



Legal Authorities Governing Federal Contracting and Subcontracting with Small Businesses

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Summary

Congress has generally broad authority to impose requirements upon the federal procurement process, or the process whereby agencies obtain goods and services from the private sector. One of the many ways in which Congress has exercised this authority is by enacting measures intended to promote contracting and subcontracting with “small businesses” by federal agencies. Among other things, these measures (1) declare a congressional policy of ensuring that a “fair proportion” of federal contract and subcontract dollars are awarded to small businesses; (2) establish government-wide and agency-specific goals for the percentage of contract and/or subcontract dollars awarded to small businesses; (3) require or authorize agencies to conduct competitions in which only small businesses may compete (i.e., set-asides), or make noncompetitive awards to them in circumstances when such awards could not be made to other businesses; and (4) task the Small Business Administration (SBA) and officers of the procuring agencies with reviewing and helping to restructure proposed procurements so as to maximize opportunities for small business participation.

Small business contracting and subcontracting are complicated topics, in part, because numerous statutes—implemented by multiple agencies and subject to interpretation by multiple judicial and administrative tribunals—require or authorize particular actions by federal agencies. The Small Business Act of 1958, as amended, is key among these authorities. This act establishes the SBA, defines “small business,” and tasks SBA with specific responsibilities intended to promote contracting with small businesses. SBA has promulgated regulations implementing the Small Business Act, and its Office of Hearings and Appeals regularly issues decisions regarding firms’ eligibility for assistance under the act.

Other provisions of the Small Business Act apply government-wide and authorize or require actions by agencies other than SBA. Among other things, these provisions (1) authorize agencies to set aside contracts for small businesses and make sole-source awards to small businesses in circumstances when such awards could not be made to other firms; (2) require agencies to incorporate terms in their prime contracts promoting subcontracting with small businesses; and (3) prohibit agencies from “bundling” or “consolidating” their requirements into contracts that are unsuitable for performance by small businesses. SBA regulations implement these provisions of the Small Business Act, but so does the Federal Acquisition Regulation, which sometimes addresses topics that are not addressed in the SBA regulations. In addition, these and other provisions of the act, along with their implementing regulations, are regularly subject to interpretation by the federal courts and the Government Accountability Office.

In addition, other statutes, beyond the Small Business Act, authorize or otherwise govern contracting and subcontracting with small businesses. Among other things, these provisions (1) permit agencies to use firms’ size and status as evaluation factors in negotiated procurements; (2) grant agencies additional authority, beyond that in the Small Business Act, to set aside contracts for small businesses or otherwise make noncompetitive awards to them; (3) establish mentor-protégé programs that are distinct from the SBA mentor-protégé program; and (4) set goals for the percentage of contract and subcontract dollars awarded to small businesses that exceed the government-wide goals provided in the Small Business Act.

A companion report, CRS Report R42390, *Federal Contracting and Subcontracting with Small Businesses: Issues in the 112th Congress*, by Kate M. Manuel and Erika K. Lunder, describes and analyzes recently enacted and introduced measures.

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Introduction

Congress has generally broad authority to impose requirements upon the federal procurement process, or the process whereby agencies obtain goods and services from the private sector.¹ One of the many ways in which Congress has exercised this authority is by enacting measures intended to promote contracting and subcontracting with “small businesses” by federal agencies. Among other things, these measures (1) declare a congressional policy of ensuring that a “fair proportion” of federal contract and subcontract dollars are awarded to small businesses;² (2) establish government-wide and agency-specific goals for the percentage of contract and/or subcontract dollars awarded to small businesses;³ (3) require or authorize agencies to conduct competitions in which only small businesses may compete (i.e., set-asides), or make noncompetitive awards to them in circumstances when such awards could not be made to other businesses;⁴ and (4) task the Small Business Administration (SBA) and officers of the procuring agencies with reviewing and helping to restructure proposed procurements so as to maximize opportunities for small business participation.⁵

Small business contracting and subcontracting are complicated topics, in part, because numerous statutes—implemented by multiple agencies and subject to interpretation by multiple judicial and administrative tribunals—require or authorize particular actions by federal agencies.⁶ The Small Business Act of 1958, as amended, is key among these authorities. However, other statutes also

¹ See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (“Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”). *But see infra* notes 10-12 and accompanying text.

² See 15 U.S.C. §631(a) (“It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for property and services for the Government (including but not limited to contracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.”).

³ See, e.g., 15 U.S.C. §644(g)(2) (requiring agencies, in consultation with the Small Business Administration (SBA), to set goals for the percentage of federal contract and/or subcontract dollars awarded to small businesses that “realistically reflect” the ability of small businesses to participate in such contracts or subcontracts).

⁴ See, e.g., 15 U.S.C. §637(a) (authorizing set-asides and sole-source awards to small businesses owned and controlled by socially and economically disadvantaged individuals participating in SBA’s Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program)).

⁵ See, e.g., 15 U.S.C. §634(b)(11) (requiring SBA to appoint Procurement Center Representatives (PCRs) to work with the procuring agencies); 13 C.F.R. §125.2(b) (requiring PCRs to review all acquisitions not set aside for small businesses to determine whether a set-aside is appropriate and to identify alternate strategies to maximize small business participation as contractors or subcontractors, among other things).

⁶ In addition, where subcontracting is concerned, there is no “privity of contract,” or direct contractual relationship, between the federal government and the subcontractor. This means that the subcontractor generally cannot seek payment from the government, and may not be entitled to certain protections that federal law provides to prime contractors (e.g., interest on payments that are not made within particular time frames, the ability to protest the award, or proposed award, of a contract). See, e.g., *Williams v. Fenix & Scisson*, 608 F.2d 1205 (9th Cir. 1979) (finding that the defendant owed no contractual duty to the plaintiff because the defendant’s contract was with the plaintiff’s employer, not the plaintiff). Where protections for subcontractors do exist, they typically result from the federal agency’s including in its contracts certain terms intended to benefit the subcontractor, and only the agency may generally enforce these terms against the contractor. See generally CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by Kate M. Manuel.

play a prominent role, especially where the activities of particular agencies are concerned. In addition, while some provisions of the Small Business Act are implemented by SBA, other provisions authorize or require actions by any “procuring activity.”⁷ Moreover, most of these statutes leave at least something to the discretion of the agency tasked with implementing the statute, which means that regulations are also significant authorities governing federal contracting with small businesses. The SBA has promulgated regulations implementing the Small Business Act. However, other regulations implementing the act have been promulgated by the Federal Acquisition Regulatory Council (FAR Council). The FAR Council has also promulgated regulations implementing other statutory authorities, as have individual agencies. Further, these statutes and regulations are regularly subject to interpretation by various judicial and other tribunals, including SBA’s Office of Hearings and Appeals (OHA), for eligibility for small business contracting programs, and the Government Accountability Office (GAO), for certain other questions that do not involve such eligibility. Understanding this legal framework is arguably important not only for its own sake, but also because Congress frequently enacts or proposes legislation that responds to agency regulations or judicial and administrative decisions.⁸

This report discusses the various legal authorities governing small business contracting and subcontracting, as well as the relationship between them. It also explains the roles of the SBA, procuring activities, OHA, GAO, and other tribunals in implementing and construing the law governing federal contracting and subcontracting with small businesses. (See also **Table A-1**.) The report begins with the statutory authorities, then discusses the regulations implementing these statutes, and concludes by discussing the various judicial and administrative tribunals whose decisions regularly construe small business statutes and regulations. A companion report, CRS Report R42390, *Federal Contracting and Subcontracting with Small Businesses: Issues in the 112th Congress*, by Kate M. Manuel and Erika K. Lunder, describes measures that Members of the 112th Congress have enacted or proposed in response to particular issues pertaining to small business contracting and subcontracting.

Statutes

Over the years, Congress has enacted numerous statutes intended to encourage federal agencies to contract or subcontract with small businesses. The Small Business Act of 1958, as amended, is

⁷ “Procuring activities” are those “elements of the agency designated by the agency head and delegated broad authority regarding acquisition functions.” 48 C.F.R. §2.101.

⁸ For example, the Small Business Jobs Act of 2010 amended Section 31 of the Small Business Act in response to a series of decisions by GAO and the U.S. Court of Federal Claims. See P.L. 111-240, tit. I, subtitle C, §1347, 124 Stat. 2546-47. These decisions had found that set-asides for Historically Underutilized Business Zone (HUBZone) small businesses took “precedence” over set-asides for other small businesses because Section 31, at that time, used “shall” to describe when agencies were to use set-asides for HUBZone small businesses, while other provisions of the Small Business Act used “may” to describe when agencies were to use set-asides for other small businesses. See *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010); *DGR Assocs. v. United States*, 94 Fed. Cl. 189 (2010); *Rice Services, Inc.*, B-403746, B-403746.2, 2010 U.S. Comp. Gen. LEXIS 253 (Sept. 16, 2010); *DGR Associates, Inc.*, B-402494, 2010 U.S. Comp. Gen. LEXIS 95 (May 14, 2010); *All Seasons Apparel, Inc.*, B-401805, B-401805.2, 2009 U.S. Comp. Gen. LEXIS 206 (Nov. 4, 2009); *Mission Critical Solutions*, B-401057, 2009 U.S. Comp. Gen. LEXIS 86 (May 4, 2009); *Int’l Program Group, Inc.*, B-400278; B-400308, 2008 U.S. Comp. Gen. LEXIS 193 (Sept. 19, 2008). In response to these decisions, Congress changed the “shall” in Section 31 to “may” and, thereby, allowed the FAR Council to promulgate regulations providing for parity among the set-aside programs. See Dep’t of Defense, Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., *Federal Acquisition Regulation: Socioeconomic Program Parity*, 76 Fed. Reg. 14566, 14567 (Mar. 16, 2011).

arguably the primary such statute, but other statutes also govern contracting with small businesses. Congress has broad authority to enact legislation in this area because the “Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”⁹ However, the U.S. Constitution does impose a few limits upon Congress’s power in this regard, most notably by guaranteeing all persons equal protection of the law.¹⁰ Equal protection issues arise most frequently with contracting preferences based on race or gender. Race and gender are “suspect classifications,” which means that the government must demonstrate that any programs that classify individuals on this basis are narrowly tailored to further a compelling government interest, in the case of race-conscious programs,¹¹ or are substantially related to important government objectives, in the case of gender-conscious programs.¹²

Small Business Act

The Small Business Act of 1958, as amended, plays a key role in governing federal contracting and subcontracting with small businesses. Congress established the SBA as a permanent agency “[i]n order to carry out the policies” of this act,¹³ and the act specifically tasks the SBA with certain responsibilities pertaining to small business contracting.¹⁴ However, the act also authorizes or requires procuring activities to take certain steps pertaining to contracting and subcontracting with small businesses.¹⁵

SBA’s Responsibilities Under the Act

The Small Business Act delegates a number of responsibilities related to small business contracting and subcontracting to SBA. Three of these responsibilities are particularly noteworthy. First, Sections 7(j) and 8(a) of the act require SBA to establish a “program” to

⁹ *Perkins*, 310 U.S. at 127.

