

SMALL BUSINESS PROCUREMENT IMPROVEMENT ACT OF
 2012

DECEMBER 21, 2012.—Committed to the Committee of the Whole House on the State
 of the Union and ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,
 submitted the following

R E P O R T

[To accompany H.R. 4118]

The Committee on Small Business, to whom was referred the bill
 (H.R. 4118) to amend the Small Business Act to provide for in-
 creased small business participation in multiple award contracts,
 and for other purposes, having considered the same, report favor-
 ably thereon without amendment and recommend that the bill do
 pass.

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I. PURPOSE AND BILL SUMMARY

The purpose of H.R. 4118, the “Small Business Procurement Im-
 provement Act of 2012,” is to amend the Small Business Act (the

Act)¹ to address a miscellany of important small business procurements policy matters. First, the legislation seeks to improve participation by small businesses in multiple award contracts (MACs) by encouraging outreach and mandating that the President establish government-wide goals for small business participation in such contracting vehicles. Second, the bill raises the small business reserve to \$200,000 and makes it applicable to MACs. Finally, the legislation expands the Federal Acquisition Regulatory (FAR) Council to include the Administrator of the Small Business Administration (SBA).

II. NEED FOR LEGISLATION

The Act iterates Congress’s belief in the importance of small business participation in federal prime contracts and the resultant subcontracts. Specifically, the Act directs that:

To effectuate the purpose 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 in the interest of assuring that a fair proportion of the total purchase 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 be made to small-business concerns.²

MACs account for a significant portion of federal contract spending, yet their relationship with the Act remains ambiguous. For example, the largest of the MACs is the General Services Administration’s (GSA’s) Multiple Award Schedules (MAS) Program, which accounts for approximately 10% of all federal contract dollars spent each year.³ However, the MAS program does not reserve all awards under \$150,000 for small businesses as required by section (j) of the Act.⁴ Likewise, traditional contracts over \$150,000 should be set aside for small business if the contracting officer determines that at least two small businesses will make offers, and an award can be made at a fair price, and additional set-asides are permitted for subcategories of small businesses.⁵ Indeed, task orders under the MAS program were held exempt from all set asides until the Small Business Jobs Act was enacted in 2010.⁶ This was based on the interpretation that only contracts, not task orders, could be set

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

² *Id.* at § 644(a).

³ GSA, FOR VENDORS—GETTING ON SCHEDULE, available at <http://www.gsa.gov/portal/category/100635> [hereinafter GETTING ON SCHEDULE].

⁴ 15 U.S.C. § 644(i).

⁵ 48 C.F.R. § 19.502-2(b). For a detailed explanation of all the small business contracting programs, please see the Committee memorandum “Small Business Programs: Misrepresentation and Fraud in the Certification Process” (October 21, 2011).

⁶ Pub. L. No. 111-240, § 1331, 124 STAT. 2536, 2541 (2010).

aside.⁷ With the enactment of Section 1331 of the Small Business Jobs Act, discretionary set-asides rather than the primary evaluation factor process were permitted. Specifically, Section 1331 of the law requires regulations that will allow agencies to, at their discretion:

(1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified [15 U.S.C. § 644] (g)(2);

(2) notwithstanding the fair opportunity requirements under [10 U.S.C. § 2304c(b)], and [41 U.S.C. § 4106], set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in [15 U.S.C. § 644] (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in [15 U.S.C. § 644] (g)(2).⁸

While final rules enacting these changes are still pending, the current statutory provisions fail to create the necessary opportunities within MACs for small businesses. On the \$50 billion in annual MAS Program sales, any protections afforded to small businesses are simply voluntary, so commercial goods and services that are suitable for award to small businesses are being awarded elsewhere. As the Federal government is not currently meeting the small business contracting goals established in Section 15(g) of the Act,⁹ additional legislation is required.

Furthermore, under current law small businesses do not have a voice on the Federal Acquisitions Regulatory (FAR) Council, whose mission is to “assist in the direction and coordination of Government-wide procurement policy and procurement regulatory activities in the Federal Government.”¹⁰ This puts small firms at a distinct disadvantage in government contracting, as no one is continuously advocating and monitoring the effects changes to the Federal Acquisition Regulations will have on small businesses. Given that, this legislation places the Small Business Administrator on the FAR Council to ensure that small businesses are represented and their concerns addressed when proposing or amending regulations that affect federal procurement.

Finally, under the Act the current reserve for small business contracting is set at \$100,000. However, the FAR Council under section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, is required to adjust this threshold for inflation every 5 years. In 2010, the small business reserve was adjusted for inflation and increased to \$150,000.¹¹ Despite this, the Government is still failing to meet its goal of awarding 23 percent of contracts to small firms and small firms are not receiving as many contracting opportunities. Therefore, this legislation raises

⁷The Government Accountability Office (GAO) rejected this rationale and recognized the validity of set-asides on MAS Program for some time. *See, e.g., Delex Sys. Inc.*, B-400403. 2008 CPD ¶ 181. However, GSA long argued that such set-asides were not allowed under the fair opportunity provisions of the Federal Acquisition Streamlining Act, 41 U.S.C. § 4106, and rejected the GAO decisions.

