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Part 1

# SMALL BUSINESS FAIRNESS IN CONTRACTING ACT

APRIL 26, 2007.—Ordered to be printed

Ms. VELÁZQUEZ, from the Committee on Small Business, submitted the following

# R E P O R T

[To accompany H. R. 1873]

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

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

59–006

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

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

TITLE I—CONTRACT BUNDLING

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

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

Sec. 201. Small business goal.
Sec. 202. Include overseas contracts in small business goal.
Sec. 203. Annual goal negotiation.
Sec. 204. Goal reasonableness.
Sec. 205. Usage of small companies in goal achievement.
Sec. 206. Annual plan for each agency explaining how agency will meet small business goals.
Sec. 207. Making small businesses the first choice.
Sec. 208. Uniform metric for subcontracting achievements.
Sec. 209. Subcontracting database.
Sec. 210. National database.
Sec. 211. Review of subcontracting plans.
Sec. 212. Agency obligation for fulfilling contracting goals.

TITLE III—PROTECTION OF TAXPAYERS FROM FRAUD

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

TITLE IV—AUTHORIZATION OF APPROPRIATIONS

Sec. 401. Authorization of appropriations.

**SEC. 2. REGULATIONS.**

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

(1) the Administrator of the Small Business Administration shall promulgate regulations to implement this Act and the amendments made by this Act; and

(2) the Federal Acquisition Regulation shall be revised to implement this Act and the amendments made by this Act.

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

# TITLE I—CONTRACT BUNDLING

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

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

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

"(1) BUNDLED CONTRACT.—

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

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

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

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

"(2) BUNDLING OF CONTRACT REQUIREMENTS.—

"(A) IN GENERAL.—The term 'bundling of contract requirements' means the use of any bundling methodology to satisfy 2 or more procurement requirements for new or existing goods or services, including any construction services, that is likely to be unsuitable for award to a small business concern due to—

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

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

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

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

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

"(i) the use of a bundling methodology for an anticipated award with an aggregate dollar value below the dollar threshold specified in paragraph (4); or

"(ii) the use of a bundling methodology to meet procurement requirements, all of which are exempted requirements under paragraph (5).

"(3) BUNDLING METHODOLOGY.—The term 'bundling methodology' means—

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

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

"(C) the creation of any new procurement requirement that permits a consolidation of contract or order requirements.

"(4) DOLLAR THRESHOLD.—The term 'dollar threshold' means—

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

"(B) $1,500,000, in all other cases.

"(5) EXEMPTED REQUIREMENTS.—The term 'exempted requirement' means one or more of the following:

"(A) A procurement requirement solely for items that are not commercial items (as the term 'commercial item' is defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

"(B) A procurement requirement with respect to which a determination that it is unsuitable for award to a small business concern has previously been made by the agency. However, the Administrator shall have authority to review and reverse such a determination for purposes of this paragraph and, if the Administrator does reverse that determination, the term 'exempted requirement' shall not apply to that procurement requirement.

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

**SEC. 102. JUSTIFICATION.**

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

(1) by striking "is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely" and inserting "would now be combined with other requirements for goods and services";

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

(3) by striking "(3) why the proposed acquisition" and inserting "(6) why the proposed acquisition";

(4) by striking "(4) why construction" and inserting "(7) why construction";

(5) by striking "(5) why the agency" and inserting "(8) why the agency";

(6) by striking "justified." and inserting "justified. The statement shall also set forth the proposed procurement strategy required by subsection (e) and, if applicable, the specifications required by subsection (e)(3). Concurrently, the statement shall be made available to the public, including through dissemination in the Federal contracting opportunities database."; and

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

**SEC. 103. APPEALS.**

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

(1) by striking "If a proposed procurement includes in its statement" and inserting "If a proposed procurement would negatively affect one or more small business concerns, or if a proposed procurement includes in its statement"; and

(2) by inserting before "Whenever the Administration and the contracting procurement agency fail to agree," the following: "If a small business concern would be adversely affected, directly or indirectly, by the procurement as proposed, and that small business concern or a trade association on behalf of that small business concern so requests, the Administrator may, in the Administrator's discretion, take action to further the interests of that small business concern.".

**SEC. 104. THIRD-PARTY REVIEW.**

Section 15(a) of the Small Business Act (15 U.S.C. 644(a)) is amended by striking the sentence beginning "Whenever the Administration and the contracting procurement agency fail to agree," and inserting the following: "Whenever the Administrator and the contracting procurement agency fail to agree, the Administrator shall submit the matter to the Administrator of the Office of Federal Procurement Policy within the Office of Management and Budget, who shall render his decision regarding the matter not later than 10 days after receiving the matter.".

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

**SEC. 201. SMALL BUSINESS GOAL.**

Section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) is amended by striking "23 percent" and inserting "30 percent".

**SEC. 202. INCLUDE OVERSEAS CONTRACTS IN SMALL BUSINESS GOAL.**

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

"(3) The procurement goals required by this subsection apply to all procurement contracts, without regard to whether the contract is for work within or outside the United States.".

**SEC. 203. ANNUAL GOAL NEGOTIATION.**

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

**SEC. 204. GOAL REASONABLENESS.**

Section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) is amended by striking "Notwithstanding the Government-wide goal, each agency shall have an annual goal" and inserting "Each agency shall have an annual goal, not lower than the Government-wide goal,".

**SEC. 205. USAGE OF SMALL COMPANIES IN GOAL ACHIEVEMENT.**

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

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

**SEC. 206. ANNUAL PLAN FOR EACH AGENCY EXPLAINING HOW AGENCY WILL MEET SMALL BUSINESS GOALS.**

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

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

**SEC. 207. MAKING SMALL BUSINESSES THE FIRST CHOICE.**

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

(1) in paragraph (1)—

(A) by inserting "or order" after "Each contract"; and

(B) by striking "$100,000" and insert "the Simplified Acquisition Threshold"; and

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

**SEC. 208. UNIFORM METRIC FOR SUBCONTRACTING ACHIEVEMENTS.**

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

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

**SEC. 209. SUBCONTRACTING DATABASE.**

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

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

**SEC. 210. NATIONAL DATABASE.**

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

**SEC. 211. REVIEW OF SUBCONTRACTING PLANS.**

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

**SEC. 212. AGENCY OBLIGATION FOR FULFILLING CONTRACTING GOALS.**

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

"(4) At the conclusion of each fiscal year, the head of each Federal agency shall submit to Congress a report specifying the percentage of contracts awarded by that agency for that fiscal year that were awarded to small business concerns. If the percentage is less than 30 percent, the head of the agency shall, in the report, explain why the percentage is less than 30 percent and what will be done to ensure that the percentage for the following fiscal year will not be less than 30 percent.".