¹⁰ U.S. Const. amend. V (guaranteeing due process of law). Due process under the Fifth Amendment includes equal protection, or the constitutional assurance that the government will apply the law equally to all people and not improperly prefer one class of people over another. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). An alleged government interest qualifies as a compelling one, for due process or equal protection purposes, only when the government entity creating the racial classification (1) identified public or private discrimination with some specificity before resorting to race-conscious remedies and (2) had a “strong basis in evidence” to conclude that race-conscious remedies were necessary before enacting or implementing these remedies. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003).

¹² *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *United States v. Virginia*, the Court required the State of Virginia to provide an “exceedingly persuasive justification” for its policy of maintaining an all-male military academy. 518 U.S. 515 (1996). It is unclear whether this standard is in fact more strict than the intermediate scrutiny standard of review that has long applied to gender classifications.

¹³ An Act to Dissolve the Reconstruction Finance Corporation, to Establish the Small Business Administration, and for Other Purposes, P.L. 83-163, §204(a), 67 Stat. 233 (July 30, 1953) (codified at 15 U.S.C. §633(a)). The 1953 act established the SBA, but it did not become a permanent agency until the 1958 act. *See* An Act to Amend the Small Business Act of 1953, as Amended, P.L. 85-536, §4(a), 72 Stat. 384 (July 18, 1958).

¹⁴ *See infra* notes 16-43 and accompanying text.

¹⁵ In addition, the act contains numerous provisions intended to assist small businesses in other ways, most notably through direct or guaranteed loans. These provisions are outside the scope of this report, but are discussed in other CRS reports, including CRS Report R41184, *Small Business Administration 504/CDC Loan Guaranty Program*, by Robert Jay Dilger; CRS Report R41146, *Small Business Administration 7(a) Loan Guaranty Program*, by Robert Jay Dilger; and CRS Report R41057, *Small Business Administration Microloan Program*, by Robert Jay Dilger.

provide non-financial assistance to certain small businesses owned and controlled by socially and economically disadvantaged individuals,¹⁶ and to enter into contracts with other government agencies that are “subcontracted” to such firms.¹⁷ These requirements underlie the SBA’s Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program) and arguably distinguish it from federal “programs” for other types of small businesses (e.g., women-owned). SBA is not expressly required by statute to implement *assistance* programs for other types of small businesses,¹⁸ although it has historically furnished assistance to them pursuant to its general authority to provide “technical, managerial, and informational aids” to small businesses whenever it “determines such action is necessary.”¹⁹ Similarly, the Small Business Act does not contemplate SBA contracting with procuring activities²⁰ for particular goods and services and then subcontracting this work to other types of small businesses. Rather, as discussed below, the act authorizes procuring activities to contract directly with such businesses.²¹ Although SBA, in practice, generally delegates its authority to subcontract with 8(a) firms to other agencies,²² Section 8(a) gives SBA arguably unique authority over contracting with 8(a) firms, such that other agencies generally cannot remove a requirement previously procured through the 8(a) Program from the program without SBA’s consent.²³

Second, Section 8(b) of the act authorizes SBA to

certify to Government procurement officers ... with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific government contract.²⁴

¹⁶ 15 U.S.C. §636(j)(10). This program shall be “exclusively” for such firms and shall, among other things, assist small business concerns participating in the program (either through public or private organizations) to develop and maintain comprehensive business plans which set forth the Program Participant’s business targets, objectives, and goals ... [and] provide for such other nonfinancial services as deemed necessary for the establishment, preservation, and growth of small business concerns participating in the Program, including but not limited to (I) loan packaging, (II) financial counseling, (III) accounting and bookkeeping assistance, (IV) marketing assistance, and (V) management assistance.

¹⁷ 15 U.S.C. §637(a)(1)(A).

¹⁸ The act does refer to “programs” for HUBZone, women-owned, and service-disabled veteran-owned small businesses. *See* 15 U.S.C. §637(m) (women-owned small businesses); 15 U.S.C. §657a (HUBZone small businesses); 15 U.S.C. §657f (service-disabled veteran-owned small businesses). However, the act does not prescribe that SBA provide specific types of assistance to such businesses as part of these programs, nor are these programs time-limited, as the 8(a) Program is. *See* 15 U.S.C. §636(j)(10)(C)(i) (limiting firms and individual owners to a maximum of nine years in the 8(a) Program). For more on the 8(a) Program, see generally 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 and John R. Luckey.

¹⁹ 15 U.S.C. §637(b)(1)(A).

²⁰ “Procuring activities” are those “elements of the agency designated by the agency head and delegated broad authority regarding acquisition functions.” 48 C.F.R. §2.101.

²¹ *See infra* note 44 and accompanying text.

²² *See, e.g.*, 13 C.F.R. §124.501(a); Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Defense, Dec. 18, 2009 (copy on file with the authors).

²³ 13 C.F.R. §124.504(d) (“Except as set forth in (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) ... program unless SBA agrees to release it for non-8(a) competition.”). *But see* K-LAK Corporation v. United States, 98 Fed. Cl. 1 (2011) (upholding an agency’s determination to procure through the Federal Supply Schedules services that it had previously procured through the 8(a) Program, notwithstanding the fact that SBA had not approved the withdrawal of these requirements).

²⁴ 15 U.S.C. §637(b)(7)(A).

This provision is particularly significant because federal agencies generally may not award a contract without first determining that the awardee is “responsible” for purposes of the contract.²⁵ The responsibility determination process considers various factors, including whether the prospective contractor has adequate financial resources and the necessary equipment and facilities to perform the contract.²⁶ Contracting officers have broad discretion in determining whether prospective contractors are responsible.²⁷ However, because of Section 8(b) of the Small Business Act, contracting officers cannot determine that a small business contractor is nonresponsible without first referring the matter to SBA, which may issue a Certificate of Competence (COC) declaring the contractor eligible for the award.²⁸ When SBA issues a COC, contracting officers are required to “accept [its] decision to issue a Certificate of Competency and award the contract to the concern.”²⁹

Third, Sections 3 and 5 of the act grant the Administrator of Small Business broad rulemaking authority as to firms’ size, eligibility for “assistance” under the act, and related matters. Section 3 establishes the minimum criteria that firms must meet in order to qualify as small under the act; namely, they must be “independently owned and operated” and “not dominant in [their] field of operations.”³⁰ However, Section 3 also provides that

[i]n addition to the criteria specified [above], the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act. The[se] standards ... may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.³¹

The Administrator has used this authority to promulgate regulations, discussed below, which set standards for size in various industries based upon firms’ annual receipts or number of

²⁵ 48 C.F.R. §9.103(a)-(b) (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”).

²⁶ See generally 41 U.S.C. §113. For more on these factors, see CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

²⁷ See, e.g., *Molded Insulation Co.*, B-151834 (Nov. 29, 1963) (“In view of the discretion vested in the contracting agency with respect to such matters we must conclude that there is no basis upon which we may question the legality of the award made pursuant to the invitation [for bids].”).

²⁸ 48 C.F.R. §9.103(b); 48 C.F.R. Subpart 19.6.

²⁹ 48 C.F.R. §9.105-2(a)(2).

³⁰ 15 U.S.C. §632(a)(1). This is the primary definition of “small business” used for federal contracting and subcontracting, and for other purposes. However, other definitions may be used in specific contexts. For example, under various transportation statutes, firms whose average gross receipts over the past three years exceed \$22.41 million are excluded from the Disadvantaged Business Enterprise (DBE) program, even if they meet the size standards established by SBA. See 49 U.S.C. §47113(a)(1)(B); 49 C.F.R. §26.65(b).

³¹ 15 U.S.C. §632(a)(2)(A). Section 5 also gives the Administrator broad authority over any “size standards” promulgated by other agencies. While the act permits other agencies to promulgate size standards without specific congressional authorization, it requires that any such standards be “approved by the Administrator,” among other things. 15 U.S.C. §632(a)(2)(C). This requirement effectively gives SBA a key role in federal determinations of firm size, and many states also rely upon federal size standards in determining eligibility for state and local programs for small businesses. See, e.g., N.Y. PUB. AUTH. §1695 (2011) (“The maximum number of employees and the maximum dollar volume which a small business may have under the rules promulgated by the authority shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries based on criteria used by the Small Business Administration.”).

employees.³² Section 5 further authorizes the Administrator to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this Act.”³³ This provision allows SBA to exercise some control over implementation of those provisions of the act which authorize procuring activities to set aside contracts for, or make sole-source awards to, small businesses.³⁴ Section 36 of the act, for example, provides that contracting officers of any agency may conduct competitions in which only service-disabled veteran-owned small businesses may participate, provided that certain conditions exist.³⁵ However, Section 3 of the act, which only SBA has the authority to implement, defines “service-disabled veteran,” “small business concern owned and controlled by service disabled veterans,” and “veteran.”³⁶ This effectively means that SBA may determine eligibility for set-asides for service-disabled veteran-owned small businesses by promulgating regulations implementing Section 3.³⁷

Other significant responsibilities with which the act tasks SBA include (1) guaranteeing the bid, performance, and payment bonds of small businesses,³⁸ (2) providing technical and other assistance to small businesses, including through mentor-protégé programs,³⁹ (3) consulting with other agencies to ensure that small businesses receive “fair and reasonable treatment,”⁴⁰ as well as assigning Procurement Center Representatives (PCRs) and other officials to work with the procuring activities to promote small business participation; and (4) making any investigations “deem[ed] necessary” to determine whether persons have engaged in, or are about to engage in, conduct that violates the act or its implementing regulations.⁴¹ Among other things, PCRs are to review all acquisitions not set aside for small businesses to determine whether a set-aside is appropriate and to identify alternate strategies to maximize small business participation as contractors or subcontractors.⁴² SBA also appoints Commercial Market Representatives (CMRs), who are “SBA’s subcontracting specialists,” and whose responsibilities include facilitating the matching of large prime contractors with small business subcontractors or suppliers.⁴³

³² See *infra* note 89 and accompanying text.

