



Small Business Contracting Law

There are multiple provisions of federal law intended to promote Congress’s “declared policy” that a “fair proportion” of government contracts and subcontracts be awarded to small businesses. *See* 15 U.S.C. §631(a). Some of these provisions are of government-wide applicability, and are generally codified in the Small Business Act. Other provisions pertain only to specific agencies, and are generally not part of the Small Business Act. Rather, they are part of other statutes, such as the provisions of the Armed Services Procurement Act codified in Title 10 of the United States Code (e.g., 10 U.S.C. §2302 note); or they are uncodified provisions of appropriations measures (e.g., 125 Stat. 1245).

This “In Focus” briefly notes key provisions of small business contracting law, and provides citations to CRS reports discussing these provisions in more detail.

What Is a Small Business?

For purposes of federal procurement law, a “small business” is one that is “independently owned and operated;” is “not dominant in its field of operation;” and meets any size standards established by the Administrator of Small Business. The Administrator has established standards which specify firm size by North American Industrial Classification System (NAICS) code and provide, for example, that recreational vehicle dealers are small if their annual receipts (averaged over three years) are less than \$32.5 million, while line-haul railroads are small if they have fewer than 1,500 employees. 15 U.S.C. §632(a)(1)-(2); 13 C.F.R. §121.201.

See CRS Report R40860, *Small Business Size Standards: A Historical Analysis of Contemporary Issues*, by Robert Jay Dilger.

Goals for Contracting and Subcontracting with Small Businesses

Section 15(g) of the Small Business Act establishes goals for the percentage of contract and/or subcontract dollars awarded to small businesses government-wide and by individual agencies. The government-wide goal is that at least 23% of federal contract dollars go to small businesses, and that at least 5% of contract and subcontract dollars go to women-owned small businesses; 5% to “small disadvantaged businesses”; 3% to Historically Underutilized Business Zone (HUBZone) small businesses; and 3% to service-disabled veteran-owned small businesses. Agency goals are to be established after “consultation” with the SBA, and often parallel the government-wide goals.

Other provisions of law sometimes establish additional goals as to contracting and subcontracting with small

businesses (e.g., 38 U.S.C. §8127), or impose goals that are higher than the government-wide goals under the Small Business Act (e.g., 51 U.S.C. §30304).

Table 1 below illustrates executive branch agencies’ reported performance as to these goals in FY2013 (the most recent fiscal year for which data is available) although it is important to note that questions have been raised regarding the accuracy of the numbers reported by the agencies.

Table 1. Agency Performance in Contracting with Small Businesses: FY2013

Type of Small Business	Percentage & Amount
Small businesses generally	23.4% (\$83 billion)
Small disadvantaged	8.6% (\$30.6 billion)
Women-owned	4.3% (\$15.4 billion)
Service-disabled veteran-owned	3.4% (\$12 billion)
HUBZone	1.8% (\$6 billion)

Source: Federal Procurement Data System, Small Business Goaling Report: FY2013, available at <https://www.fpds.gov>.

See CRS Report R40987, “Disadvantaged” Small Businesses: Definitions and Designations for Purposes of Federal and Federally Funded Contracting Programs, by Kate M. Manuel.

Limiting Competition to Promote Contracting with Small Businesses

Various provisions of the Small Business Act authorize or, in some case, require agencies to provide for other than “full and open competition through the use of competitive procedures” when dealing with small businesses. Among other things, under the act or its implementing regulations,

- smaller contracts—whose value exceeds \$3,000, but is less than \$150,000—are generally “reserved exclusively” for small businesses;
- agencies *must* generally “set aside” larger contracts—valued at or above \$150,000—for competitions in which small businesses (of any type) can compete provided offers are reasonably expected from at least two small businesses, and *may* similarly “set aside” such larger contracts for competitions in which particular types of small businesses can compete (e.g., women-owned);
- agencies *may* make sole-source awards to particular types of small businesses when the conditions for a small business “set-aside” are not satisfied; and
- agencies *must* grant HUBZone small businesses a price evaluation preference in unrestricted competitions.