# TITLE III—PROTECTION OF TAXPAYERS FROM FRAUD

**SEC. 301. SMALL BUSINESS SIZE PROTEST NOTIFICATION.**

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

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

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

**SEC. 302. REVIEW OF NATIONAL REGISTRY.**

The Administrator of the Small Business Administration shall ensure, on a biannual basis, that an independent audit is performed of the Central Contractor Registry, or any successor to that registry, and that the Dynamic Small Business Search portion of the registry, or any successor to that portion of the registry, is purged of any businesses that are not in fact small businesses. If a business that has been so purged attempts, while not in fact a small business, to re-register, that business is subject to debarment as a Federal contractor and is further subject to penalties outlined in section 16 of the Small Business Act (15 U.S.C. 645).

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

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

"(5) RECERTIFICATION.—

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

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

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

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

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

# TITLE IV—AUTHORIZATION OF APPROPRIATIONS

**SEC. 401. AUTHORIZATION OF APPROPRIATIONS.**

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

## II. PURPOSE AND SUMMARY

The Small Business Fairness in Contracting Act, H.R. 1873, amends key sections of the Small Business Act to assist small business participation in federal procurement. The predecessors to the Small Business Administration (SBA) can be traced back to World War II and efforts by Presidents Roosevelt and Truman to ensure that small businesses contributed to the maintenance of a robust defense industrial base. Today, the SBA is best known for its access to capital programs. Nevertheless, the genesis of the agency in government procurement is reflected in the Small Business Act's dictate that small business concerns receive a "fair proportion of the total purchases and contracts for the Government in each industry category . . . ." [1] Despite this clear mandate in existence for more than 50 years, small businesses have not received their fair share of federal government contracts, much less in each industry category. Although there are many reasons for this failure, H.R. 1873 adopts a measured approach to addressing some of the key causes for those failures. By doing so, the authors intend to dramatically improve on the capability of small businesses to earn their fair share of federal government contracts as mandated by the Small Business Act.

The bill rectifies significant contracting problems in three main areas: contract bundling, establishment of contracting goals for small businesses, and inaccuracies of government databases listing small business concerns. Title I strengthens the definition of contract bundling by closing loopholes in the definition, adding construction services to those contracts that are subject to a bundling

[1] § 15(a) of the Small Business Act 15 U.S.C. § 644(a).

analysis mandated by 15(e) of the Small Business Act,[2] and providing a means by which the Administrator of the SBA may obtain an independent resolution of a dispute over the propriety of a bundled contract. Title II raises the procurement goals for small businesses, modifies how that overall goal is calculated, mandates the time-frame for negotiating the goals with each federal agency, and raises the threshold for set-asides of small business contracts to the Simplified Acquisition threshold of $400,000. Title II also enhances the capacity for small businesses to obtain a fair share of subcontracts awarded by large prime contractors through improved compliance with the subcontracting plans proffered by the prime contractors. Title III of the bill corrects a problem of recent origin concerning the accuracy of the data kept on federal procurement databases and the associated misreporting of firms' size status.

The Committee does not expect that these changes will alleviate all the problems associated with small business access to federal government contracts. Nevertheless, this bill makes a sound start at eliminating some of the more egregious barriers erected that prevent small business concerns from achieving the goal of their fair share of federal contracts set forth in the Small Business Act.

## III. Background and Need for Legislation

In 2006, the federal government spent over $417 billion on goods and services in 8.3 million separate contract actions. There is no reason to believe that the federal marketplace will not continue to grow at a record pace. Small businesses won approximately $80 billion in contracts which is about 21.5 percent of the remaining prime contracts. The opportunity for free and predominantly fair competition for those contracts is an immensely important benefit for small businesses.

Congress acknowledged the value of small business participation in federal contracting and has established federal policies to promote that objective for over 60 years. During World War II it was found to be in our national interest to ensure a strong and diverse industrial base. In Section 2 of the Small Business Act[3] procurement goals are established as follows: "it is the declared policy of the Congress that the Government should aid, counsel, assist and protect ... the interests of small business concerns in order to preserve free competitive enterprise and to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small business enterprises." Without competition, industrial concentration occurs and the government's purchasing options are dramatically reduced.

Through a series of laws and procurement requirements Congress established a benchmark to give small businesses every opportunity to compete fairly for the award of federal contracts. The foundation for these efforts is the Small Business Act, passed in 1953, which has been steadily amended to adapt to meet the demands of the marketplace, to support important social and technological goals, and to conform to an increasingly sophisticated procurement system.

[2] 15 U.S.C. § 644(e).
[3] 15 U.S.C. § 631(a).

In recent years, as the number of contracts grew and competition for lucrative federal contracts intensified, the process became still more complex. At the same time the federal government has instituted significant initiatives designed to streamline and centralize the procurement process which would lower administration costs. Unfortunately some of these procedures ended up artificially reducing competition. They also provide an advantage to large corporations that have the contacts and resources to operate successfully world-wide.

The issues the bill seeks to correct include: the increased prevalence of contract bundling of federal contracts; the miscoding of large businesses as small businesses for contract purposes or the improper use of codes to include or exclude certain businesses; the exclusion of overseas and other categories of contracts from government small business goals and programs; the lack of growth in general of small business goals; and the need for stronger incentives and enforcement mechanisms to spur the attainment of small business policy and goals. These worsening problems need to be addressed because they are central to maintaining fair competition.