³³ 15 U.S.C. §634(b)(7).

³⁴ See *infra* note 44 and accompanying text.

³⁵ 15 U.S.C. §657f(a)-(b).

³⁶ 15 U.S.C. §632(q). SBA’s authority here is somewhat limited in that the Small Business Act defines “veteran” and “service-disabled veteran” by reference to the Veterans Benefits Act. However, SBA may otherwise determine eligibility for the service-disabled veteran-owned small business program so long as its determinations are consistent with the definitions of “veteran” and “service-disabled veteran” given in the Veterans Benefits Act.

³⁷ See generally 13 C.F.R. §§125.8-125.29.

³⁸ 15 U.S.C. §694b. For these purposes, a surety bond is an instrument between a surety, a contractor, and a project owner, under which the surety assumes the contractor’s responsibilities to ensure that the project is completed in the event the contractor is unable to successfully perform the contract. See generally CRS Report R42037, *SBA Surety Bond Guarantee Program*, by Robert Jay Dilger.

³⁹ 15 U.S.C. §637(b)(1). Mentor-protégé programs are intended to promote contracting and/or subcontracting with small businesses by pairing new businesses with more experienced businesses in mutually beneficial relationships. Section 637(b)(1) also authorizes SBA to establish a Service Corps of Retired Executives (SCORE) to advise small businesses. For more on the SCORE program, see generally CRS Report R41352, *Small Business Management and Technical Assistance Training Programs*, by Robert Jay Dilger.

⁴⁰ 15 U.S.C. §637(b)(1) & (11).

⁴¹ 15 U.S.C. §634(b)(11).

⁴² See 13 C.F.R. §125.2(b).

⁴³ See 13 C.F.R. §125.3(e).

Responsibilities of Other Agencies

Unlike the provisions discussed above, which pertain solely to SBA, other provisions of the Small Business Act apply government-wide and authorize or require actions by other federal agencies. Among these provisions are ones authorizing agencies to set aside contracts for small businesses, or make “sole-source” (or noncompetitive) awards to them in circumstances when sole-source awards could not be made to other firms.⁴⁴ **Table 1** lists these provisions and briefly notes the range of actions agencies may take in reliance upon them. It is important to note that these actions differ by section, which means that the set-aside programs for the different types of small businesses (i.e., 8(a), HUBZone, women-owned, service-disabled veteran-owned) differ.⁴⁵ In addition, with the possible exception of Section 15, none of these sections could be construed as requiring agencies to set aside contracts for small businesses or make sole source awards to them.⁴⁶ In other words, under these provisions, any set-aside or sole-source award to small businesses is within the discretion of the contracting officer.

⁴⁴ The Competition in Contracting Act (CICA) of 1984 generally authorizes agencies to make noncompetitive awards only when expressly authorized by statute, or when one of the following seven circumstances exist: (1) the property or services needed by the agency are available from only one responsible source, and no other type of property or services satisfies the agency’s needs; (2) the agency’s need for property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; (3) it is necessary to award the contract to a particular source in order to maintain the industrial base; (4) the terms of an international agreement effectively require the use of other than competitive procedures; (5) a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency needs brand-name commercial items for authorized resale; (6) disclosure of the agency’s needs would compromise national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or (7) the head of an agency determines that it is necessary in the public interest to use other than competitive procedures in the procurement and notifies Congress in writing of this determination no less than 30 days before the award of the contract. *See* 10 U.S.C. §2304(c)(1)-(7) (procurements of defense agencies); 41 U.S.C. §3304(1)(1)-(7) (procurements of civilian agencies). The Small Business Act, in contrast, expressly authorizes noncompetitive awards to particular types of small businesses in certain circumstances when similar awards could not be made to other firms. *See* **Table 1**.

⁴⁵ For more on these programs, see generally CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by Kate M. Manuel and Erika K. Lunder.

⁴⁶ Section 15 of the Small Business Act states that

small-business concerns within the meaning of this chapter 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.

15 U.S.C. §644(a). The regulations implementing Section 15 indicate that a set-aside “shall” be used if the contracting officer reasonably expects offers from at least two small businesses, and the award can be made at a fair market price. *See, e.g.*, 48 C.F.R. §19.502-2(b). However, it is unclear whether these regulations would be found to be entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See infra* notes 84- 85 and accompanying text.

Table I. Provisions of the Small Business Act Authorizing Agencies to Use Set-Asides and Sole-Source Awards to Small Businesses

Section	Authorized Actions
<p>Section 8(a) (codified at 15 U.S.C. §637(a))</p> <p>Certain small businesses owned and controlled by socially and economically disadvantaged individuals or groups^a</p>	<p>Contracts whose value is between \$150,000 and \$4 million (\$6.5 million for manufacturing contracts) are generally awarded on a sole-source basis. Contracts whose value exceeds \$4 million (\$6.5 million for manufacturing contracts) must generally be awarded via a set-aside unless (1) the contracting officer does not reasonably expect offers from at least two 8(a) firms, or (2) the award is made to a firm owned by an Alaska Native Corporation, Indian tribe, or, in the case of Department of Defense procurements, a Native Hawaiian Organization.</p>
<p>Section 8(m) (codified at 15 U.S.C. §637(m))</p> <p>Women-owned small businesses (WOSBs)</p>	<p>Contracts whose value is between \$150,000 and \$4 million (\$6.5 million for manufacturing contracts) may be set-aside for economically disadvantaged WOSBs in industries where WOSBs are underrepresented (or for WOSBs in industries where WOSBs are substantially underrepresented) if contracting officer reasonably expects offers from at least two WOSBs.</p>
<p>Section 15 (codified at 15 U.S.C. §644(a))</p> <p>Small businesses generally</p>	<p>Contracts valued in excess of \$150,000 shall be set-aside for small businesses if doing so is determined by SBA and the procuring agency to be in the interest of assuring that a “fair proportion” of government purchases and contracts “in each industry category” are placed with small businesses.^b</p>
<p>Section 31 (codified at 15 U.S.C. §657a)</p> <p>HUBZone small businesses</p>	<p>Contracts whose value is between \$150,000 and \$4 million (\$6.5 million for manufacturing contracts) may be awarded on a sole-source basis if the contracting officer does not reasonably expect offers from at least two HUBZone small businesses. Otherwise, agencies are to award the contract via a set-aside. Agencies may also grant price evaluation adjustments of up to 10% to the bids or offers of HUBZone small businesses in unrestricted competitions.^c</p>
<p>Section 36 (codified at 15 U.S.C. §657f)</p> <p>Service-disabled veteran-owned small businesses (SDVOSBs)</p>	<p>Contracts whose value is between \$150,000 and \$3.5 million (\$6 million for manufacturing contracts) may be awarded on a sole-source basis if the contracting officer does not reasonably expect offers from at least two SDVOSBs. Otherwise, agencies are to award the contract via a set-aside.</p>

Source: Congressional Research Service, based on various sources cited in **Table I**.

- a. Only small disadvantaged businesses participating in the 8(a) Program are eligible for set-asides and sole-source awards under the authority of Section 8(a). Firms and individual owners may participate in the 8(a) Program one time, for a maximum of nine years. See generally 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 and John R. Luckey.
- b. The regulations implementing Section 15 state that agencies “shall” set aside such contracts for small businesses whenever the contracting officer reasonably expects offers from at least two small businesses, and the award can be made at a fair market price. See *supra* note 46.
- c. This means that, when determining which offer has the lowest price or represents the “best value” for the government, agencies may add up to 10% to the price of all offers except those offers received from HUBZone or certain other small businesses. 48 C.F.R. §52.219-4(b)(i)-(ii).

Section 8(d) of the Small Business Act also 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 “[i]t is the policy of the United States” that small businesses have the “maximum practicable opportunity” to participate in the performance of federal contracts as subcontractors and suppliers, and that “[i]t is further the policy of the United

States” that its prime contractors establish procedures to ensure timely payment of small business subcontractors;⁴⁷ and

- incorporate in *contracts valued in excess of \$650,000* (\$1.5 million for construction contracts) a “subcontracting plan” that includes “[s]eparate percentage goals” for the amount of work to be subcontracted to various types of small businesses, as well as a statement of the total dollars that are expected to be subcontracted.⁴⁸

Other provisions—in Section 15(g) of the act—establish goals for the percentage of federal contract and/or subcontract dollars awarded to small businesses government-wide and by each agency. The government-wide goal is that at least 23% of federal contract dollars go to small businesses, and that 5% of contract and subcontract dollars go to women-owned small business; 5% to small businesses owned and controlled by socially and economically disadvantaged individuals (i.e., small disadvantaged businesses);⁴⁹ 3% to HUBZone small businesses; and 3% to service-disabled veteran-owned small businesses.⁵⁰ Individual agencies’ goals are to represent the “maximum practicable opportunity” for small businesses to participate in the performance of federal contracts and subcontracts, and generally correspond to the government-wide goals.⁵¹

Yet other provisions seek to promote contracting or subcontracting with small businesses by limiting agencies’ ability to “bundle” or “consolidate” their requirements into contracts that are unsuitable for performance by small businesses,⁵² and by requiring agencies to include in their prime contracts terms obligating the contractor to notify the contracting officer if it fails to use a subcontractor “used” in preparing in its bid or proposal, or if payment to a subcontractor is reduced or untimely.⁵³ In addition, agencies are generally required to appoint personnel—Small Business Specialists (SBSs) and Offices of Small and Disadvantaged Business Utilization (OSDBUs)—to assist small business contractors and subcontractors. SBSs are tasked with reviewing all acquisitions valued above a certain amount (\$2 million to \$7.5 million, depending

⁴⁷ 15 U.S.C. §637(d)(2)-(3). This clause is not required in contracts for personal services, or which will be entirely performed (including any subcontracts) outside the United States. The Prompt Payment Act generally does not apply to payment of subcontractors. *But see* Prompt Payment Act Amendments of 1988, P.L. 100-496, §9, 102 Stat. 3460-63 (Oct. 17, 1988) (codified at 31 U.S.C. §3905(b)(1)-(2)) (requiring that every construction contract awarded by a federal agency contain clauses obligating the prime contractor to (1) pay the subcontractor for “satisfactory performance” under the subcontract within seven days of receiving payment from the agency and (2) pay interest on any amounts that are not paid within the proper time frame). The contract must also obligate the prime contractor to include similar payment and interest-penalty terms in its subcontracts, as well as require its subcontractors to impose these terms on *their* subcontractors. *Id.*

⁴⁸ 15 U.S.C. §637(d)(4)-(5). This clause is not required in contracts that do not offer subcontracting possibilities.

