

Union Calendar No. 534

112TH CONGRESS
2^D SESSION

H. R. 3893

[Report No. 112–731, Part I]

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

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 2012

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

DECEMBER 27, 2012

Additional sponsors: Mr. HANNA, Mr. WALSH of Illinois, Mr. CHABOT, Mr. GRAVES of Missouri, Mr. WEST, Mr. SCHILLING, Mr. TIPTON, Mrs. ELLMERS, and Mr. KINGSTON

DECEMBER 27, 2012

Reported from the Committee on Small Business with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

DECEMBER 27, 2012

The Committee on Oversight and Government Reform discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on February 2, 2012]

A BILL

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

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

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

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

7 (b) *TABLE OF CONTENTS.*—

Sec. 1. Short title; table of contents.

TITLE I—LIMITATIONS ON SUBCONTRACTING

Sec. 101. Limitations on subcontracting.

Sec. 102. Penalties.

Sec. 103. Conforming amendments.

Sec. 104. Guidance.

TITLE II—SUBCONTRACTING PLANS

Sec. 201. Subcontracting plans.

Sec. 202. Notices of subcontracting opportunities.

TITLE III—INSOURCING

Sec. 301. Definitions relating to procurement protest system.

Sec. 302. Insourcing.

8 **TITLE I—LIMITATIONS ON**
 9 **SUBCONTRACTING**

10 **SEC. 101. LIMITATIONS ON SUBCONTRACTING.**

11 *The Small Business Act (15 U.S.C. 631 et seq.) is*
 12 *amended—*

13 (1) *by redesignating section 45 as section 47;*

14 *and*

15 (2) *by inserting after section 44 the following:*

1 **“SEC. 45. LIMITATIONS ON SUBCONTRACTING.**

2 “(a) *IN GENERAL.*—If awarded a contract under sec-
3 tion 8(a), 8(m), 15(a), 31, or 36, a covered small business
4 concern—

5 “(1) *in the case of a contract for services, may*
6 *not expend on subcontractors more than 50 percent of*
7 *the amount paid to the concern under the contract;*

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

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

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

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

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

25 “(i) *50 percent of that amount, if the*
26 *category of services or supplies applicable*

1 under subparagraph (A) is described in
2 paragraph (1); and

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

7 “(4) in the case of a contract for supplies from
8 a regular dealer in such supplies, shall supply the
9 product of a domestic small business manufacturer or
10 processor, unless a waiver of such requirement is
11 granted—

12 “(A) by the Administrator, after reviewing
13 a determination by the applicable contracting of-
14 ficer that no small business manufacturer or
15 processor can reasonably be expected to offer a
16 product meeting the specifications (including pe-
17 riod for performance) required by the contract;
18 or

19 “(B) by the Administrator for a product (or
20 class of products), after determining that no
21 small business manufacturer or processor is
22 available to participate in the Federal procure-
23 ment market.

24 “(b) *SIMILARLY SITUATED ENTITIES.*—Contract
25 amounts expended by a covered small business concern on

1 *a subcontractor that is a similarly situated entity shall not*
 2 *be considered subcontracted for purposes of determining*
 3 *whether the covered small business concern has violated a*
 4 *requirement established under subsection (a) or (d).*

5 “(c) *MODIFICATIONS OF PERCENTAGES.*—

6 “(1) *IN GENERAL.*—*The Administrator may*
 7 *change, by rule (after providing notice and an oppor-*
 8 *tunity for public comment), a percentage specified in*
 9 *paragraphs (1) through (4) of subsection (a) if the*
 10 *Administrator determines that such change is nec-*
 11 *essary to reflect conventional industry practices*
 12 *among business concerns that are below the numerical*
 13 *size standard for businesses in that industry category.*

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

17 “(d) *OTHER CONTRACTS.*—

18 “(1) *IN GENERAL.*—*With respect to a category of*
 19 *contracts to which a requirement under subsection (a)*
 20 *does not apply, the Administrator is authorized to es-*
 21 *tablish, by rule (after providing notice and an oppor-*
 22 *tunity for public comment), a requirement that a cov-*
 23 *ered small business concern may not expend on sub-*
 24 *contractors more than a specified percentage of the*

1 *amount paid to the concern under a contract in that*
2 *category.*

3 “(2) *UNIFORMITY.—A requirement established*
4 *under paragraph (1) shall apply to all covered small*
5 *business concerns.*