BARRIERS FOR SMALL BUSINESS PARTICIPATION

In many cases, small businesses can handily fulfill the basic requirements of federal contracts and beat their competition; in fact, lower overhead, nimbler production and structural efficiencies often mean they can rise to provide services or products at the best price. But competition is not always so straightforward. Small businesses might not have the manpower or systems to track and bid on all the opportunities for which they would qualify. Certain federal contracts, such as overseas contracts, are exempted by the SBA from small business goal setting, even though some small businesses would like to bid for those opportunities.

Even in those cases where the law requires that certain contracts be set aside for competition between capable small businesses there are often barriers for smaller firms. For example, the Committee found that agencies are not doing a good job following the rules or ensuring all applicants are actually small. Also, sometimes a smaller contract to provide parts can disappear if it is swept into a larger contract for overall maintenance. Or perhaps a small bidder could win the award and simply turn it over to a large bidder, which in effect is a backdoor award to a large bidder.

The latest figures show that federal buying of goods and services continues a remarkable expansion. Since 2000, the U.S. government's buying has expanded by nearly 60 percent to a record total of $340 billion in goods and services in the basic pool available to the small business rule. Current law requires the SBA to negotiate and establish contracting goals for every federal agency. The federal wide goal is currently 23 percent but SBA establishes individual agency goals that they then aggregate to obtain the overall 23 percent goal. One adverse side effect of this system is that one agency's compliance with the goal is used to conceal another agency's failure. A standard goal would provide a fixed benchmark by which to judge all agencies.

Unfortunately, contracting opportunities for small businesses continue to lag and, because of the failure of the government's tracking system, are likely worse than the available data shows.

Agencies pressed for time and budget dollars rely more heavily on shortcuts such as contract bundling and other procurement practices that shut small businesses out of the federal marketplace. Seven years ago this Committee set out to highlight individual agencies by grading their performance. Those grades show a system that has consistently gotten worse.

Equally problematic, as evidenced by the lack of disaster recovery contracts going to local companies in the aftermath of the Gulf coast hurricanes, are efforts to expand harmful small business contracting practices. New methods of government buying that have the potential to put taxpayer money at risk are flourishing. Government contracts are structured so that the only avenue for participation by small companies is as a subcontractor where they are generally left to the vagaries of commercial contract law. Overall, small businesses continue to lose out on federal contracts, which have negative impacts for taxpayers in the form of reduced quality and increased costs.

CONTRACT BUNDLING

The practice of bundling contracts—combining two or more contracts into a larger single package—most often ends up pushing small firms out of the contract competition. Congress responded in 1997 with provisions in the Small Business Reauthorization Act of 1997. The new law created its own problems as ways were found to skirt its requirements. The last ten years have illustrated that additional clarification is needed.

The President's Small Business Agenda of 2002 requested that the Office of Management and Budget (OMB) stop the unnecessary bundling of contracts and required the Office of Federal Procurement Policy (OFPP) to develop detailed plans to implement this objective. In 2003, the SBA and OFPP proposed regulations which were finalized and published in the Federal Register on October 20, 2004. Shortly thereafter, the GAO reviewed SBA bundling processes and data and found that the Federal Procurement Data System (FDPS) was inaccurate because of confusion about the statutory definition of contract bundling, inadequate verification of information they were receiving, and ineffective controls in the FPDS reporting process. The Committee believes that, as a result, the reporting of bundling actions is wholly inadequate. In 2006, for example, only 43 bundlings were reported by the federal government even though independent studies have put the number, under a broader, more realistic definition at hundreds of thousands of contracts.[4]

Another indication to the Committee that bundling is increasing over the last 5 years is that despite an increase in total government contracting dollars of 60 percent since 2000, the total number of contracting actions received by small business has declined by 55 percent. Meanwhile, small business contracts continue to be phased out and combined with larger projects putting them beyond the reach of small firms. The Committee has not seen evidence that these bundled contracts are less expensive to taxpayers and provide higher quality goods and services.

[4] The Impact of Contract Building on Small Business 1992–2001; Office of Advocacy, SBA, 2001.

Currently, the Small Business Act (Act) defines "Bundling of Contract Requirements" as:

> [C]onsolidating 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).[5]

The definition requires that bundling only occurs for work that has been performed under preexisting contracts. However, over the years, contracts evolve and new requirements emerge and this provision has resulted in limiting the contracts covered. In addition, construction contracts are not covered even though construction jobs tend to be very suitable for smaller, individual contracts. Very few construction jobs are alike because they involve a host of complex variables. Witnesses at the Committee's April 19, 2007 hearing testified that specifically including construction services in the definition and deleting the requirement that work have been previously provided or performed, will better address this important sector of the small business economy.

APPEALS

Because of the current statutory definition of "contract bundling," very few contracts actually receive a review to determine their impact on small firms. Merely adding one component of work that was not in the previous contract seems to allow an agency to avoid the analytical requirements that come with the determination of bundling. In the rare cases where bundled contracts are reviewed, the SBA is allowed under statute to appeal the contracting action to the agency. The Act currently only triggers a review of a proposed bundle when "a proposed procurement includes in its statement of work goods or services currently being performed by a small business,"[6] and only allows bringing the issue to the attention of the Administrator if the Procurement Center Representative begins the appeal of the bundling decision. Unfortunately, these appeals rarely improve the likelihood that the contract will be unbundled. The SBA's appeal effectively asks an agency if it is sure it wants to proceed with the bundled contract—with the SBA offering arguments as to why the proposed approach would harm small firms. In essence, this is asking the procuring agency to reverse itself—a highly improbable outcome. Given the failure of the SBA to prevail in these appeals, the agency has used this option less and less.

Under current law, small businesses are allowed to protest the award of a bundled contract if they are harmed by it, but are unlikely to do so given the cost and that the agency may take puni-

[5] Small Business Act, § 3(o)(2), 15 U.S.C. 632(o)(2).
[6] Small Business Act § 15(a), 15 U.S.C. 644(a).

tive action against them as a result. Small business witnesses testified that being excluded from a contract competition because of a combination of tasks should be enough injury to a small business to trigger a review. However, they pointed out that these reviews are expensive and therefore might inhibit a small business from moving forward to assert its rights. The Committee feels that appeals should be enlarged to cover instances where the small business is negatively affected by not being able to bid on the contract. In addition, the business or a trade association should be able to pursue an appeal through the Administrator.