⁸*Id.*

⁹15 U.S.C. § 644(g).

¹⁰41 U.S.C. § 421(a).

¹¹Federal Acquisition Regulation; Inflation Adjustment of Acquisition—Related Thresholds, Final Rule, 75 Fed. Reg. 53129 (Aug. 30, 2010) (to be codified at 48 C.F.R. § 19.502-2).

the small business reserve to \$200,000 in order to enhance opportunities for small business concerns to receive federal contracts.

III. HEARINGS

The issues raised in H.R. 4118 were examined in multiple hearings, including in previous Congresses, held by the Committee and Subcommittees. They were most recently addressed in the June 7, 2012 hearing entitled, “Scheduling Success? Issues and Opportunities for Small Businesses on the GSA Schedules,” conducted by the Subcommittee on Contracting and Workforce.

IV. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on March 7, 2012, and ordered H.R. 4118 reported, to the House by a voice vote at 3:47 pm. During the markup, no amendments were offered. No recorded votes were taken in consideration of H.R. 4118.

V. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto.

VI. SECTION-BY-SECTION ANALYSIS OF H.R. 4118

SECTION-BY-SECTION ANALYSIS OF H.R. 4118 AS AMENDED

Section 1—Short title

This section provides that the bill may be cited as the “Small Business Procurement Improvement Act of 2012.”

Section 2—Increasing small business participation in multiple award contracts

This section amends section 15(r) of the Small Business Act to require that federal agencies use small business contracting procedures such as the small business reserve and set-aside authorities for MACs. Further, this section requires creation of an agency outreach program to increase small business participation in MACs. The program will be overseen by the Administrator acting in consultation with the Administrator, Office of Federal Procurement Policy (OFPP) and any agency that obtains 5 percent of procurement requirements through MACs.

Section 3—Definitions

This section amends section 3 of the Small Business Act to insert definitions related to MACs. First, it adds each of the following to the definition of MAC: (1) the MAS Program; (2) multi-agency contracts and task orders awarded to pursuant to 31 U.S.C. § 1535; and (3) government-wide acquisition contracts (GWACs) or task orders on GWACs, with GWAC defined by 40 U.S.C. § 11302(e).

Next, it adds two definitions for terms commonly used in relationship to MACs. The first is blanket purchase agreements (BPAs), which are given the meaning found in 48 C.F.R. §§ 13.301–1 and 13.301–3. This reference specifies that BPAs are charge ac-

counts established with qualified sources of supply to simplify filling anticipated repetitive needs for supplies or services.

Finally, the section adds a definition of basic ordering agreement (BOA). BOA is given the meaning currently found in 48 C.F.R. §16.703. A BOA is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement. BOAs are not contracts.

Section 4—Ensuring small business participation in multiple award contracts, multi-agency contracts, and government-wide acquisition contracts

This section amends section 15(g) of the Small Business Act to require that the President annually set government-wide goals for the total dollar value of all task orders and delivery orders placed against MACs, blanket purchases agreements, and basic ordering agreements awarded under each contracting program established pursuant to the Small Business Act.

Section 5—Improvements to the small business reserve

This section amends section 15(j) of the Small Business Act by increasing the small business reserve to \$200,000. This section specifies that the increase to MACs, including those issued by the GSA. Further, this section requires the Administrator of the SBA to work in consultation with the Administrator of the GSA to enact regulations within 120 days of this bill's passage to ensure that small businesses have the correct size standard applied to each task order, that task orders follow the limitation on subcontracting and non-manufacturing rule, and that GSA's electronic ordering systems utilize the correct size information for small businesses seeking a set aside of a task order.

Section 6—Small business representation on the Federal Acquisition Regulatory Council

This section amends 41 U.S.C. 1302(b) by placing the SBA Administrator on the FAR Council. Recognizing that with 4 members, the FAR Council decisions could be deadlocked, section 6 essentially gives the Administrator of OFPP the deciding vote in situations where there is a tie.

VII. UNFUNDED MANDATES

H.R. 4118 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

VIII. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate

with respect to new budget authority, entitlement authority and tax expenditures. The Committee has not received an estimate of new budget authority prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974. However, the Committee is of the opinion that the bill will have no cost since it only requires changes in regulations that can be covered by existing salaries and expenses.

IX. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 4118 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 that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18 and Art. IV, § 3, cl. 2 of the Constitution of the United States.

XI. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 4118 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104–1.

XII. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 4118 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

XIII. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 4121 does not contain any congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of rule XXI of the Rules of the House.

XIV. PERFORMANCE GOALS AND OBJECTIVES

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

H.R. 4118 includes provisions to improve participation by small businesses in Multiple Award Contracts by encouraging outreach and mandating that the President establish government-wide goals for small business participation in such contracting vehicles; raise the small business reserve to \$200,000 and make it applicable to multiple award contracts; and expand the Federal Acquisition Regulatory Council to include the Administrator of the Small Business Administration.