⁴⁹ All firms participating in the 8(a) Program are small disadvantaged businesses (SDBs). However, firms that are not in the 8(a) Program may also qualify as SDBs. *See generally* CRS Report R40987, “Disadvantaged” Small Businesses: Definitions and Designations for Purposes of Federal and Federally Funded Contracting Programs, by Kate M. Manuel.

⁵⁰ 15 U.S.C. §644(g)(1).

⁵¹ 15 U.S.C. §644(g)(1)-(2). For more on the goaling program, see generally <http://archive.sba.gov/aboutsba/sbaprograms/goals/index.html>.

⁵² 15 U.S.C. §644(e) (bundling); 15 U.S.C. §657q (consolidation). For more on bundling and consolidation, see generally CRS Report R41133, *Contract “Bundling” Under the Small Business Act: Existing Law and Proposed Amendments*, by Kate M. Manuel.

⁵³ 15 U.S.C. §637(d)(6)(G)(1)-(2) (contractor must notify the contracting officer if it fails to work with the subcontractors whom it “used” in preparing its bid or offer); 15 U.S.C. §637(d)(12) (contractor must notify the contracting officer if payment is reduced or untimely).

upon the agency) that are not “entirely reserved or set-aside” for small businesses as early in the acquisition process as possible (and no later than 30 days before the issuance of a solicitation), and making recommendations on how the procurement could be structured so as to maximize small business participation.⁵⁴ OSDBU Directors are similarly tasked with (1) identifying acquisitions that involve “significant bundling” and working with the agency to devise alternative procurement strategies;⁵⁵ (2) assisting small businesses in obtaining payment, any required interest penalties for late payment, or information regarding payment from agencies and contractors; and (3) making recommendations to contracting officers as to whether particular acquisitions should be set-aside for small businesses.⁵⁶

When these provisions are involved, SBA generally may exercise its rulemaking authority to determine whether firms are eligible for set-asides, sole-source awards, or other assistance provided under the act. In other respects, however, SBA plays a limited role. Authority to enter contracts inheres in each federal agency,⁵⁷ and is delegated from the agency head through the heads of “procuring activities” to individual contracting officers.⁵⁸ SBA generally cannot prohibit agencies from contracting with large businesses, or require them to contract with small businesses.⁵⁹ For example, SBA procurement center representatives (PCRs)—who are assigned to work with procuring activities—may appeal to the head of the procuring activity when they disagree with the contracting officer as to whether a particular procurement is bundled or “substantially bundled.”⁶⁰ If the head of the procuring activity agrees with the contracting officer, the PCR may notify SBA, which may then appeal to the secretary of the department or the head of the agency.⁶¹ However, the secretary or agency head’s determination is final,⁶² and SBA cannot overrule that determination under current law.⁶³ The same is true in other areas; SBA consults

⁵⁴ See, e.g., 13 C.F.R. §125.2(b).

⁵⁵ Neither the Small Business Act nor its implementing regulations define what it means for a procurement to involve “significant bundling.”

⁵⁶ 15 U.S.C. §644(k)(1)-(10). Contracting officers are not required to follow OSDBU recommendations as to whether particular acquisitions should be set aside for small businesses. However, they must document any failure to do so in the contract file. 15 U.S.C. §644(k)(10).

⁵⁷ See, e.g., *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886) (government has the inherent authority to enter into binding contracts in the execution of its duties).

⁵⁸ 48 C.F.R. §1.602-1 (authority of contracting officers); 48 C.F.R. §1.603-1 (appointment of contracting officers). See *supra* note 7 for more on “procuring activities.” Other statutes, beyond the Small Business Act, also authorize agencies to make noncompetitive awards to businesses, including small businesses, in certain circumstances. See 10 U.S.C. §2304(c)(1)-(7) (procurements of defense agencies) & 41 U.S.C. §3304(1)(1)-(7) (procurements of civilian agencies).

⁵⁹ SBA can, however, ensure that agencies do not award contracts under the authority of the Small Business Act to ineligible firms, and agencies need SBA’s approval to withdraw requirements from the 8(a) Program. See *supra* note 23 and accompanying text.

⁶⁰ 15 U.S.C. §644(a); 13 C.F.R. §125.2(b)(7). The “substantial bundling” threshold varies by agency. It is \$8 million for the Department of Defense; \$6 million for NASA, the General Services Administration, and the Department of Energy; and \$2.5 million for other agencies. 48 C.F.R. §7.107(e).

⁶¹ 15 U.S.C. §644(a); 13 C.F.R. §125.2(b)(7).

⁶² 48 C.F.R. §19.505(e). Executive Order 13170 requires the heads of agencies to “carefully review” and “give[] due consideration” to SBA’s views. It also authorizes SBA or the procuring agency to “seek assistance” from the Office of Management and Budget (OMB) when there are disagreements as to the existence or extent of bundling. Executive Order 13170, *Increasing Opportunities and Access for Disadvantaged Businesses*, 65 Fed. Reg. 60827, 60829 (Oct. 12, 2000). However, Executive Order 13170 does not require the agency to comply with OMB’s recommendations.

⁶³ However, legislation has been introduced in the 112th Congress that would authorize the Administrator of Small Business to delay the issuance of a solicitation, pending submission of the matter to the Director of the Office of Management and Budget, whenever SBA and the procuring agency fail to agree on the existence or degree of bundling. See *Expanding Opportunities for Main Street Act of 2011*, H.R. 2424; S. 1334. Whether there is any such delay is (continued...)

with and advises other agencies in their procurement activities, but generally cannot control their actions.

ASPA and FPASA

The Small Business Act is not the only statute applicable to federal contracting and subcontracting with small businesses, however. The general contracting authorities—the Armed Services Procurement Act (ASPA) of 1947 and the Federal Property and Administrative Services Act (FPASA) of 1949—grant defense and civilian agencies, respectively, broad authority to contract with any responsible firm, including small businesses.⁶⁴ While ASPA and FPASA do not authorize agencies to set aside contracts for small businesses, or make sole-source awards to them in circumstances when sole-source awards could not be made to other firms,⁶⁵ agencies may still “favor” small businesses in certain procurements conducted under their authority by using small-business status as an evaluation factor in negotiated procurements. A negotiated procurement is one in which the government awards the contract to the contractor whose offer represents the “best value” for the government in light of various factors established by the government and incorporated into the solicitation for the contract.⁶⁶ Cost or price must be among these factors, but it need not be the primary factor or carry any specific weight in the overall award.⁶⁷ Other factors may include contractors’ compliance with the solicitation requirements, technical excellence, management capability, personnel qualifications, prior experience, and small-business status.⁶⁸ Commentators sometimes call contracts that are awarded using firms’ size as an evaluation factor “preference contracts” because they allow agencies to prefer various types of small businesses without setting aside a procurement for them. Certain requirements pertaining to contracts with small businesses under the authority of the Small Business Act—such as the limitations on subcontracting, discussed below—have been found to be inapplicable to preference contracts because these contracts are not awarded under the Small Business Act.⁶⁹

Veterans Benefits, Health Care, and Information Technology Act

The Veterans Benefits, Health Care, and Information Technology Act of 2006,⁷⁰ as amended by the Veterans’ Benefits Improvements Act of 2008,⁷¹ imposes upon the Department of Veterans Affairs (VA) some unique requirements pertaining to contracting with small businesses owned by

(...continued)

currently within the agency’s control.

⁶⁴ ASPA, P.L. 80-413, 62 Stat. 21 (Feb. 19, 1948) (codified at 10 U.S.C. §2302 et seq.) (governing the procurements of defense agencies); FPASA, P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in scattered sections of Titles 40 and 41 of the United States Code) (governing the procurements of civilian agencies).

⁶⁵ See *supra* note 44 and accompanying text.

⁶⁶ 48 C.F.R. §15.101 (best value); 48 C.F.R. §15.304 (evaluation factors). For more on negotiated procurements, see 48 C.F.R. §§15.000-15.609.

⁶⁷ 48 C.F.R. §15.304(c)(1).

⁶⁸ 48 C.F.R. §15.304(c)(2).

⁶⁹ See *Washington-Harris Group*, Comp. Gen. Dec. No. B-401794; B-401794.2, 2009 U.S. Comp. Gen. LEXIS 226 (Nov. 16, 2009).

⁷⁰ P.L. 109-461, 120 Stat. 3431 (Dec. 22, 2006) (codified, in part, at 38 U.S.C. §§8127-8128).

⁷¹ P.L. 110-389, 122 Stat. 4189 (Oct. 10, 2008).

serviced-disabled and other veterans.⁷² Under the 2006 and 2008 acts, the Secretary of Veterans Affairs is required to establish annual goals for the “participation in Department contracts (including subcontracts)” of small businesses owned by service-disabled and other veterans, the former of which cannot be less than 3%.⁷³ The 2006 and 2008 acts also authorize VA to use “other than competitive procedures” in meeting these goals. Specifically, VA may award any contract whose value is below the simplified acquisition threshold (generally \$150,000⁷⁴) to a veteran-owned business on a sole-source basis,⁷⁵ and it may also make sole-source awards of contracts whose value (including options) is between \$150,000 and \$5 million provided that certain conditions are met.⁷⁶ When these conditions are not met, VA is generally *required* to set aside the contract for service-disabled or other veteran-owned small businesses.⁷⁷

Key Difference Between the Set-Aside Programs under the Veterans Benefits and Small Business Acts

- The Veterans Benefits Act applies only to the procurements of VA, while the Small Business Act applies to the procurements of all federal agencies.
- The Veterans Benefits Act authorizes set-asides and sole-source awards for veteran-owned small businesses, as well as for service-disabled veteran-owned small businesses. The Small Business Act authorizes only set-asides and sole-source awards for service-disabled veteran-owned small businesses.
- Set-asides for service-disabled veteran-owned small businesses are within agencies’ discretion under the Small Business Act, while VA is generally required by the Veterans Benefits Act to set-aside contracts for service-disabled and other veteran-owned small businesses.
- Firms must be listed in a database (the VetBiz Vendor Information Pages) maintained by VA to be eligible for contracting preferences under the Veterans Benefits Act, while they may self certify as to their eligibility for preferences under the Small Business Act.

⁷² Under these acts, awards to service-disabled veteran-owned small businesses take priority over those to veteran-owned small businesses, and awards to veteran-owned small businesses take priority over those to other small businesses under other authority. *See generally* 38 U.S.C. §8127(i)(1)-(4).

⁷³ 38 U.S.C. §8127(a)(1). The latter goal (i.e., that for the percentage of contracts awarded to veteran-owned small businesses) is within the Secretary’s discretion. *See* 38 U.S.C. §8127(a)(2)-(3). In addition, the Secretary is required to “establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.” 38 U.S.C. §8127(a)(4).

⁷⁴ In the case of supplies or services to be used in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, the simplified acquisition threshold increases to \$300,000 for contracts to be awarded and performed inside the United States, and \$1 million for contracts to be awarded and performed outside the United States. 48 C.F.R. §2.101.

⁷⁵ 38 U.S.C. §8127(b). Under the 2006 and 2008 acts, VA also has discretion to set aside contracts whose value is below the simplified acquisition threshold for competitions in which only veteran-owned small businesses may compete. *Id.*

⁷⁶ Specifically, the contracting officer must determine that the business is a responsible source with respect to performance of the contract, and that the award can be made at a fair and reasonable price “that offers best value to the United States.” 38 U.S.C. §8127(c)(1)-(3).

⁷⁷ *See, e.g.*, Aldevra, B-405271; B-405524 (Oct. 11, 2011) (finding that the VA lacked discretion to purchase goods that could have been acquired through a set-aside for veteran-owned small businesses from the Federal Supply Schedules); Powerhouse Design Arch. & Eng’rs, Ltd., B-403174; B-403175; B-403176; B-403177; B-403633; B-403647; B-403648; B-403649 (Oct. 7, 2010) (finding that procurements of architect/engineer services by the VA are subject to set-asides for small businesses); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208 (2010) (finding that set-asides for veteran-owned small businesses under the 2006 and 2008 acts take precedence over procurements from the AbilityOne Procurement List).

Other Statutes

Other agency-specific statutes pertaining to contracting and subcontracting with small businesses (1) establish the mentor-protégé program of the Department of Defense, which differs from the mentor-protégé programs under the Small Business Act by focusing upon small business subcontractors and suppliers, not prime contractors;⁷⁸ (2) set goals for the percentage of contract and subcontract dollars awarded to small businesses that exceed the government-wide goals in the Small Business Act;⁷⁹ and (3) authorize agencies to take particular actions which would otherwise not be in accordance with federal “competition requirements” in order to promote contracting with small businesses.⁸⁰

Regulations

Because most small business statutes leave at least something to the discretion of the agency tasked with implementing them, regulations promulgated by agencies also play a significant role in federal contracting and subcontracting with small businesses.⁸¹ SBA regulations, which implement the Small Business Act, generally apply. However, depending upon circumstances, the Federal Acquisition Regulation (FAR) and/or various agency-specific regulations may also apply. Agencies’ power to promulgate regulations intended to promote contracting or subcontracting with small businesses is more limited than Congress’s authority in this regard,⁸² although it can still be quite broad depending upon the context. The agency must have been delegated authority to promulgate the regulation by Congress,⁸³ and the regulation itself must correspond to the statute if “Congress has directly spoken to the precise question at issue.”⁸⁴ If Congress has not

⁷⁸ An Act to Authorize Appropriations for Fiscal Year 1991 for Military Activities of the Department of Defense, for Military Construction, and for Defense Activities of the Department of Energy, to Prescribe Personnel Strengths for the Armed Forces and for Other Purposes, P.L. 101-510, §831, 104 Stat. 1607-08 (Nov. 5, 1990) (codified, as amended, at 10 U.S.C. §2302 note). The DOD Mentor-Protégé Pilot Program also contemplates mentors providing different types of assistance to protégés than is provided under SBA’s mentor-protégé program. *See generally* CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger and Kate M. Manuel.

⁷⁹ *See, e.g.*, 51 U.S.C. §30304 (requiring the NASA Administrator to annually establish as a goal that at least 8% of the total value of certain prime contracts and subcontracts be made to small disadvantaged businesses).

⁸⁰ *See, e.g.*, 12 U.S.C. §1441a (authorizing the Resolution Trust Corporation to award certain small businesses “an additional 10 percent of the total technical points and an additional 5 percent of the total cost preference points achievable in the technical and cost rating process” when evaluating proposals); Consolidated Appropriations Act, 2012, P.L. 112-74, §7057,—Stat.—(Dec. 23, 2011) (“In entering into multiple award indefinite-quantity contracts with funds appropriated by this Act, USAID may provide an exception to the fair opportunity process for placing task orders under such contracts when the order is placed with any category of small or small disadvantaged business.”).

⁸¹ For example, the Small Business Act requires only that small businesses (1) be independently owned and operated; (2) be not dominant in their field of operations; and (3) meet any standards established by the Administrator of Small Business. 15 U.S.C. §632(a)(1)-(2). *See supra* note 31 and accompanying text. The act does not require the Administrator to establish such standards, or specify what any standards should be. Rather, the Administrator has established by notice-and-comment rulemaking the well-known standards that define firms’ size based, in part, upon their annual receipts or number of employees. *See infra* note 89 and accompanying text.

⁸² *See supra* notes 9 to 12 and accompanying text.

⁸³ *See generally* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Maeve P. Carey.

⁸⁴ *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). *See, e.g.*, *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386, 410-12 (2010) (finding that SBA regulations that implicitly provided for parity among the set-aside programs were not entitled to deference under *Chevron* because they were contrary to the Small Business Act, as it then existed).

directly spoken to the precise question, the agency can have considerable discretion, and a regulation implementing the agency's governing statute will generally be upheld by judicial or other tribunals so long as it is "based upon a permissible construction of the statute."⁸⁵ However, there are certain things that Congress has effectively prohibited agencies from doing, by regulation or otherwise, where contracting is concerned. Arguably the foremost among these is establishing a new set-aside program for small or other businesses.⁸⁶ A key obstacle to the creation of such programs by regulation is the Competition in Contracting Act (CICA) of 1984, which generally requires that agencies obtain "full and open competition through the use of competitive procedures" unless other procedures are expressly authorized by statute.⁸⁷ Because CICA defines "full and open competition" to mean that "all responsible sources are permitted to submit bids or competitive proposals on the procurement,"⁸⁸ it effectively bars agencies from implementing set-asides unless they have express statutory authority to do so.

SBA Regulations

Like the Small Business Act, SBA regulations are important authorities governing federal contracting and subcontracting with small businesses. These regulations, which are codified in Title 13 of the *Code of Federal Regulations*, are the source of many requirements commonly associated with small business contracting and subcontracting. For example, SBA regulations specify the "size standards," or the maximum annual receipts or number of employees that firms in particular industries may have while qualifying as small.⁸⁹ Other SBA regulations govern eligibility for the set-aside programs for different types of small businesses (e.g., HUBZone small businesses), and establish

- what it means for firms to be at least 51% unconditionally "owned" and "controlled" by women, service-disabled veterans, or socially and economically disadvantaged individuals;⁹⁰
- a rebuttable presumption that members of certain racial and ethnic groups are socially disadvantaged;⁹¹

⁸⁵ *Chevron*, 91 Fed. Cl. at 843. Procurement regulations can generally be challenged in pre- or post-award protests by "interested parties" alleging that agency conduct pursuant to the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, e.g., 31 U.S.C. §§3551-3553 (authorizing pre- and post-award protests); *Superior Helicopter LLC v. United States*, 78 Fed. Cl. 181, 186-87 (2007) (application of the arbitrary-and-capricious standard in a bid protest). An "interested party" includes any "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. §3551(2)(A).

⁸⁶ For an overview of current set-aside programs, see generally **Table 1** and CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by Kate M. Manuel and Erika K. Lunder.

⁸⁷ P.L. 98-369, §§2701-2753, 98 Stat. 1175-1203 (July 18, 1984) (codified, in part, at 10 U.S.C. §2304(a)(1) (procurements of defense agencies) & 41 U.S.C. §3301(a)(1) (procurements of civilian agencies)).

⁸⁸ 41 U.S.C. §107.

⁸⁹ 13 C.F.R. §121.201. For example, businesses in the field of scheduled passenger air transportation are small if they have fewer than 1,500 employees, while those in data processing are small if they have annual receipts of less than \$25 million. 13 C.F.R. §121.201. SBA regulations also specify how annual receipts and number of employees are to be calculated. See 13 C.F.R. §121.104 (annual receipts); 13 C.F.R. §121.106 (number of employees).