Finally, a third party should be able to independently review the appeal as it has proved ineffective to let agencies review their own bundling decisions. The concept of an independent third party was endorsed by the small business witnesses who commented on the legislation.

SMALL BUSINESS GOALS

Federal contracts are awarded and coded based on the businesses' characteristics (including small, women-owned, minority-owned, HUBZone and disabled veteran-owned). This information is collected by agencies. The federal government and specifically the SBA (working with the OFPP) are required to monitor the utilization of small businesses by federal agencies and compile records of compliance with federal contracting programs.

The Act provides that the government wide goal for small business prime contracts is to be not less than 23 percent of the prime contracts awarded each year. The SBA negotiates and establishes individual goals for each federal agency and, under the current procedures, these awards are added across all federal agencies to obtain the percentage of federal prime contracts awarded in each category annually. Not all federal contracts are included in the pool of contracts on which goals are based; for example, contracts performed overseas are excluded from the tabulation. In addition to the overall prime contracting goal for small businesses goals are established for Historically Underutilized Business Zone (HUBZone) small businesses and Service Disabled Veteran Owned Small Businesses (SDVOSBs) at 3 percent each. Finally, the Act sets goals for small business concerns owned and controlled by socially and economically disadvantaged individuals (SDBs) and small business concerns owned and controlled by women (WOSBs) at 5 percent.[7]

If contracts won by large businesses or exempt entities are counted toward the small business goal, its value is inflated and, the Committee found, less effort is expended to bring competitive and real small businesses into government contracting. In addition, without good information policymakers cannot make informed decisions and the purposes of the programs are frustrated. The Committee has analyzed agency tabulations over the last 7 years (1999 through 2005) in its Scorecard Reports. Starting in 2002, it became apparent through this analysis that a significant number of the contracts were routinely misreported—always reflecting a higher goal percentage attainment than was actually achieved. Therefore, the Committee has recommended changes to require more accurate

[7] Small Business Act § 15(g)(1), 15 U.S.C. 644(g).

reporting and to strengthen the manner in which the data was reported and certified.

MISCODING

In a Committee investigation, it became apparent that large businesses (including Fortune 500 companies) and ineligible entities (non-profits or state, local and federal governments) were receiving billions of dollars in contacts that were attributed to small businesses and contaminating the goal results. For example, in June of 2006, the SBA issued its annual report on federal contracting and stated that small businesses received 25.36 percent of qualified federal prime contracts. However, a review of the underlying data showed the report substantially overstated the amount of contracts small businesses received. Further analysis showed that if contracts actually awarded to large corporations and other ineligible organizations were removed, the actual percentage of federal prime contracts going to small business was 21.5 percent. Approximately $12 billion in contract awards had been miscoded.[8] In addition to the Committee's oversight efforts, the SBA Inspector General, the Government Accountability Office and the SBA Office of Advocacy have all found significant miscoding problems with the data.[9]

With the exception of a new SBA proposal that requires companies to recertify their business size every five years, very little has been done to ensure that large companies are not able to take advantage of small business programs through miscoding. The Central Contractor Registry (CCR) currently includes hundreds of large businesses that present themselves as small firms. In addition, there is no way to know that the new SBA regulation will work unless the list of small business vendors receiving contracts is audited individually to ensure that no large businesses or other unqualified entities are listed as small.

SUBCONTRACTING

Subcontracting can provide an important training ground for small companies to familiarize themselves with the government contracting process. Increasingly, small firms are becoming subcontractors, not by choice, but by necessity. Most businesses, given the choice, would prefer to have their own contracts directly with the federal government. In this way they receive the full benefit of their own hard work, ingenuity and efficiency and enjoy federal protections and guarantees for payment.

Unfortunately, subcontracting has been a very negative experience for some small businesses even where large amounts of contracting dollars were available. In the Gulf Region, for example, billions of dollars of cleanup work was awarded through four large no-bid contracts. When small businesses did get a piece of that work, it was most often as sub-subcontractors for low-value tasks and for a fraction of the price the government was charged.

The same is true for the recent Department of Homeland Security award for a $67 million "virtual fence" along the U.S. border

[8] See ScoreCard VII at www.house.gov/smbiz.

[9] See Analysis of Type of Business Coding for the Top 1000 Businesses Receiving Small Buainess Awards; Office of Advocacy, Small Business Administration submitted by Eagle Eye Publishers, Inc; December 2004.

that went to a large company. By the time small firms were made aware of this work, it was already awarded. At some point in the future, if small firms are able to participate, they will be relegated to subcontracts with the profits going mainly to the prime contractor.

Subcontracts are commercial contracts between private parties. Rights accorded under federal procurement statutes between the government and prime contractors, such as prompt payment, do not apply. Disputes are resolved through arbitration or in costly litigation.

Subcontracting dollars are often overstated. Prime contractors currently report their usage of small business subcontractors as a percentage of the amount of the prime subcontracts, as opposed to the total dollar value of the contract award. This practice has the result of inflating the amount of work that small business subcontractors are receiving on large federal contracts.

OVERSEAS CONTRACTING

The large amount of federal dollars spent on combating terrorism, providing international security and resultant rebuilding efforts in Iraq and Afghanistan, has underscored the unfairness of not including overseas contracts as part of the base of contracts for which small businesses can compete. The U.S. government operates hundreds of overseas bases and facilities. Under its current rules the SBA does not include work performed overseas in the calculation of goal results. If foreign contract opportunities were considered, some analysts calculate that the actual small business prime contracting level is only about 19 percent of all federal contracts.[10] The overseas exclusion sends the message to federal agencies they need not bother soliciting small companies for contracts performed abroad as it will not count against them for their goals. But many small businesses are fully capable of international performance and likely would bid for such contracts.

In FY 2004, $340 billion in contracts were awarded in the total federal marketplace. Of these contracts, more than $6 billion (and probably much more) was spent overseas using domestic U.S. corporations. Small firms received less than $122 million of these contracts; roughly 2 percent.[11] As a rule, this information is not tracked by the federal agencies that contract much of this work, such as the Defense Department, the State Department, and the U.S. Agency for International Development. The problem is intensified because large corporations rarely are required to utilize small U.S. businesses as subcontractors on contracts they perform for the U.S. abroad. A temporary fix was added last year through an amendment to the appropriations bill that now requires prime contractors to make stronger efforts to use small businesses in the overseas contracts of the Defense Department, with the exception that combat areas such as Iraq and Afghanistan continue to be excluded.