XV. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

SMALL BUSINESS ACT

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

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

(1) a multiple award task order contract or delivery order contract that is entered into under the authority of sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k); **[and]**

(2) *a contract under the Federal Supply Schedule program of the General Services Administration;*

(3) *a multi-agency contract which is a contract, or a task order or delivery order awarded pursuant to such a contract, established by one agency for use by Government agencies to obtain supplies, services, or both, in accordance with section 1535 of title 31, United States Code;*

(4) *a Government-wide acquisition contract which is a contract, task order contract, or delivery order contract for information technology established by one agency for Government-wide use pursuant to section 11302(e) of title 40, United States Code; and*

[(2)] (5) any other indefinite delivery, indefinite quantity contract that is entered into by the head of a Federal agency with 2 or more sources pursuant to the same solicitation.

* * * * *
(dd) **BLANKET PURCHASE AGREEMENT.**—*In this Act, the term “blanket purchase agreement” has the meaning given such term in sections 13.303–01 and 13.303–2 of title 48, Code of Federal Regulations (as in effect on October 1, 2011).*

(ee) **BASIC ORDERING AGREEMENT.**—*In this Act, the term “basic ordering agreement” has the meaning given such term in section 16.703 of title 48, Code of Federal Regulations (as in effect on October 1, 2011).*

* * * * *
SEC. 15. (a) * * *

* * * * *
(g)(1)(A) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not

less than 23 percent of the total value of all prime contract awards for each fiscal year. 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 and subcontract 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 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 for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(B) The President shall annually establish Government-wide goals for the total dollar value of all task orders and delivery orders placed against multiple award contracts, blanket purchase agreements, and basic ordering agreements awarded to small business concerns, small business concerns owned and controlled by service disabled veterans, qualified HUB-Zone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

* * * * *

(j)(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than **[\$100,000]** \$200,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

* * * * *

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than **[\$100,000]** \$200,000 under the authority of subsection (a) of section 8 of this Act, section 2323 of title 10, United States Code, section 712 of the Business Opportunity Development Reform Act of 1988 (Public Law 100–656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

(4) *MULTIPLE AWARD CONTRACT APPLICABILITY.*—

(A) *This subsection applies to all task or delivery orders placed against multiple award contracts, including any contract under the Federal Supply Schedule program of the General Services Administration.*

(B) *The Administrator, in consultation with the Administrator of General Services Administration, shall within 120 days of the date of enactment of this Act, issue regulations regarding—*

(i) how the Administrator of the General Services Administration will ensure that the correct size standard is applied to each task order;

(ii) how the Administrator of the General Services Administration will ensure that the non-manufacturer rule and limitation on subcontracting provisions are implemented at the task order level; and

(iii) how the Administrator of the General Services Administration will ensure that its electronic ordering systems display the correct size information for small business concerns seeking the set aside of a task order.

* * * * *

(r) *MULTIPLE AWARD CONTRACTS.*—Not later than 1 year after the date of enactment of this subsection, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies **[may, at their discretion]** *shall, to the maximum extent practicable, include small business concerns in multiple award contracts, as defined in section 3(v) of this Act, including—*

(1) **[set]** *setting* aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)), **[set]** *setting* aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); **[and]**

(3) **[reserve]** *reserving* 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2)**[.]; and**

(4) *making full use of the set-aside programs established in sections 8(a), 8(m), 31, and 36 of this Act and any other program under this Act that provides for set-asides of contracts for small businesses.*

(s) *AGENCY OUTREACH PROGRAM.*—The Administrator, in consultation with the Administrator of the Office of Federal Procurement Policy and any agency that obtains 5 percent of procurement requirements through a multiple award contract, shall carry out a program to increase the participation of small business concerns in multiple award contracts, as defined in section 3(v) of this Act. Such program shall—

- (1) increase awareness among small business concerns regarding multiple award contracts;
- (2) provide small business concerns with education and training on Federal agency procedures for the bid and award of multiple award contracting procedures;
- (3) assist small business concerns with becoming listed on multiple award contracts, including the Federal Supply Schedules of the General Services Administration; and
- (4) develop measures to track small business participation in multiple award contracts, including awards pursuant to those contracts.

* * * * *

SECTION 1302 OF TITLE 41, UNITED STATES CODE

§ 1302. Establishment and membership

(a) * * *

(b) MEMBERSHIP.—

(1) MAKEUP OF COUNCIL.—The Council consists of—

(A) the Administrator;

* * * * *

(C) the Administrator of National Aeronautics and Space; **[and]**

(D) the Administrator of General Services**[.]**; and

(E) the Administrator of the Small Business Administration.

* * * * *

(c) *DECIDING VOTE.*—In the case of an equal vote among council membership, the Administrator of the Office of Federal Procurement Policy will have the deciding vote.

* * * * *