⁹⁰ See, e.g., 13 C.F.R. §124.105 (ownership of 8(a) firms); 13 C.F.R. §124.106 (control of 8(a) firms).

⁹¹ See 13 C.F.R. §124.103(b). In the Small Business Act, Congress finds that certain groups, including, but not limited to, "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities" are socially disadvantaged. 15 U.S.C. §631(f)(1)(C). However, other (continued...)

- the maximum net worth that economically disadvantaged women and socially disadvantaged individuals may have;⁹²
- who counts as an employee and what it means for at least 35% of a HUBZone small business's employees to reside in a HUBZone;⁹³ and
- when the spouse or "permanent caregiver" of a service-disabled veteran with a permanent and severe disability may exercise control over a service-disabled veteran-owned small business.⁹⁴

Yet other regulations expand upon the statutory "limitations on subcontracting," and require that small businesses awarded construction contracts under the authority of the Small Business Act perform certain percentages of the cost of the contract with their own employees, instead of subcontracting the work.⁹⁵ SBA regulations are also the source of the "nonmanufacturer rule," which applies in the procurement of manufactured products under small business set-asides or through the 8(a) Program, and provides that, regardless of the applicable size standard, a firm that does not manufacture the product may be considered small if it (1) does not have more than 500 employees and (2) will supply the product of a small business manufacturer, or obtains a waiver of this requirement from SBA.⁹⁶ In addition, SBA regulations establish procedures for protests of firms' size and status (e.g., HUBZone small business),⁹⁷ as well as penalties for misrepresentations of size or status.⁹⁸ Among other things, the latter regulations permit protests of

(...continued)

groups have been recognized as such by SBA (e.g., Indian Americans), and SBA regulations establish procedures whereby other groups may petition for recognition as socially disadvantaged. 13 C.F.R. §124.103(d).

⁹² See 13 C.F.R. §124.104(c)(2) ("For initial 8(a) ... eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) ... eligibility after admission to the program, net worth must be less than \$750,000."); 13 C.F.R. §127.203(b) ("In order to be considered economically disadvantaged, the woman's personal net worth must be less than \$750,000."). Individuals' ownership interests in the small business and equity in their primary personal residences are excluded when determining net worth.

⁹³ See, e.g., 13 C.F.R. §126.103 ("Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement or co-employed pursuant to a professional employer organization agreement."). See also *Mission Critical Solutions v. United States*, 96 Fed. Cl. 657 (2011) (finding that at least 35% of a firm's employees must reside in a HUBZone both at the time the firm is certified as a HUBZone firm and at the time the firm is awarded a contract through the HUBZone program).

⁹⁴ See 13 C.F.R. §125.10.

⁹⁵ The Small Business Act requires that small businesses perform at least 50% of the cost of manufacturing (excluding the cost of materials) on contracts for supplies, and at least 50% of the personnel cost on contracts for non-construction services. 15 U.S.C. §637(a)(14)(A)(i)-(ii) (limitations on subcontracting for 8(a) firms; 15 U.S.C. §644(o)(1)(A)-(B) (limitations on subcontracting for other firms). However, SBA has promulgated regulations that further require that small businesses perform at least 15% of the cost (excluding materials) on general construction contracts, and at least 25% of the cost (excluding materials) on contracts involving construction by special trade contractors. 13 C.F.R. §125.6(a)(3)-(4). These limitations on subcontracting apply only to contracts award under the authority of the Small Business Act, not those awarded under other authority. See *supra* note footnote 69.

⁹⁶ 13 C.F.R. §§121.406 & 126.601(f). The rule applies differently for purposes of the HUBZone program. Among other things, waivers are not available under the HUBZone program, and the small business supplying the end product to the HUBZone nonmanufacturer generally must also be a HUBZone small business. 13 C.F.R. §126.601(f).

⁹⁷ 13 C.F.R. §§121.1001-121.1010 (protests as to size); 13 C.F.R. §§124.1001-124.1014 (protests as to 8(a) status); 13 C.F.R. §§125.24-124.28 (protests as to service-disabled veteran-owned status); 13 C.F.R. §§126.800-126.805 (protests as to HUBZone status); 13 C.F.R. §§127.600-127.605 (protests as to women-owned status).

⁹⁸ 13 C.F.R. §121.108 (misrepresentation of size); 13 C.F.R. §124.1004 (misrepresentation of eligibility for the 8(a) Program); 13 C.F.R. §125.29 (misrepresentation of service-disabled veteran-owned status); 13 C.F.R. §126.900 (misrepresentation of HUBZone status); 13 C.F.R. §127.700 (misrepresentation of women-owned status).

firms' size by any offeror who has not been eliminated for reasons unrelated to size, the contracting officer, certain SBA officials, and "other interested parties," potentially including large businesses.⁹⁹ These regulations also provide that persons who misrepresent their eligibility for assistance under the Small Business Act may be subject to debarment or suspension from government contracting, civil penalties under the False Claims Act and the Program Fraud Civil Remedies Act, civil or criminal penalties under Section 16 of the Small Business Act, and/or other penalties.¹⁰⁰

Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR) also plays a significant role in federal contracting and subcontracting with small businesses. The FAR was promulgated in 1984 as part of an effort to standardize procurement rules across the government,¹⁰¹ and generally governs the conduct of agency contracting officers.¹⁰² The FAR is codified in Title 48 of the *Code of Federal Regulations*, and Subpart 19, in particular, addresses "small business programs." While many of the topics covered in Subpart 19 are also addressed in SBA regulations, the FAR often provides additional guidance specifically applicable to agency contracting officers exercising their authority under the Small Business Act, or complying with the act's requirements. For example, the FAR instructs contracting officers on how to apply SBA size standards to particular procurements by

- (1) [c]lassifying the product or service being acquired in the industry whose definition, as found in the North American Industry Classification System (NAICS) Manual ..., best describes the principal nature of the product or service being acquired;
- (2) [i]dentifying the size standard SBA established for that industry; and
- (3) [s]pecifying the size standard in the solicitation, so that offerors can appropriately represent themselves as small or large.¹⁰³

The FAR also provides guidance for contracting officers on locating potential small business sources,¹⁰⁴ determining what constitutes a fair market price when deciding whether to set aside a particular acquisition for small businesses,¹⁰⁵ and what reasons do not justify failure to set aside

⁹⁹ See, e.g., 13 C.F.R. §121.1001(a)(i)-(iv).

¹⁰⁰ See, e.g., 13 C.F.R. §125.29. For more on debarment and suspension, see generally CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

¹⁰¹ See Dep't of Defense, Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102 (Sept. 19, 1983) (codified, as amended, in part, at 48 C.F.R. §1.101) ("The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the [FAR], which is the primary document, and agency acquisition regulations that implement or supplement the FAR.").

¹⁰² But see 48 C.F.R. Subpart 1.4 (authorizing contracting officers to deviate from the FAR on a contract-by-contract or class basis).

¹⁰³ 48 C.F.R. §19.102(b)(1)-(3).

¹⁰⁴ 48 C.F.R. §19.202-2.

¹⁰⁵ 48 C.F.R. §19.202-6 (determining fair market price for all except 8(a) set-asides); 48 C.F.R. §19.807 (estimating fair market price for 8(a) set-asides).

an acquisition for small businesses.¹⁰⁶ In addition, several topics are addressed solely in the FAR, and not in the SBA regulations. These topics include how to calculate liquidated damages in cases where prime contractors fail to make “good faith efforts” to comply with their subcontracting plans,¹⁰⁷ and the use of evaluation factors and monetary incentives promoting subcontracting with small disadvantaged businesses (SDBs).¹⁰⁸ Specifically, the FAR authorizes contracting officers to consider prime contractors’ past and proposed performance in subcontracting with SDBs when awarding contracts,¹⁰⁹ and to pay prime contractors up to 10% of the amount by which their performance in subcontracting with SDBs exceeds their targets for subcontracting with SDBs.¹¹⁰

When they address the same topics, the FAR and SBA regulations generally correspond.¹¹¹ However, on certain topics and at certain times, they can differ. When this occurs, one can generally determine whether the FAR or SBA regulations prevail by considering whether the Federal Acquisition Regulatory Council (FAR Council) or SBA is tasked with administering the statute underlying the regulation. For example, the FAR Council is tasked with implementing Section 807 of the Ronald W. Reagan National Defense Authorization Act for FY2005, which calls for “acquisition-related dollar thresholds” to be adjusted for inflation on October 1 of each year evenly divisible by five.¹¹² This means that the FAR prevails over any SBA regulations that might give different amounts when specifying the value of contracts that may be set aside for small businesses,¹¹³ or when directing agencies to take particular actions regarding “bundled” contracts.¹¹⁴ SBA, in contrast, is generally tasked with implementing those provisions of the

¹⁰⁶ 48 C.F.R. §19.502-5(a)-(h). For example, under the FAR, having placed a large percentage of previous contracts for the requirements with small businesses, or having a period of less than 30 days available for receipt of offers, are insufficient causes for not setting aside a procurement for small businesses.

¹⁰⁷ 48 C.F.R. §19.705-7. The SBA regulations note only that liquidated damages may be assessed in such cases. *See* 13 C.F.R. §125.3(f)(5).

¹⁰⁸ 48 C.F.R. §§19.1201-19.1203.

¹⁰⁹ Under the FAR, when evaluating proposals, agencies may consider: (1) the extent to which the offers specifically identify potential subcontracting opportunities for SDBs; (2) the extent of offerors’ commitment to use SDBs; (3) the complexity and variety of work to be performed by small SDBs; (4) the realism of offerors’ proposals; (5) the offerors’ past performance in complying with subcontracting plan goals for SDBs and monetary targets for SDB participation; and (6) the extent of SDB participation in terms of the value of the total acquisition.

¹¹⁰ Funds generally are not appropriated specifically to pay such monetary incentives, unlike with “subcontracting bonuses” under the Indian Financing Act. *See, e.g.*, Consolidated Appropriations Act, P.L. 112-74, §8019,—Stat.—(Dec. 23, 2011) (appropriating \$15 million to the Department of Defense for use in making “incentive payments” under Section 504 of the Indian Financing Act of 1974 to contractors or subcontractors that use certain Indian-owned small businesses as subcontractors or suppliers).