The Committee believes this policy should be recalibrated with a policy that advances the use of small American firms as prime con-

[10] See recent study by Paul Murphy of Eagle Eye which had small businesses receiving 19.3 percent of all federal prime contracts.

[11] Committee estimate based on available data. Not all such data is available or is kept in a form that can be tabulated.

tractors and subcontractors for work performed outside of U.S. territory. There may be good reasons why some contracts are awarded to large domestic companies or foreign contractors, but these decisions should be reviewed and publicly disclosed when possible. Strengthening and diversifying the international capabilities of our small business base would have a positive impact on our international competitiveness.

## IV. Hearings

In the 110th Congress, the full Committee on Small Business held a hearing on Women's Business Ownership March 21, 2007 that examined barriers to full participation by women-owned business in federal contracting. Also, a significant portion of the Committee's hearing on the President's FY2008 budget proposals centered on questions raised about contracts awarded to large businesses that were "miscoded" as small businesses for reporting purposes. The hearing looked at the sufficiency of the SBA's personnel and budget requests to address the serious problems in small business procurement activities that were indicated in reports from the Inspector General, the Government Accountability Office, the Office of Advocacy and our Committee reports. A full Committee hearing was held in New Orleans on April 12, 2007 where the heads of six federal agencies testified about federal contracting to local small businesses in the wake of the Hurricane Katrina disaster. Most recently a hearing was held on April 19, 2007 on key contracting issues for small businesses and how H.R. 1873 would address those problems. Finally, the Committee held over 15 hearings on these topics in the 107th, 108th and 109th Congress where the Committee found that chronic structural and administrative problems that created barriers to small business participation were increasing, rather than abating.

## V. Committee Consideration

The Committee on Small Business met in open session on April 24, 2007 to consider H.R. 1873.

## VI. Committee Votes

The Committee on Small Business ordered H.R. 1873 reported to the House, as amended by an amendment in the nature of a substitute, by a voice vote at 10:12 a.m.

## VII. Section-by-Section Analysis of Procurement Bill

*Sec. 1 Short title; table of contents*

This section includes a short title and the table of contents.

*Sec. 2 Regulations*

This section requires the SBA and the Federal Procurement Agencies that constitute the Federal Acquisition Rule Council to implement any necessary regulations within 180 days of the passage of this Act.

The Committee is concerned that, often times, regulatory changes are not timely reflected in the Federal Acquisition Regulation (FAR). Because contracting officers generally consult the FAR

when making procurement decisions, and not SBA regulations, it is important that the changes mandated be performed in a coetaneous manner. Furthermore, the Committee requires the regulations be issued pursuant to the Administrative Procedure Act to avoid any question whether these regulations constitute a major procurement rule under section 418 of the Office of Federal Procurement Policy Act.

*Title I*

*Sec. 101 Definitions of bundling of contract requirements and related terms*

This provision clarifies the definition of contract bundling and related terms. Specifically, "bundled contract" is defined as a contract or order that is entered into to meet requirements that are consolidated in a bundling of contract requirements without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made. "Bundling of contract requirements" is defined as the use of any bundling methodology to satisfy 2 or more requirements for new or existing goods or services, including any services for construction, 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 or order performance sites; or (d) any combination of the factors described in (a), (b), and (c). "Bundling methodology" is defined as a solicitation to obtain offers for a single contract or order, or a multiple award contract or order; a solicitation of offers for the issuance of a task or delivery order under an existing single or multiple award contract or order; or the creation of any new procurement requirement that permits a consolidation of contract or order requirements. Contracts under $1.5 million (or $65 million for construction), however, are exempted under all of these definitions. Additionally, contracts for solely non-commercial items, and contracts made up of two elements previously determined to be unsuitable for small business performance cannot be considered bundled. The Administrator will, however, be entitled to examine and overturn previous determinations of unsuitability. Finally, the term "procurement requirement" is defined in this section as "a determination by an agency that a specified good or service is needed to satisfy the mission of the agency."

Under the current definition, a contract may only be considered bundled if it has been previously performed. This provision expands the definition to include construction and other new work. By expanding the definition, more contracts will be subject to a bundling review and may ultimately be broken into smaller parts that are better suited for small business performance. The dollar thresholds have been added to ensure that the expanded definition is not too broad. These dollar limits have been set at levels above which that indicate bundling of contract requirements.[12] This provision is not intended to include contracts including only one re-

[12] One requirement means the procurement of one good. The definition is not intended to exclude one requirement with indefinite quantity.

quirement, or contracts for goods or services that small businesses are inherently incapable of providing.

With respect to orders, the Committee intends that not only contracts, but also orders such as indefinite delivery vehicles, requirements-type contracts, and indefinite delivery indefinite quantity contracts—whether single award or multiple award—are reviewed for potential bundling as long as the contracts exceed the dollar thresholds set forth in this section. For the following types of contracts, this review will occur at formation: single award, single requirement; single award, indefinite delivery vehicle; single award, and requirements. For the following types of contracts, this review will occur both at the time of formation and at the time of task order issuance: single award, indefinite delivery indefinite quantity; multiple award, indefinite delivery vehicle; multiple award, requirements; and multiple award, indefinite delivery indefinite quantity.

*Sec. 102 Justification*

This provision requires a Procurement Activity to provide the Procurement Activity's Small Business Procurement Center Representative with the names, addresses, and size of the incumbent contract holders; a description of the industries that might be interested in bidding on the contract requirements; and the number of small businesses listed in the industry categories that could be excluded from future bidding if the contract is combined or packaged. The provision also allows for the Administrator to intervene if no notification is provided, but he determines that a contract may be bundled. He may demand that a statement of work goods or services be completed by the Procurement Activity and sent to the Procurement Center Representative. Meanwhile, the solicitation process is postponed for at least 10 days to allow time for the Administrator's review and recommendations. Finally, the provision requires that justifications be made publicly available.