6 “(3) *CONSTRUCTION PROJECTS.—The Adminis-*
7 *trator shall establish, through public rulemaking, re-*
8 *quirements similar to those specified in paragraph*
9 *(1) to be applicable to contracts for general and spe-*
10 *cialty construction and to contracts for any other in-*
11 *dustry category not otherwise subject to the require-*
12 *ments of such paragraph. The percentage applicable*
13 *to any such requirement shall be determined in ac-*
14 *cordance with paragraph (2).*

15 “(e) *DEFINITIONS.—In this section, the following defi-*
16 *nitions apply:*

17 “(1) *COVERED SMALL BUSINESS CONCERN.—The*
18 *term ‘covered small business concern’ means a busi-*
19 *ness concern that—*

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

23 “(B) *with respect to a contract awarded*
24 *under section 8(m)—*

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

4 “(ii) is a small business concern owned
5 and controlled by women (as defined in that
6 section) that is not less than 51 percent
7 owned by 1 or more women who are eco-
8 nomically disadvantaged (and such owner-
9 ship is determined without regard to any
10 community property law);

11 “(C) with respect to a contract awarded
12 under section 15(a), is a small business concern;

13 “(D) with respect to a contract awarded
14 under section 31, is a qualified HUBZone small
15 business concern; or

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

20 “(2) *SIMILARLY SITUATED ENTITY.*—The term
21 ‘similarly situated entity’ means a subcontractor
22 that—

23 “(A) if a subcontractor for a small business
24 concern, is a small business concern;

1 “(B) if a subcontractor for a small business
2 concern eligible to receive contracts under section
3 8(a), is such a concern;

4 “(C) if a subcontractor for a small business
5 concern owned and controlled by women (as de-
6 fined in section 8(m)), is such a concern;

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

14 “(E) if a subcontractor for a qualified
15 HUBZone small business concern, is such a con-
16 cern; or

17 “(F) if a subcontractor for a small business
18 concern owned and controlled by service-disabled
19 veterans, is such a concern.”.

20 **SEC. 102. PENALTIES.**

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

23 “(g) SUBCONTRACTING LIMITATIONS.—

24 “(1) IN GENERAL.—Whoever violates a require-
25 ment established under section 45 shall be subject to

1 *the penalties prescribed in subsection (d), except that,*
 2 *for an entity that exceeded a limitation on subcon-*
 3 *tracting under such section, the fine described in sub-*
 4 *section (d)(2)(A) shall be treated as the greater of—*

5 *“(A) \$500,000; or*

6 *“(B) the dollar amount expended, in excess*
 7 *of permitted levels, by the entity on subcontrac-*
 8 *tors.*

9 *“(2) MONITORING.—Not later than 1 year after*
 10 *the date of enactment of this subsection, the Adminis-*
 11 *trator shall take such actions as are necessary to en-*
 12 *sure that an existing Federal subcontracting reporting*
 13 *system is modified to notify the Administrator, the*
 14 *appropriate Director of the Office of Small and Dis-*
 15 *advantaged Business Utilization, and the appropriate*
 16 *contracting officer if a requirement established under*
 17 *section 45 is violated.”.*

18 **SEC. 103. CONFORMING AMENDMENTS.**

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

21 *(1) in subparagraph (A)(i) by striking subclause*
 22 *(III) and inserting the following:*

23 *“(III) with respect to any sub-*
 24 *contract entered into by the small busi-*
 25 *ness concern pursuant to a contract*

1 *awarded to the small business concern*
 2 *under section 31, the small business*
 3 *concern will ensure that the require-*
 4 *ments of section 45 are satisfied; and”;*

5 *(2) by striking subparagraphs (B) and (C); and*

6 *(3) by redesignating subparagraph (D) as sub-*
 7 *paragraph (B).*

8 *(b) ENTITIES ELIGIBLE FOR CONTRACTS UNDER SEC-*
 9 *TION 8(a).—Section 8(a) of such Act (15 U.S.C. 637(a))*
 10 *is amended by striking paragraph (14) and inserting the*
 11 *following:*

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

16 *(c) SMALL BUSINESS CONCERNS.—Section 15 of such*
 17 *Act (15 U.S.C. 644) is amended by striking subsection (o)*
 18 *and inserting the following:*

19 *“(o) LIMITATIONS ON SUBCONTRACTING.—A concern*
 20 *may not be awarded a contract under subsection (a) as a*
 21 *small business concern unless the concern agrees to satisfy*
 22 *the requirements of section 45.”.*