Other statutes also authorize set-asides, sole-source awards, or other departures from “full and open competition” to promote contracting with small businesses by particular agencies (e.g., 38 U.S.C. §8127).

See CRS Report R42981, *Set-Asides for Small Businesses: Legal Requirements and Issues*, by Kate M. Manuel and Erika K. Lunder; CRS Report R40744, *The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by Kate M. Manuel.

Requiring Prime Contractors to Subcontract

Section 8(d) of the Small Business Act requires agencies to incorporate terms in their prime contracts pertaining to subcontracting with small businesses. Specifically, agencies must incorporate

- in contracts valued in excess of \$150,000, terms indicating that federal policy calls for small businesses to have the “maximum practicable opportunity” to participate as subcontractors and suppliers; and
- in contracts valued in excess of \$650,000 (\$1.5 million for construction contracts), a “subcontracting plan” that includes “separate percentage goals” for the amount of work to be subcontracted to small businesses.

The subcontracting plans must also include terms obligating the contractor to “make a good faith effort” to work with the subcontractors that they “used” in preparing their bids or proposals. 15 U.S.C. §637(d)(6)(H)(i)-(ii).

Subcontracting plans constitute a material part of the contract, and failure to make a “good faith effort” to comply could subject the contractor to liquidated damages of an “amount equal to the ... amount by which the contractor failed to achieve each subcontracting goal.” 15 U.S.C. §637(d)(9); 48 C.F.R. §19.705-7(b).

See CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by Kate M. Manuel.

Minimizing Bundling and Consolidation

Since 1997, Congress has sought to limit agencies’ ability to structure their procurements in such a way that small businesses are unable to perform the contract by defining and regulating “bundling” and, more recently, “consolidation.” Although there are subtle distinctions between them, both terms attempt to capture agencies’ grouping of “requirements” (i.e., needed supplies and services) into contracts that small businesses are likely to be unable to perform. For example, under Section 44 of the Small Business Act, agencies are generally prohibited from carrying out an acquisition strategy that involves a consolidation of “contract requirements” (i.e., the supplies and services being procured) valued in excess of \$2 million unless senior agency acquisition officials determine in writing that consolidation is “necessary and justified.”

See CRS Report R41133, *Contract “Bundling” Under the Small Business Act: A Legal Overview*, by Kate M. Manuel.

Payment Protections for Small Business Contractors and Subcontractors

The Prompt Payment Act of 1982 generally requires federal agencies to pay interest to prime contractors on any invoice payments the agency fails to make by the date(s) specified in the contract, or within 30 days of receipt of a “proper invoice,” if no date is specified. Amendments made to the act in 1988 impose similar requirements upon agency prime contractors in paying subcontractors on construction contracts. Also, legislation enacted in 2010 requires that subcontracting plans incorporate terms obligating the contractor to notify the agency in writing if a subcontractor is paid a reduced price, or if payment is more than 90 days past due on a contract for which the federal agency has paid the prime contractor (15 U.S.C. §637(d)(13)).

The Obama Administration has also issued guidance that calls for agencies to pay small business contractors within 15 days of receipt of a “proper invoice,” and to “accelerate” payment to other contractors so that they can pay their small business subcontractors more quickly.

See CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by Kate M. Manuel.

Other Provisions

Other provisions, not specifically addressed here, also seek to promote contracting and subcontracting with small businesses in various ways. Among other things, these provisions authorize mentor-protégé programs for small business contractors and permit the SBA to guarantee the bonds that small businesses post to comply with general requirements that federal contractors post certain bonds.

See CRS Report R42391, *Legal Authorities Governing Federal Contracting and Subcontracting with Small Businesses*, by Kate M. Manuel and Erika K. Lunder; CRS Report R43573, *Federal Contracting and Subcontracting with Small Businesses: Legislation in the 113th Congress*, by Kate M. Manuel; CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger; and CRS Report R42037, *SBA Surety Bond Guarantee Program*, by Robert Jay Dilger.

Kate M. Manuel, kmanuel@crs.loc.gov, 7-4477

IF10138