The Committee intends this provision to close an existing loophole. The SBA is not presently advised of a number of contract bundles. This provision will allow the SBA to intervene in bundled contracts that the SBA becomes aware of even though the SBA was not originally notified of the bundle by the procuring agency. The justifications are intended to be made publicly available via the FedBizOpps website.

*Sec. 103 Appeals*

This provision allows small businesses, and trade organizations acting on their behalf, that are adversely affected, directly or indirectly, by a proposed procurement, to request that the SBA appeal the procurement on their behalf. This provision is intended to allow small businesses to protest procurements through trade associations, which decreases the financial and reputation-related burdens associated with protests. This is not intended to be a vehicle for unmeritorious claims.

*Sec. 104 Third-party review*

This provision requires the OFPP within the Office of Management and Budget (OMB) to decide a dispute between the SBA and a procuring agency with regard to contract bundling. The OFPP

Administrator is required to render a decision not later than 10 days after receiving the matter. Moreover, the OFPP Administrator may not delegate this duty except to a subordinate official within OMB appointed by the President, with the advice and consent of the Senate.

The Committee intends for this provision to provide an alternative to the current review process, which requires SBA to appeal to the contracting agency. As the contracting agency initially let the contract, it would be highly improbable to agree with an appeal as evidenced by the SBA's record of not prevailing on these appeals. A third party such as the OFPP, which has been authorized by Executive Order 13170, would be a more appropriate mediator. The ten day limit has been set to ensure efficiency. The Committee does not intend for the OFPP to become involved in every federal contract. Rather, the Committee intends that OFPP involvement occur only when agencies and SBA disagree as to the appropriateness of action. The Committee understands that the OFPP is not normally supposed to get involved in specific contract actions. However, the Committee believes that bundled contracts should be an exception given the OFPP's and OMB's numerous existing involvements in bundling as policy. As a result, the Committee intends that OFPP act to ensure that the Administration's policies with respect to contract bundling are being furthered.

*Title II*

*Sec. 201 Small business goal*

This provision raises the small business goal from 23 percent to 30 percent. The Committee believes that this increase is appropriate, as the goal has not been raised in ten years—since 1997. In 1997, there were 23 million small businesses. In 2005, there were 25.8 million. Furthermore, the federal marketplace has expanded from $177.5 billion to over $300 billion. Given that, a seven percent raise seems reasonable. The Committee intends for this increased level to encourage agencies to strive for accomplishments beyond 23 percent.

*Sec. 202 Include overseas contracts in small business goal*

This provision extends the small business goal to all procurement contracts without regard to whether the contract is for work within or outside the United States. The Committee intends for the small business contracting goal to apply to all contracts, and is concerned that certain contracts are being excluded from the goal calculation. By not extending the goal to overseas contracts, agencies have no incentive to contract with small businesses for this work. This provision is intended to afford small businesses greater opportunity to compete for these contracts, and to allow agencies to apply overseas contracts awarded to small businesses toward their annual achievements.

*Sec. 203 Annual goal negotiation*

This provision requires the President, before the close of each fiscal year, to establish new Government-wide procurement goals for the following fiscal year for procurement contracts. This is intended to allow agencies to adjust their goals on an annual basis so that

the most appropriate objective is set. The Committee is concerned that over the past several years, the administration—despite the language of the existing statute—has engaged in biannual goal setting. By modifying the language of the statute, the Committee is ensuring that new goals will be established each year.

*Sec. 204 Goal reasonableness*

This provision requires that the annual small business contracting goals of each agency be not lower than the Government-wide goals. The Committee intends that the Government-wide goals serve as a floor for all individual agency goals. No agency may set its goals at a lower percentage.

*Sec. 205 Usage of small companies in goal achievement*

This provision requires that small business concerns shall be counted toward a maximum of one additional category, even if the concern otherwise qualifies under more than one category goal. The Committee intends for this provision to eliminate the problem of agencies searching for businesses that can meet as many criteria as possible—and for small business owners making decisions on the location and structure of their companies based on recommendations of agency personnel. This provision will allow any small business that qualifies in other categories to count once as small, and again in only one additional category (e.g., HUBZone, minority-owned, etc.) as chosen by the agency.

*Sec. 206 Annual plan for each agency explaining how agency will meet small business goals*

This provision will require the head of each Federal agency, before the beginning of each fiscal year, to submit to the Administrator and Congress, a detailed plan outlining how the agency intends to meet its small business goals for the upcoming fiscal year. The Committee expects for the agency leadership to be fully engaged in small business contracting policy. By requiring the development of an annual plan, the leadership will have to take a proactive role in the agency's commitment to small business participation in federal procurement.

*Sec. 207 Making small business the first choice*

This provision requires that the small business set-aside requirement applies not only to contracts, but also to orders. It will additionally require that the maximum dollar value for the small business threshold be raised to that of the Simplified Acquisition Threshold. This is intended to apply the set-aside requirement—known as the "small business reserve"—to the Federal Supply Schedules and other procurement vehicles. Because these purchases are considered "orders" rather than "contracts," they have been previously exempted from certain contracting rules.

By tying the maximum threshold to the Simplified Acquisition Threshold, the two limits can be adjusted for inflation at the same time. Additionally, the Simplified Acquisition Threshold allows for greater flexibility than having one static number covering all acquisition types.

*Sec. 208 Uniform metric for subcontracting achievement*

This provision requires prime contractors to report small business subcontract usage, at all tiers, based on the percentage of the total dollar amount of the contract award. The purpose of this provision is to establish a uniform metric for measuring subcontracting performance. The Committee intends to measure performance as a percentage of the total dollar amount rather than the dollar amount subcontracted out, or any other form of measurement.

*Sec. 209 Subcontracting database*

This provision requires the Administrator to develop and maintain a password-protected database that will enable agency contracting personnel to assist small businesses in marketing their goods and services to large corporations. The Committee intends for this to aid small businesses in finding opportunities as subcontractors. The Committee does not intend this database to be made available to the public or subject to disclosure pursuant to the Freedom of Information Act. The Committee expects that the SBA will use the information to direct small businesses to appropriate prime contractors for potential subcontracting opportunities.