23 **SEC. 104. REGULATIONS.**

24 *Not later than 180 days after the date of enactment*
 25 *of this Act, the Administrator of the Small Business Admin-*

1 *istration shall issue guidance with respect to compliance*
 2 *with the changes made to the Small Business Act by the*
 3 *amendments in this Act, with opportunities for notice and*
 4 *comment.*

5 ***TITLE II—SUBCONTRACTING*** 6 ***PLANS***

7 ***SEC. 201. SUBCONTRACTING PLANS.***

8 *(a) SUBCONTRACTING REPORTING REQUIREMENTS.—*

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

11 *(A) by striking “(6) Each subcontracting*
 12 *plan” and inserting the following:*

13 *“(6) SUBCONTRACTING PLAN REQUIREMENTS.—*
 14 *Each subcontracting plan”;*

15 *(B) by amending subparagraph (E) to read*
 16 *as follows:*

17 *“(E) assurances that the offeror or bidder*
 18 *will—*

19 *“(i) submit—*

20 *“(I) not later than 180 days after*
 21 *the date on which performance under*
 22 *the applicable contract begins, and*
 23 *every 180 days thereafter until con-*
 24 *tract performance ends, a report that*
 25 *describes all subcontracting activities*

1 *under the contract during the pre-*
2 *ceding 180-day period;*

3 “(II) *not later than 1 year after*
4 *the date on which performance under*
5 *the applicable contract begins, and an-*
6 *nually thereafter until contract per-*
7 *formance ends, a report that describes*
8 *all subcontracting activities under the*
9 *contract that have occurred before the*
10 *date on which the report is submitted*
11 *(except that, with respect to the De-*
12 *partment of Defense and the National*
13 *Aeronautics and Space Administra-*
14 *tion, a report under this subclause*
15 *shall be submitted not later than 180*
16 *days after the date on which contract*
17 *performance begins and every 180 days*
18 *thereafter until contract performance*
19 *ends); and*

20 “(III) *not later than 30 days after*
21 *the date on which performance under*
22 *the applicable contract ends, a report*
23 *that describes all subcontracting activi-*
24 *ties under the contract; and*

1 “(ii) cooperate with any study or sur-
2 vey required by the applicable Federal agen-
3 cy or the Administration to determine the
4 extent of compliance by the offeror or bidder
5 with the subcontracting plan;” and

6 (C) by moving the margins for subpara-
7 graphs (A), (B), (C), (D), and (F) 2 ems to the
8 right (so that they align with subparagraph (E),
9 as amended by subparagraph (B) of this para-
10 graph).

11 (2) *REPORTING SYSTEM MODIFICATION.*—

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

1 *not carry out or establish any pilot program*
 2 *until the date the Administrator modifies the re-*
 3 *porting system.*

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

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

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

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

15 *(2) in subparagraph (A) by striking “subsection,*
 16 *or” and inserting “subsection,”;*

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

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

21 *“(C) assurances provided under paragraph*

22 *(6)(E),”;* *and*

23 *(5) by moving the margins of subparagraphs*
 24 *(A), (B), and the matter following subparagraph (B)*
 25 *2 ems to the right.*

1 (c) *AUTHORITY OF SMALL BUSINESS ADMINISTRA-*
 2 *TION.—Section 8(d)(10) of such Act (15 U.S.C. 637(d)(10))*
 3 *is amended—*

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

6 “(10) *AUTHORITY OF ADMINISTRATION.—In the*
 7 *case of”;*

8 (2) *in subparagraph (B) by striking “, which*
 9 *shall be advisory in nature,”;*

10 (3) *in subparagraph (C) by striking “, either on*
 11 *a contract-by-contract basis, or in the case contrac-*
 12 *tors” and inserting “as a supplement to evaluations*
 13 *performed by the contracting agency, either on a con-*
 14 *tract-by-contract basis or, in the case of contractors”;*
 15 *and*

16 (4) *by moving the margins of subparagraphs (A)*
 17 *through (C) 2 ems to the right.*

18 (d) *APPEALS.—Section 8(d) of such Act (15 U.S.C.*
 19 *637(d)) is amended by adding at the end the following:*

20 “(13) *APPEALS.—*

21 “(A) *IN GENERAL.—If a procurement center*
 22 *representative or commercial market representa-*
 23 *tive determines that a subcontracting plan re-*
 24 *quired under paragraph (4) or (5) fails to pro-*
 25 *vide the maximum practicable opportunity for*

1 covered small business concerns to participate in
2 the performance of the contract to which the plan
3 applies, such representative may delay accept-
4 ance of the plan in accordance with subpara-
5 graph (B).