¹¹¹ For example, in their provisions regarding contract bundling, the FAR and SBA regulations both require agencies to notify any small business(es) currently performing the requirements of the agency’s intention to bundle the requirements at least 30 days before releasing the solicitation. *See* 13 C.F.R. §125.2(d)(4); 48 C.F.R. §10.001(c)(2).

¹¹² P.L. 108-375, §807, 118 Stat. 2010-11 (Oct. 28, 2004) (codified at 41 U.S.C. §1908). The act further provides that, subject to certain exceptions, “acquisition-related dollar threshold” includes any “dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency.”

¹¹³ *See, e.g.*, 13 C.F.R. §126.607(b)(2) (2011) (giving the simplified acquisition threshold as \$100,000, despite changes made to the FAR in 2010). The amounts given in various provisions of the Small Business Act also do not reflect these inflation adjustments.

¹¹⁴ *See, e.g.*, 13 C.F.R. §125.2(d)(5)(i)(A)-(B) (2011) (distinguishing between contracts valued at or below \$86 million and those valued over \$86 million). After adjustments for inflation, the FAR gives this amount as \$94 million. 48 C.F.R. §7.107(b)(1)-(c).

Small Business Act governing firm size, and SBA size standards would prevail over the FAR to the degree that they were inconsistent.¹¹⁵

Agency-Specific Regulations

Depending upon the circumstances, agency-specific regulations may also be relevant, including agency FAR supplements. For example, both the VA regulations, codified in Title 38 of the *Code of Federal Regulations*, and the Department of Veterans Affairs FAR supplement (commonly known as the Veterans Administration Acquisition Regulation (VAAR)), codified in Title 48, have provisions governing set-asides and sole-source awards under the authority of the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended.¹¹⁶ The Defense Federal Acquisition Regulation Supplement (DFARS) similarly has provisions governing the DOD mentor-protégé program, including the contents of the agreements between mentors and protégés.¹¹⁷ The agency-specific regulations noted here interpret statutes applicable only to VA and DOD, respectively, so they may—and do—diverge from the FAR. Where such statutory authority is lacking, agency regulations may generally only “implement Government-wide policies and procedures within the agency,” or establish “additional policies and procedures required to satisfy the specific and unique needs of the agency.”¹¹⁸ This limitation upon the promulgation of agency-specific procurement regulations is one reason why the mentor-protégé programs developed by agencies without express statutory authority to create such programs generally provide only for protégés to receive technical or other assistance from mentors,¹¹⁹ and for mentors to have their participation counted towards their subcontracting plans or as evaluation factors in future procurements.¹²⁰ Such agencies arguably cannot authorize reimbursement of advance payments made by mentors to small business subcontractors, like DOD can, because advance payments are generally prohibited under federal procurement law.¹²¹ Such agencies also cannot provide that joint ventures between mentors and protégés may qualify as small for purposes of federal procurements, as SBA can.¹²² SBA may authorize such treatment because the

¹¹⁵ See, e.g., *Marwais Steel Co. v. Dep’t of the Air Force*, 871 F. Supp. 1448 (D.D.C. 1994) (addressing an alleged discrepancy between FAR §19.303(i) and 13 C.F.R. §121.1603(a)(2), as those provisions then existed).

¹¹⁶ See 38 C.F.R. §§74.1-74.29; 48 C.F.R. §§819.201-819.202-72.

¹¹⁷ 48 C.F.R. Ch. 2, Appendix I, I-107. Mentor-protégé programs typically seek to pair new businesses with more experienced businesses in mutually beneficial relationships. Protégés may receive financial, technical, and/or management assistance from mentors in obtaining and performing federal contracts or subcontracts, or serving as suppliers under such contracts or subcontracts. Mentors may receive credit toward subcontracting goals, reimbursement of certain expenses, or other incentives. For more on the DOD and other mentor-protégé programs, see generally CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger and Kate M. Manuel.

¹¹⁸ 41 U.S.C. §1303(a)(2) (emphasis added).

¹¹⁹ See, e.g., 48 C.F.R. §3052.219-71(b)(1) (mentor-protégé program of the Department of Homeland Security).

¹²⁰ 48 C.F.R. §§3052.219-71 to 3052.219-72.

¹²¹ Advance payments are payments made to a contractor before any costs have been incurred on a contract, while progress payments are payments made during the performance of work, but before completion of the contract, on the basis of either a percentage of completion of the work or the incurrence of costs. Advance payments are generally only authorized when (1) the contractor gives adequate security; (2) the payments do not exceed the contract price; and (3) the agency head or a designee determines that advance payment is in the public interest or facilitates the national defense. See, e.g., 48 C.F.R. §32.402(b). Progress payments made on the basis of percentage of completion under construction or architect-engineer contracts are considered invoice payments and are permissible. 48 C.F.R. §32.903. Progress payments made on the basis of performance milestones are considered financing payments and are likewise permissible. 48 C.F.R. Subpart 32.5. Any other progress payments based on costs are considered “unusual progress payments” and may be used only when authorized in “exceptional cases.” See 48 C.F.R. §§501-1-501.2.

¹²² 13 C.F.R. §124.513(b)(3); 13 C.F.R. §124.520(d)(1). For the joint venture to be eligible for awards set aside for (continued...)

Small Business Act grants it broad authority over size determinations, and SBA has historically taken the view that only its mentor-protégé program, or other programs expressly approved by it, are eligible for this treatment.¹²³

Judicial and Other Decisions

The statutes and regulations governing contracting and subcontracting with small businesses are regularly subject to interpretation by the federal courts and other tribunals, whose decisions can have considerable effects upon the law in these areas. The 2008 decision by the U.S. Court of Appeals for the Federal Circuit in *Rothe Development Corporation v. Department of Defense* illustrates this.¹²⁴ In *Rothe*, the court struck down a statute authorizing the Department of Defense (DOD) to apply a 10% “price evaluation adjustment”¹²⁵ to the offers of small disadvantaged businesses on the grounds that Congress lacked a strong basis in evidence for concluding that there was discrimination on the basis of race within the defense industry when it re-authorized this program in 2006. Although other provisions of law had prohibited DOD from granting price evaluation adjustments in every fiscal year since 1998,¹²⁶ the *Rothe* decision was nonetheless significant because it resulted in SBA delaying implementation of the set-aside program for women-owned small businesses so that it could “review[] the relevance of the standard for disparity studies discussed in” *Rothe*.¹²⁷ Congress also re-enacted¹²⁸ certain preferences for minority-serving institutions of higher education that the district court, to whom the Federal Circuit remanded the case in *Rothe*, struck down on the grounds that they were “contingent” upon

(...continued)

small businesses, the protégé must qualify as small for the size standard corresponding to the NAICS code assigned to the procurement, and must not have “reached the dollar limit set forth in §124.519.” *Id.* Section 124.519 generally prohibits 8(a) firms from receiving additional sole-source awards once they have received a combined total of competitive and sole-source awards in excess of \$100 million, in the case of firms whose size is based on their number of employees, or in excess of an amount equivalent to the lesser of (1) \$100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues.

¹²³ See, e.g., Small Bus. Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. 55694, 55694 (Oct. 28, 2009) (“[A]n exception to affiliation for protégés in other Federal mentor/protégé programs will be recognized by SBA only where specifically authorized by statute (e.g., the Department of Defense mentor/protégé program) or where SBA has authorized an exception to affiliation for a mentor/protégé program of another Federal agency under the procedures set forth in §121.903.”).

¹²⁴ 545 F.3d 1023 (Fed. Cir. 2008). For more on the *Rothe* decision and its potential implications for small business contracting programs, see generally CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

¹²⁵ For purposes of DOD’s program, a price evaluation adjustment worked as follows: when comparing an offer from a small disadvantaged business with one submitted by another business, the agency could subtract up to 10% of the price from the offer submitted by the small disadvantaged business in determining which offer has the lowest price or represents the best value.

¹²⁶ See Strom Thurmond National Defense Authorization Act for FY1999, P.L. 105-261, §801, 112 Stat. 2080-81 (Oct. 17, 1998) (prohibiting DOD from using its authority to grant price evaluation adjustments in any fiscal year directly following a fiscal year in which DOD awarded at least 5% of its contract dollars to small disadvantaged businesses).

¹²⁷ See Small Bus. Admin., The Women-Owned Small Business Federal Contract Assistance Procedures: Eligible Industries, 74 Fed. Reg. 1153 (Jan. 12, 2009). This proposed rule has since been withdrawn, and the Obama Administration issued final regulations for the set-aside program for women-owned small businesses. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 Fed. Reg. 62258 (Oct. 7, 2010).

¹²⁸ National Defense Authorization Act for FY2010, P.L. 111-84, §252, 123 Stat. 2242-43 (Oct. 28, 2009).

the provision authorizing price evaluation adjustments.¹²⁹ In addition, the Obama Administration recently proposed amending the FAR to repeal the regulations governing the price evaluation adjustment authority struck down in *Rothe*.¹³⁰

SBA's Office of Hearings and Appeals

Depending upon the context, various courts and other tribunals have issued decisions that significantly affect federal contracting and subcontracting with small businesses. Key among these tribunals is SBA's Office of Hearings and Appeals (OHA), which was established in 1983 to hear "protests" of, or challenges to, particular firms' eligibility for assistance under the Small Business Act. Its decisions generally address

- the appropriate NAICS codes for particular procurements;
- whether particular firms qualify as small; and
- whether particular firms are otherwise eligible for the 8(a) Program or other small business contracting programs.¹³¹

While these decisions generally focus upon specific procurements or firms, they often articulate standards that are applied broadly in determining size or status, such as the seven-part test commonly used in determining when a subcontractor is an "affiliate" of a firm.¹³² This test is significant because, when firms are found to be affiliates, their annual receipts or number of employees are generally added when determining whether a firm is small.¹³³ OHA does not hear protests regarding the award, or proposed award, of federal contracts, as discussed below.¹³⁴ Conversely, the Government Accountability Office (GAO), which is one of the primary forums to hear the latter types of protests, expressly disclaims jurisdiction over "Small Business Administration issues," such as those heard by OHA.¹³⁵

¹²⁹ *Rothe Dev. Corp. v. Dep't of Defense*, 2009 U.S. Dist. LEXIS 22029, at *11-14 (W.D. Tex. 2009).

¹³⁰ Dep't of Defense, Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses, 76 Fed. Reg. 55849 (Sept. 9, 2011).

¹³¹ See OHA Decisions, available at http://archive.sba.gov/aboutsba/sbaprograms/oha/OHADecisions/OHA_DECISIONS.html.

¹³² *Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc.*, SBA 4151 (1996). This test considers: (1) which party will manage the contract; (2) which party possesses the background and expertise required to perform the contract; (3) which party actively sought the contract; (4) what degree of collaboration was involved in the bid; (5) whether each party is to perform discrete tasks, or whether there is commingling of personnel or materials; (6) the relative amount of work performed by each party; and (7) which party will perform the more complex and costly functions.

¹³³ 13 C.F.R. §121.103(a)(6). Certain affiliations may, however, be excluded when determining size. See, e.g., 13 C.F.R. §124.109(c)(2)(iii) ("In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) ... program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.").

¹³⁴ See 31 U.S.C. §3556 (granting GAO, the procuring agencies, and the U.S. Court of Federal Claims each non-exclusive authority to hear bid protests). Previously, the federal district courts also had jurisdiction over bid protests. However, this jurisdiction expired on January 1, 2001. See Administrative Dispute Resolution Act of 1996, P.L. 104-320, §12(d), 110 Stat. 3875 (Oct. 19, 1996).

¹³⁵ 4 C.F.R. §21.5(b).

GAO and the Court of Federal Claims

Where questions of small business law unrelated to the size or status of particular firms are concerned, other judicial and/or administrative tribunals play a role. GAO and the U.S. Court of Federal Claims,¹³⁶ along with the procuring agencies, have jurisdiction to hear “bid protests,” or challenges to the award or proposed award of federal contracts.¹³⁷ Decisions in such bid protests can play an arguably important role in interpreting the various statutes and regulations governing federal contracting and subcontracting with small businesses, such as happened in 2008-2010 when GAO and the Court of Federal Claims construed the Small Business Act, as it then existed, as giving set-asides for HUBZone small businesses “precedence” over set-asides for other small businesses.¹³⁸ More recently, GAO has construed the Veterans Benefits Act as removing VA’s discretion to procure goods or services through the Federal Supply Schedules when a set-aside for veteran-owned small businesses could be used,¹³⁹ an interpretation that could potentially result in veteran-owned small businesses receiving an additional \$3 billion in federal procurement dollars.¹⁴⁰ The Court of Federal Claims and GAO often—but not always—agree in their interpretations of various procurement laws and regulations.¹⁴¹ However, the court’s decisions are legally binding upon executive branch agencies, while GAO’s are not. GAO is a legislative branch agency, and the “separation of powers” doctrine precludes it from dictating the conduct of executive branch agencies.¹⁴² GAO can only make “recommendations” in its bid protest decisions, although these recommendations are highly influential and generally adopted by the procuring agencies.¹⁴³

Federal District Courts

The federal district courts currently do not have jurisdiction to hear bid protests.¹⁴⁴ However, they may hear certain questions related to small business contracting and subcontracting that do not arise in connection with a procurement or proposed procurement. Thus, the federal district and appellate courts have heard suits (1) seeking to compel disclosure under the Freedom of Information Act (FOIA) of forms tracking prime contractors’ compliance with their subcontracting plans;¹⁴⁵ (2) asserting that particular agency actions are contrary to federal law

¹³⁶ Appeals from the Court of Federal Claims are heard by the U.S. Court of Appeals for the Federal Circuit.

¹³⁷ 31 U.S.C. §3556. For more on GAO bid protests, in particular, see generally CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

¹³⁸ See *supra* note 8 for a discussion of these decisions and subsequent amendments to the Small Business Act.

¹³⁹ Aldevra, B-405271; B-405524 (Oct. 11, 2011).

¹⁴⁰ See, e.g., Kathleen Miller, Veteran-Owned Suppliers May Gain \$3 Billion from Griddle Fight, *Bloomberg Gov’t*, Nov. 14, 2011.

¹⁴¹ *But compare* Infiniti Solutions LLC v. United States, 92 Fed. Cl. 347 (2010) (finding that certain actions by the procuring agency did not constitute permissible “market research” under 13 C.F.R. §124.503(e)) *with id.* at 354 (noting that GAO had dismissed this protest because it found that the agency’s actions constituted permissible “informal assessments” under 13 C.F.R. §124.503(e)(2)).

¹⁴² *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 809 F.2d 979, 986 (3d Cir. 1986).

¹⁴³ See generally CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz (noting that in only 7 cases between FY2001 and FY2011 did an agency decline to follow GAO’s recommendations). Agencies are required to notify GAO whenever they decline to follow its recommendations, and GAO, in turn, is required to notify several committees of Congress. See 31 U.S.C. §3554(b)(3).

¹⁴⁴ See *supra* note 134.

¹⁴⁵ See, e.g., *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994) (finding that such forms were (continued...))

and, thus, violate the Administrative Procedure Act (APA);¹⁴⁶ and (3) alleging liability under the False Claims Act for fraudulent subcontracting plans or reports.¹⁴⁷ In addition, at least one federal district court recently found that it has jurisdiction to hear challenges to agency insourcing determinations brought by small businesses.¹⁴⁸

(...continued)

generally not confidential or exempt from disclosure).

¹⁴⁶ See, e.g., *Am. Small Bus. League v. Johnson*, 2010 U.S. Dist. LEXIS 97846 (N.D. Cal., Sept. 3, 2010) (alleging that the removal of certain fields pertaining to small business contracting from the Federal Procurement Data System (FPDS) was in violation of the Office of Federal Procurement Policy Act).

¹⁴⁷ See, e.g., *United States ex rel. King v. F.E. Moran, Inc.*, 2002 U.S. Dist. LEXIS 16277 (N.D. Ill., Aug. 29, 2002).

¹⁴⁸ *K-Mar Indus., Inc. v. U.S. Dep't of Defense*, 752 F. Supp. 2d 1207 (W.D. Okla. 2010). For an overview of this and other cases challenging agency insourcing determinations, see generally CRS Report R41810, *Insourcing Functions Performed by Federal Contractors: An Overview of the Legal Issues*, by Kate M. Manuel and Jack Maskell.

Appendix. Entities with Significant Roles in Federal Procurement from Small Businesses

Table A-1. Tabular Comparison of Various Entities Having Significant Roles in Federal Contracting and Subcontracting with Small Businesses

Entity	Key Roles
<p>Small Business Administration (SBA)</p>	<p>Operates a “small business and capital ownership development program” for certain small businesses owned and controlled by socially and economically disadvantaged individuals and “subcontracts” other agencies’ prime contracts to them (i.e., the 8(a) Program); may delegate its authority to subcontract with 8(a) firms to other agencies</p> <p>Consults with procuring agencies in establishing annual goals for contracting and subcontracting with small businesses; reports on government performance in meeting these goals</p> <p>Issues Certificates of Competency (COCs) declaring small businesses “responsible” for purposes of the award of federal contracts</p> <p>Promulgates size standards which firms must generally meet in order to qualify as “small” for purposes of federal contracts and subcontracts</p> <p>Issues other rules and regulations “deemed necessary” to carry out the Small Business Act, including those governing eligibility for the programs for women-owned, service-disabled veteran-owned and Historically Underutilized Business Zone (HUBZone) small businesses</p> <p>Guarantees certain bid, performance, and payment bonds of small businesses</p> <p>Provides technical and other assistance to small businesses, including through mentor-protégé programs</p> <p>Assigns Procurement Center Representatives (PCRs) and other officials to work with the procuring agencies to promote small business participation</p> <p>Investigates violations of the act</p>
<p>Federal Acquisition Regulatory Council (FAR Council)</p>	<p>Office of Hearings and Appeals (OHA) hears protests regarding the NAICS codes for particular procurements, as well as the size and status (e.g., women-owned) of particular firms</p> <p>Promulgates those provisions of the Federal Acquisition Regulation implementing the Small Business Act; also promulgates other government-wide procurement regulations</p>
<p>Individual procuring agencies</p>	<p>Exercise any authority to “subcontract” with 8(a) small businesses delegated to them by SBA</p> <p>Exercise authority under the Small Business Act to set aside contracts for HUBZone, women-owned, serviced-disabled veteran-owned, and other small businesses, as well as to make sole-source awards to HUBZone and service-disabled veteran-owned small businesses; may also grant price evaluation adjustments to HUBZone small businesses in unrestricted competitions</p> <p>Exercise authority under the Armed Services Procurement Act, the Federal Property and Administrative Services Act, and other statutes to give various types of “preferences” to small businesses</p> <p>Incorporate terms in certain contracts requiring prime contractors to subcontract specific percentages of the work to small businesses, among other things</p> <p>Along with SBA, establish annual goals for the percentage of agency contract and/or subcontract dollars awarded to small businesses</p> <p>Avoid “bundling” or “consolidating” requirements into contracts unsuitable for performance by small businesses</p>

Entity	Key Roles
	Appoint Small Business Specialists (SBSs) and Offices of Small and Disadvantaged Business Utilization (OSDBUs) to protect small businesses' interests in the federal procurement process
	Promulgate regulations implementing any agency-specific procurement authorities (e.g., Veterans Administration Acquisition Regulation (VAAR))
Government Accountability Office	Hears certain protests regarding the award or proposed award of federal contracts that raise issues related to small business contracting other than those heard by OHA
Court of Federal Claims	Hears protests regarding the award or proposed award of federal contracts that raise issues related to small business contracting, as well as other cases potentially involving small business law
Federal District Courts	Hears certain cases affecting small business-related issues, such as Freedom of Information Act (FOIA) requests regarding prime contractors' subcontracting plans; challenges to agency actions that are contrary to law; and alleged violations of the False Claims Act for misrepresentations of size or status

Source: Congressional Research Service, based on various sources cited throughout this report

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