[(k)] (j) **ANNUAL REPORTS.**—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

[(l)] (k) **DEFINITIONS.**—In this section:

(1) The term “small business concern” has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

[(2)] The term “small business concern owned and controlled by veterans” means a small business concern—

[(A)] (i) not less than 51 percent of which is owned by one or more veterans or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

[(ii)] the management and daily business operations of which are controlled by one or more veterans; or

[(B)] not less than 51 percent of which is owned by one or more veterans with service-connected disabilities that are permanent and total who are unable to manage the

daily business operations of such concern or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more such veterans.】

(2) *The term “small business concern owned and controlled by veterans” has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)).*

(3) *The term “small business concern owned and controlled by veterans with service-connected disabilities” has the meaning given the term “small business concern owned and controlled by service-disabled veterans” under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)).*

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