*Sec. 210 National database*

This provision will require the Administrator to ensure that, whenever a small business enters its information into the Central Contractor Registry, or any successor to that registry, the SBA personnel contacts that business within 30 days regarding the likelihood of Federal contracting opportunities. Moreover, the Administrator will be required to ensure that each small business that so registers is, for each industry code entered by that small business, provided with the total dollar value of government contract awards to small businesses for that industry.

The Committee is increasingly concerned that small companies are registering in the Central Contractor Registry, but remain unfamiliar with other federal registries such as the online bid listing "Fedbizopps." This provision is intended to aid businesses wishing to contract with the federal government. By SBA response, firms may gain a better understanding of the opportunities available within their industry. This is not intended to require a personal response from the Administrator or SBA personnel. A software program could be used to generate an industry-specific response for each registrant.

*Sec. 211 Review of subcontracting plans*

This provision will require the Administrator to, after an opportunity for notice and comment, and not later than 120 days after the enactment of this section, prescribe regulations to govern the Administrator's review of subcontracting plans, including standards for determining good faith effort in compliance with the subcontracting plans.

This provision is intended to ensure that subcontracting plans are thoroughly reviewed. A more thorough review should encourage the production of better-prepared subcontracting plans. Moreover, the Committee is concerned that although the Small Business Act has allowed for the assessment of liquidated damages against prime contractors that fail to achieve their small business goals

since the enactment of P.L. 100–656 in 1988, the Committee is unaware of even a single assessment. Primarily, this has occurred because of the requirement that prior to an assessment of damages an agency must demonstrate that the prime contractor did not put forth a good faith effort to comply but prime contractors are given no guidelines in what constitutes compliance. A rulemaking will clarify this provision and provide appropriate standards for measurement of good faith compliance.

*Sec. 212 Agency obligation for fulfilling contracting goals*

This provision requires the head of each Federal agency to submit a report to Congress at the conclusion of each fiscal year specifying the percentage of small business contracts awarded by that agency for that fiscal year. If the percentage is less than 30 percent, the head of the agency shall, in the report, explain why the 30 percent goal has not been met, and what will be done to ensure that the goal will be met for the following fiscal year. By requiring the heads of agencies that have not met the goal to formulate strategies for meeting the goal in the future, it increases the likelihood that agency-wide contracting policies will be adopted with a view toward small business inclusion.

*Title III*

*Sec. 301 Small business size protest notification*

This provision requires the Administrator of the SBA to work with appropriate Federal agencies to ensure that whenever a business fails to prevail in a size protest and is determined to be other than small, the business is flagged as such in the Central Contractor Registry (or any successor to that registry). The provision will further require the Administrator, in making any report of small business goal accomplishments, to qualify the accomplishments as "estimated" until the Administrator obtains from the Comptroller General's certification that there are no data integrity issues with respect to the national repository of contract award information known as Federal Procurement Data System—Next Generation (FPDS–NG), or any successor to that repository. Finally, the provision will require the Administrator, acting through the Inspector General, to annually submit a report to Congress on the number and dollar value of contract awards that were coded as awards to small business concerns but in fact were made to businesses that did not qualify as small business concerns.

The Committee intends for this provision to help ensure that there is coordination among agencies. Currently, when a business loses a size protest with one agency, other agencies may be unaware of this, and may continue to contract with this business and count it as a small business towards its goal achievements. By requiring a notification in CCR, all agencies will be aware of the adverse decision.

Moreover, requiring the Administrator to qualify accomplishments as "estimated" until the Comptroller General has certified the data integrity of FPDS will alleviate problems associated with miscoding. When agencies rely on goal accomplishments that have been produced with erroneous data, a false sense of achievement

and decreased incentive to use small businesses may result. This provision is intended to address that problem.

Lastly, the provision is intended to directly address miscoding by requiring the Administrator to report to Congress regarding miscoded contract entries. The Committee has opted to require the reporting through the Inspector General of each agency because those offices are the independent investigative arms of the agencies.

*Sec. 302 Review of national registry*

This provision requires the Administrator of the SBA to ensure, on a biannual basis, that an independent audit is performed of the Central Contractor Registry, or any successor to that registry. The Administrator will be required to ensure that the Dynamic Small Business Search of the registry, or any successor to that portion of the registry, is purged of any businesses that are other than small. Furthermore, any business that has been so purged that attempts, while not in fact a small business, to re-register, may be subject to debarment as a Federal contractor or other penalties as set forth in the FAR and is further subjected to penalties outlined in section 16 of the Small Business Act.

The Committee intends for this provision to address the problem of companies incorrectly identifying themselves as small businesses. Inaccurate small business goal achievements are the result of both agencies counting large businesses as small, and small businesses incorrectly representing themselves as small. Reviewing the CCR for incorrectly listed businesses would address the latter issue and reduce the chances of large businesses trying to take advantage of small business opportunities.

*Sec. 303 Recertification of compliance with size standards and registration with Central Contract Registry*

This provision will require businesses that are, at the time of a contract award, close to exceeding their size standards, to annually recertify throughout the duration of the contract. Business concerns not close to exceeding their size standards will be required only to annually update their listings in the Central Contracting Registry. The provision defines "close to exceeding" as being within 5 percent of an employee-based size standard and 20 percent of a receipts-based size standard.

This is intended to ensure that businesses that outgrow the small business classification do not remain eligible for small business awards for years afterwards. The Committee intends that only small businesses are eligible for assistance derived through that designation. However, a business that exceeds the size standard will not lose its contract. Rather, the Committee intends only that agencies are no longer able to take credit for the company as a small business.

*Sec. 401 Authorization of appropriations*

This provision authorizes to be appropriated such sums as may be necessary to carry out this Act and the amendments made by this Act.

## VIII. Committee Estimate of Costs

At the time of the filing of the report on H.R. 1873, the cost estimate of the Congressional Budget Office was not available. In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives and based on the best information available at this time, the Committee estimates that, should H.R. 1873 be enacted, it would be a cost of $2.5 million in fiscal year 2008 and $2 million each year thereafter. Most of the costs fall within budget function 370 (commerce and housing credit).

We estimate that the bill would be enacted prior to FY 2008 and that necessary amounts will be appropriated near the start of each fiscal year thereafter. Accordingly we estimate the 5 year cost from 2008 through 2012 to be $10.5 million.

## IX. Oversight Findings

In accordance with clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 1873 are incorporated into the descriptive portions of this report.

## X. Statement of Constitutional Authority

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, Section 8, clause 18, of the Constitution of the United States.

## XI. Compliance with Public Law 104–4

H.R. 1873 contains no unfunded mandates.

## XII. Congressional Accountability Act

H.R. 1873 does not relate to the terms and conditions of employment or access to public services or accommodations with the meaning of section 102(b)(3) of P.L. 104–1.

## XIII. Federal Advisory Committee Statement

H.R. 1873 does not establish or authorize the establishment of any new advisory committees.

## XIV. Statement of No Earmarks

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

## XV. Performance Goals and Objective

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation: H.R. 1873 includes a number of provisions designed to update and to improve the Small Business Administration's procurement monitoring systems.

## XVI. Changes in Existing Law Made by the Bill, as Reported

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

### SMALL BUSINESS ACT

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

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*(5) RECERTIFICATION.—*

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

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

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

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

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

* * * * * * *

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

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

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

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

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

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

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

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

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

*(1) BUNDLED CONTRACT.—*

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

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

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

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

*(2) BUNDLING OF CONTRACT REQUIREMENTS.—*

*(A) IN GENERAL.—The term "bundling of contract requirements" means the use of any bundling methodology to satisfy 2 or more procurement requirements for new or existing goods or services, including any construction services, that is likely to be unsuitable for award to a small business concern due to—*

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

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

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

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

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

*(i) the use of a bundling methodology for an anticipated award with an aggregate dollar value below the dollar threshold specified in paragraph (4); or*

*(ii) the use of a bundling methodology to meet procurement requirements, all of which are exempted requirements under paragraph (5).*

*(3) BUNDLING METHODOLOGY.—The term "bundling methodology" means—*

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

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

*(C) the creation of any new procurement requirement that permits a consolidation of contract or order requirements.*

*(4) DOLLAR THRESHOLD.—The term "dollar threshold" means—*

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

*(B) $1,500,000, in all other cases.*

*(5) EXEMPTED REQUIREMENTS.—The term "exempted requirement" means one or more of the following:*

*(A) A procurement requirement solely for items that are not commercial items (as the term "commercial item" is defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).*

*(B) A procurement requirement with respect to which a determination that it is unsuitable for award to a small business concern has previously been made by the agency. However, the Administrator shall have authority to review and reverse such a determination for purposes of this paragraph and, if the Administrator does reverse that determination, the term "exempted requirement" shall not apply to that procurement requirement.*

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

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SEC. 8. (a) * * *

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(d)(1) * * *

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

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

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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] *If a proposed procurement would negatively affect one or more small business concerns, or 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] *would now be combined with other requirements for goods and services*, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects, or the solicitation involves an unnecessary or unjustified bundling of contract requirements, as determined by the Administration, the Procurement Activity shall provide a copy of the proposed procurement to the Procurement Activity's Small Business Procurement Center Representative at least 30 days prior to the solicitation's issuance along with a statement explaining (1) why the proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement, [(2) why delivery schedules] *(2) the names, addresses and size of the incumbent contract holders; (3) a description of the industries that might be interested in bidding on the contract requirements; (4) the number of small businesses listed in the industry categories that could be excluded from future bidding if the contract is combined or packaged; (5) why delivery schedules* cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government, [(3) why the proposed acquisition] *(6) why the proposed acquisition* cannot be offered so as to make small business participation likely, [(4) why construction] *(7) why construction* cannot be procured as separate discrete projects, or [(5) why the agency] *(8) why the agency* has determined that the bundled contract (as defined in section 3(o)) is necessary and justified. *The statement shall also set forth the proposed procurement strategy required by subsection (e) and, if applicable, the specifications required by subsection (e)(3). Concurrently, the statement shall be made available to the public, including through dissemination in the Federal contracting opportunities database.* The thirty-day notification process shall occur concurrently with other processing steps required prior to issuance of the solicitation. Within 15 days after receipt of the proposed procurement and accompanying statement, if the Procurement Center Representative believes that the procurement as proposed will render small business prime contract participation unlikely, the Representative shall recommend to the Procurement Activity alternative procurement methods which would increase small business prime contracting opportunities. [Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.] *If no notification of the procurement and accompanying statement is received, but the Administrator determines that there is cause to believe the contract combines requirements or a contract (single or multiple award) or task or delivery order for construction services or includes unjustified bundling, then the Administrator can demand that such a statement of work goods or services be completed by the procurement activity and sent to the Procurement Center Representative and the solicitation process postponed for at least 10 days to allow the Administrator to review the statement and make recommendations as described in this section before the pro-*

*curement is continued. If a small business concern would be adversely affected, directly or indirectly, by the procurement as proposed, and that small business concern or a trade association on behalf of that small business concern so requests, the Administrator may, in the Administrator's discretion, take action to further the interests of that small business concern. Whenever the Administrator and the contracting procurement agency fail to agree, the Administrator shall submit the matter to the Administrator of the Office of Federal Procurement Policy within the Office of Management and Budget, who shall render his decision regarding the matter not later than 10 days after receiving the matter.* 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.

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(g)(1) **[**The President shall annually establish Government-wide goals for procurement contracts**]** *The President shall before the close of each fiscal year establish new Government-wide procurement goals for the following fiscal year for procurement contracts* awarded to small business concerns, small business concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than **[**23 percent**]** *30 percent* of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year. The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 1 percent of the total value of all prime contract awards for fiscal year 1999, not less than 1.5 percent of the total value of all prime contract awards

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

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*(3) The procurement goals required by this subsection apply to all procurement contracts, without regard to whether the contract is for work within or outside the United States.*

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

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

(h)(1) * * *

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*(4) At the conclusion of each fiscal year, the head of each Federal agency shall submit to Congress a report specifying the percentage of contracts awarded by that agency for that fiscal year that were awarded to small business concerns. If the percentage is less than 30 percent, the head of the agency shall, in the report, explain why the percentage is less than 30 percent and what will be done to ensure that the percentage for the following fiscal year will not be less than 30 percent.*

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

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

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