6 “(B) *PROCESS*.—A procurement center rep-
7 resentative or commercial market representative
8 who makes the determination under subpara-
9 graph (A) with respect to a subcontracting plan
10 may delay acceptance of the plan for a 30-day
11 period by providing written notice of such deter-
12 mination to appropriate personnel of the con-
13 tracting agency. Such notice shall include rec-
14 ommendations for altering the plan to provide
15 the maximum practicable opportunity described
16 in that subparagraph.

17 “(C) *DISAGREEMENTS*.—If a procurement
18 center representative or commercial market rep-
19 resentative delays the acceptance of a subcon-
20 tracting plan under subparagraph (B) for a 30-
21 day period and, during such period, does not
22 reach agreement with appropriate personnel of
23 the contracting agency to alter the plan to pro-
24 vide the maximum practicable opportunity de-
25 scribed in subparagraph (A), the disagreement

1 *shall be submitted to the head of the contracting*
 2 *agency by the Administrator for a final deter-*
 3 *mination.*

4 *“(D) COVERED SMALL BUSINESS CONCERNS*
 5 *DEFINED.—In this paragraph, the term ‘covered*
 6 *small business concerns’ means small business*
 7 *concerns, qualified HUBZone small business*
 8 *concerns, small business concerns owned and*
 9 *controlled by veterans, small business concerns*
 10 *owned and controlled by service-disabled vet-*
 11 *erans, small business concerns owned and con-*
 12 *trolled by socially and economically disadvan-*
 13 *tagged individuals, and small business concerns*
 14 *owned and controlled by women.”.*

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

16 *Section 8(k)(1) of the Small Business Act (15 U.S.C.*
 17 *637(k)(1)) is amended by striking “in the Commerce Busi-*
 18 *ness Daily” and inserting “on the appropriate Federal Web*
 19 *site (as determined by the Administrator)”.*

20 **SEC. 203. REGULATIONS.**

21 *Not later than 180 days after the date of enactment*
 22 *of this Act, the Administrator of the Small Business Admin-*
 23 *istration shall issue guidance with respect to the changes*
 24 *made to the Small Business Act, with opportunity for notice*
 25 *and comment.*

1 **TITLE III—INSOURCING**

2 **SEC. 301. DEFINITIONS RELATING TO PROCUREMENT PRO-** 3 **TEST SYSTEM.**

4 (a) *PROTEST*.—Section 3551(1) of title 31, United
5 *States Code*, is amended by adding at the end the following:

6 “(F) Conversion of a function that is being
7 performed by a small business concern to per-
8 formance by a Federal employee.”.

9 (b) *INTERESTED PARTY*.—Section 3551(2) of such title
10 is amended—

11 (1) in subparagraph (A) by striking “and” at
12 the end;

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

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

16 “(C) with respect to a conversion described
17 in paragraph (1)(F), means a small business
18 concern (as that term is defined in section 3(a)
19 of the *Small Business Act*) whose economic inter-
20 est would be affected by the conversion.”.

21 **SEC. 302. INSOURCING.**

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

1 **“SEC. 46. INSOURCING.**

2 *“A Federal agency may only convert a function that*
3 *is being performed by a small business concern to perform-*
4 *ance by a Federal employee if—*

5 *“(1) the agency has made publicly available,*
6 *after providing notice and an opportunity for public*
7 *comment, the procedures of the agency with respect to*
8 *decisions to convert a function being performed by a*
9 *small business concern to performance by a Federal*
10 *employee; and*

11 *“(2) the procedures described in paragraph (1)*
12 *include that all decisions described in such paragraph*
13 *are reviewed by any appropriate—*

14 *“(A) Office of Small and Disadvantaged*
15 *Business Utilization; and*

16 *“(B) procurement center representative.”.*

Union Calendar No. 534

112TH CONGRESS
2^D Session

H. R. 3893

[Report No. 112-731, Part I]

A BILL

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

DECEMBER 27, 2012

Reported from the Committee on Small Business with an amendment

DECEMBER 27, 2012

The Committee on Oversight and Government Reform discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed