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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* (i.e., the process whereby agencies obtain supplies 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 other 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’ size and status (e.g., woman-owned, service-disabled veteran-owned).

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. 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.

However, other legal authorities, beyond the Small Business Act, also authorize or 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 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 R43573, *Federal Contracting and Subcontracting with Small Businesses: Legislation in the 113th Congress*, by Kate M. Manuel, describes and analyzes recently enacted and introduced measures.

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Congress has generally broad authority to impose requirements upon the federal procurement process (i.e., the process whereby agencies obtain supplies 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 other 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 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

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 or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts 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)(B) (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. §644(l)(1) (requiring SBA to appoint Procurement Center Representatives (PCRs) to work with “each major procurement center”); 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.

⁷ “Procuring activities” are those “component[s] of an executive agency having a significant acquisition function and (continued...)”

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 other decisions.⁸

This report provides an overview of 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 other tribunals whose decisions regularly construe small business statutes and regulations. A companion report, CRS Report R43573, *Federal Contracting and Subcontracting with Small Businesses: Legislation in the 113th Congress*, by Kate M. Manuel, describes measures that Members of the 113th 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 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 has generally been seen to “enjoy[] the unrestricted power to produce its own supplies, to

(...continued)

designated as such by the head of the agency.” 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 (September 27, 2010). 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 (September 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 (November 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 (September 19, 2008). In response to these decisions, Congress changed the “shall” in Section 31 to “may”, thereby permitting 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 *Federal Register* 14566, 14567 (March 16, 2011).

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 provide non-financial assistance to certain small businesses owned and controlled by socially and

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 (i.e., an “exceedingly persuasive justification”) is to be seen as more stringent than the “intermediate scrutiny” traditionally applied to classifications based on gender.

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.

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 supplies 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 SBA must consent to “releasing” requirements formerly procured through the 8(a) Program for procurement outside the 8(a) Program.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)(15)(A)-(B). 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 [their] 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)(15) (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.

¹⁹ 15 U.S.C. §637(b)(1)(A).

²⁰ For more on “procuring activities,” see *supra* note 7.

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, January 1, 2013, available at <http://www.sba.gov/sites/default/files/files/Department%20of%20Defense.pdf>.

²³ 13 C.F.R. §124.504(d)(1) (“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 generally 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 (November 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 annual gross receipts over the past three years exceed \$23.98 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 under certain circumstances, it requires that any such standards be “approved by the Administrator,” among other things. 15 U.S.C. §632(a)(2)(C)(iii). 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 (e.g., as subcontractors) in procurements that are not set-aside.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 91 and accompanying text.

³³ 15 U.S.C. §634(b)(6).

³⁴ See *infra* notes 57-63 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. §§125.8-125.30.

³⁸ 15 U.S.C. §694b. Bid, performance, and payment bonds are all types of surety bonds. 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)(1)(i)(A).

⁴³ See 13 C.F.R. §125.3(e)(1).

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)(a)(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 R42981, *Set-Asides for Small Businesses: Legal Requirements and Issues*, 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,

and 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* 15 U.S.C. §644(a); 48 C.F.R. §19.502-2(b). These regulations have been construed as requiring agencies to set aside contracts for small businesses when the specified conditions are met. *See, e.g.*, DNO Inc., B-406256, B-406256.2 (March 22, 2012) (“Contracting officers generally are required to set aside for small business all procurements exceeding \$150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns.”); Metasoft, LLC, B-402800 (July 23, 2010) (“Under FAR sect. 19.502-2(b), a procurement with an anticipated dollar value of more than [\$150,000] must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price.”).

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), as amended by P.L. 112-239, §1697)</p> <p>Women-owned small businesses (WOSBs)</p>	<p>Contracts valued in excess of \$150,000 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. If offers are not reasonably expected from at least two WOSBs, the contract may be awarded on a sole-source basis so long as the anticipated price is fair and reasonable, and the contract's value does not exceed \$4 million (\$6.5 million for manufacturing contracts).</p>
<p>Section 15(a) (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 15(j) (codified at 15 U.S.C. §644(j))</p> <p>Small businesses generally</p>	<p>Contracts whose value exceeds \$3,000, but is less than \$150,000, are reserved exclusively for small businesses unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive with regard to market prices and the quality and delivery of the supplies or services being purchased; such contracts can be awarded using the "simplified procedures" for "small purchases" discussed in Subpart 13 of the FAR, instead of competitive set-asides.</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 may award the contract via a set-aside. Section 31 also requires agencies to grant price evaluation adjustments of up to 10% to certain 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 may 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.
- 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 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 be established after “consultation” with the SBA. Agencies must also develop plans for achieving these goals, and make a “consistent effort to annually expand” small business participation as to each goal.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

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 (October 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)(A)(i)-(v).

⁵¹ 15 U.S.C. §644(g)(2)(A)-(E). For more on the goaling program, see generally <http://www.sba.gov/category/about-sba-navigation-structure/sba-programs/contracting/goaling-program>.

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: A Legal Overview*, by Kate M. Manuel.

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 (\$2.5 million to \$8 million, depending upon the agency) 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 procurements that involve “substantial bundling” could be restructured to reduce or minimize the scope of bundling.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 awarded to any type of small business.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, “substantially bundled,” or consolidated.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

⁵³ 15 U.S.C. §637(d)(6)(G)(i)-(ii) & (13)(B)(i)-(ii).

⁵⁴ See, e.g., 13 C.F.R. §125.2(c)(4)(i)-(ii). The “substantial bundling” threshold varies by agency. It is \$8 million for the Department of Defense; \$6 million for the National Aeronautics and Space Administration (NASA), the General Services Administration, and the Department of Energy; and \$2.5 million for other agencies. 48 C.F.R. §7.104(d)(2)(i).

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)-(16); 13 C.F.R. §125.2(c)(5)(i)-(v). 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)(a)(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 for the “release” of requirements from the 8(a) Program. See *supra* note 23 and accompanying text.

⁶⁰ 13 C.F.R. §125.2(b)(3).

⁶¹ 13 C.F.R. §125.2(b)(3).

⁶² 48 C.F.R. §19.505(e). Executive Order 13170 requires the heads of agencies to “carefully review” and “give[] due (continued...) ”

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

Titles 10 and 41 of the United States Code

The Small Business Act is not the only statute applicable to federal contracting and subcontracting with small businesses, however. The general contracting authorities—the provisions of the former Armed Services Procurement Act (ASPA) of 1947 codified in Title 10 of the United States Code and the provisions of the Federal Property and Administrative Services Act (FPASA) of 1949 codified in Title 41—grant defense and civilian agencies, respectively, broad authority to contract with any responsible firm, including small businesses.⁶⁴ While Titles 10 and 41 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—most notably, 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

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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 *Federal Register* 60827, 60829 (October 12, 2000). However, Executive Order 13170 does not require the agency to comply with OMB’s recommendations.

⁶³ However, legislation introduced in the 113th Congress would have authorized 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*, H.R. 2551, 113th Cong. Whether there is any such delay is currently within the agency’s control.

⁶⁴ ASPA, P.L. 80-413, 62 Stat. 21 (February 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. Part 15.

⁶⁷ 48 C.F.R. §15.304(c)(1).

⁶⁸ 48 C.F.R. §15.304(c)(2).

⁶⁹ *See, e.g.*, Washington-Harris Group, Comp. Gen. December No. B-401794; B-401794.2, 2009 U.S. Comp. Gen. LEXIS 226 (November 16, 2009) (finding that the limitations on subcontracting do not apply to preference contracts); (continued...)

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 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 \$150,000)⁷⁴ 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 although it could retain discretion not to set aside contracts for veteran-owned small businesses in certain circumstances. For example, the U.S. Court of Appeals for the Federal Circuit recently upheld a lower court decision finding that VA may procure supplies and services from the Federal Supply Schedules instead of through a set-aside for veteran-owned small businesses because the 2006 and 2008 acts

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archived CRS Report R40998, *The Inapplicability of Limitations on Subcontracting to "Preference Contracts" for Small Businesses: Washington-Harris Group*, by Kate M. Manuel. However, the 112th Congress enacted legislation which authorizes the Administrator of Small Business to promulgate limitations on subcontracting for contracts that are awarded under authorities other than the Small Business Act. See National Defense Authorization Act for FY2013, P.L. 112-239, §1651, 126 Stat. 2079-81 (January 2, 2013). SBA proposed amendments to the regulatory limitations on subcontracting at the end of 2014, but the proposed changes do not appear to address limitations as to contracts awarded under authorities other than the Small Business Act. See Small Bus. Admin., Small Business Contracting and National Defense Authorization Act of 2013 Amendments, 79 Fed. Reg. 77955 (December 29, 2014).

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

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

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). 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 Powerhouse Design Arch. & Eng'rs, Ltd., B-403174; B-403175; B-403176; B-403177; B-403633; B-403647; B-403648; B-403649 (October 7, 2010) (finding that procurements of architect/engineer services by the VA are subject to set-asides for small businesses).

do not unambiguously require such purchases to be made from small businesses.⁷⁸ (A petition for Supreme Court review of this decision is pending, however.)⁷⁹

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 (although it could retain discretion not to set-aside procurements for small businesses in particular circumstances).
- 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.

Other Statutes

Other notable 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;⁸⁰ (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;⁸¹ 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.⁸²

⁷⁸ *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923 (Fed. Cir. 2014), *aff'g* 107 Fed. Cl. 226 (November 27, 2012). GAO had reached the opposite conclusion in a series of 18 bid protest decisions issued in 2011 and 2012. *See, e.g.*, *Aldevra*, B-405271; B-405524 (October 11, 2011); *Kingdomware Techs.*, B-405727 (December 19, 2011); *Crosstown Courier Serv., Inc.*, B-406262 (March 21, 2012). *See also* *Alternative Contracting Enters., LLC*; *Pierce First Med.*, B-406265, B-406266, B-406291, B-406291.2, B-406318.1, B-406318.2, B-406343, B-406356, B-406357, B-406369, B-406371, B-406374, B-406400, B-406404, B-406428 (March 26, 2012) (finding that it was within VA’s discretion to promulgate regulations which provided for the purchase of items currently on the AbilityOne list from AbilityOne, as opposed to a set-aside for veteran-owned small businesses).

⁷⁹ Petition for Certiorari No. 14-916 (filed January 29, 2015) (copy on file with the authors).

⁸⁰ 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 (November 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.

⁸¹ *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).

⁸² *See, e.g.*, 12 U.S.C. §1441a (2010) (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(h), 125 Stat. 1245 (December 23, 2011) (“In entering into multiple award indefinite-quantity (continued...)”).

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.⁸³ 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,⁸⁴ although it can still be quite broad depending upon the context. The agency must have been delegated authority to promulgate the regulation by Congress,⁸⁵ and the regulation itself must correspond to the statute if "Congress has directly spoken to the precise question at issue."⁸⁶ If Congress has not 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."⁸⁷ 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.⁸⁸ 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.⁸⁹ Because

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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."). Other agencies currently have similar authority under 15 U.S.C. §644(r)(2) (permitting agencies to set aside orders placed under multiple-award contracts "notwithstanding the fair opportunity requirements under section 2304c(b) of title 10 and section 4106(c) of title 41"). The cited provisions generally require that all vendors holding a multiple-award contract be given a "fair opportunity to be considered" for orders placed under it.

⁸³ 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 91 and accompanying text.

⁸⁴ *See supra* notes 9 to 12 and accompanying text.

⁸⁵ *See generally* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey; CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd.

⁸⁶ *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).

⁸⁷ *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).

⁸⁸ For an overview of current set-aside programs, see generally **Table 1**.

⁸⁹ P.L. 98-369, §§2701-2753, 98 Stat. 1175-1203 (July 18, 1984) (codified, in part, at 10 U.S.C. §2304(a)(1) (continued...))

CICA defines “full and open competition” to mean that “all responsible sources are permitted to submit bids or competitive proposals on the procurement,”⁹⁰ it would appear to bar agencies from implementing set-asides—which are competitions in which only certain responsible firms may compete—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.⁹¹ 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;⁹²
- a rebuttable presumption that members of certain racial and ethnic groups are socially disadvantaged;⁹³
- the maximum net worth that economically disadvantaged women and socially disadvantaged individuals may have while remaining eligible for contracting preferences under the authority of the Small Business Act;⁹⁴
- 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;⁹⁵ and

(...continued)

(procurements of defense agencies) & 41 U.S.C. §3301(a)(1) (procurements of civilian agencies)).

⁹⁰ 41 U.S.C. §107.

⁹¹ 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 \$32.5 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).

⁹² *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).

⁹³ *See* 13 C.F.R. §124.103(b)(1). 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 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).

⁹⁴ *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)(1) (“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 generally excluded when determining net worth.

⁹⁵ *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 (continued...))

- 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.⁹⁶

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.⁹⁷ 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.⁹⁸ In addition, SBA regulations establish procedures for protests of firms’ size and status (e.g., HUBZone small business),⁹⁹ as well as penalties for misrepresentations of size or status.¹⁰⁰ Among other things, the latter regulations permit protests of 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.¹⁰¹ 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

(...continued)

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).

⁹⁶ See 13 C.F.R. §125.10.

⁹⁷ The 112th Congress enacted legislation that restates how the limitations on subcontracting are expressed—in terms of the amount paid instead of the costs of performing—in the hopes of “ensur[ing] that small businesses that get contracts are doing the bulk of the work.” P.L. 112-239, §1651, 126 Stat.2079-81; Charles S. Clark, House Republican Seeks to Curb “Deceitful” Subcontracting, *Govt. Exec.*, February 2, 2012, available at <http://www.govexec.com/contracting/2012/02/house-republican-seeks-curb-deceitful-subcontracting/41074/>. Under this legislation, small businesses may subcontract no more than 50% of the “amount paid to [them] under the contract,” in the case of contracts for services (other than construction) or supplies (other than from a regular dealer in such supplies). This legislation also requires SBA to establish similar limitations for general and special trade construction. P.L. 112-239, §1651, 126 Stat.2079-81. In addition, it grants SBA the authority to modify any statutory limitations on subcontracting if it determines that “such change is necessary to reflect conventional industry practices” for small businesses, and to apply similar percentages to other contracts not awarded under the authority of the Small Business Act. *Id.* As previously noted, the SBA proposed amendments to the regulatory limitations on subcontracting at the end of 2014. See generally 79 Fed. Reg. 77955.

⁹⁸ 13 C.F.R. §§121.406 &126.601(f). It is important to note that, in its recent decision in *Rotech Healthcare Inc. v. United States*, the U.S. Court of Federal Claims found that the SBA regulations here are contrary to the plain language of 15 U.S.C. §637(a)(17)(A) because the regulatory version of the nonmanufacturer rule applies only to contracts for supplies or manufacturing, while the statutory version of the rule, in the court’s view, applies to *any* contract that involves the supply of a product. See 118 Fed. Cl. 408 (2014); James Boland, *Fed. Claims Court Extends Reach of Nonmanufacturer Rule*, LAW360, September 25, 2014. The proposed regulations promulgated by the SBA at the end of 2014 include certain changes to the nonmanufacturer rule, but do not appear to directly respond to the *Rotech* decision.

⁹⁹ 13 C.F.R. §§121.1001-121.1103 (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).

¹⁰⁰ 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).

¹⁰¹ See, e.g., 13 C.F.R. §121.1001(a)(i)-(iv).

Remedies Act, civil or criminal penalties under Section 16 of the Small Business Act, and/or other penalties.¹⁰²

Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR) also plays a significant role in federal contracting and subcontracting with small businesses.¹⁰³ The FAR was promulgated in 1984 as part of an effort to standardize procurement rules across the government,¹⁰⁴ and generally governs the conduct of agency contracting officers.¹⁰⁵ 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.¹⁰⁶

The FAR also provides guidance for contracting officers on locating potential small business sources,¹⁰⁷ determining what constitutes a fair market price when deciding whether to set aside a particular acquisition for small businesses,¹⁰⁸ and what reasons do not justify failure to set aside an acquisition for small businesses.¹⁰⁹ 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

¹⁰² 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: Legal Overview*, by Kate M. Manuel.

¹⁰³ For more on the FAR, see generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.

¹⁰⁴ See Dep’t of Defense, Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., Establishing the Federal Acquisition Regulation, 48 *Federal Register* 42102 (September 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.”).

¹⁰⁵ 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).

¹⁰⁶ 48 C.F.R. §19.102(b)(1)-(3).

¹⁰⁷ 48 C.F.R. §19.202-2.

¹⁰⁸ 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).

¹⁰⁹ 48 C.F.R. §19.502-6(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.

plans,¹¹⁰ and the use of monetary incentives promoting subcontracting with small businesses.¹¹¹ Specifically, the FAR authorizes contracting officers to consider prime contractors' past and proposed performance in subcontracting with SDBs when awarding contracts,¹¹² 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.¹¹³

When they address the same topics, the FAR and SBA regulations generally correspond.¹¹⁴ 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.¹¹⁵ 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,¹¹⁶ or when directing agencies to take particular actions regarding "bundled"

¹¹⁰ 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).

¹¹¹ 48 C.F.R. §52.219-10(b) ("If the Contractor exceeds its subcontracting goals for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in performing this contract, it will receive _ [Contracting Officer to insert the appropriate number between 0 and 10] percent of the dollars in excess of each goal in the plan, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the subcontracting plan, or the award of subcontracts that had been planned but had not been disclosed in the subcontracting plan during contract negotiations).") Formerly, the FAR also included provisions addressing the use of performance in small business subcontracting as an evaluation factor in certain procurements, as well as made somewhat different provisions for monetary incentives. *See* 48 C.F.R. §§19.1201-19.1204 (2013). However, these provisions were deleted as a result of amendments made in 2014. *See generally* Dep't of Defense, Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; Federal Contracting Programs for Minority-Owned and Other Small Businesses: Final Rule, 79 Fed. Reg. 61746, 61746 (Oct. 14, 2014). It is important to note, though, that in making the 2014 amendments, the FAR Council expressly stated that "nothing ... precludes an agency from using evaluation factors and subfactors for subcontracting." The FAR Council also cited SBA regulations authorizing such evaluation factors. *See id.* (citing 13 C.F.R. §125.3(g)).

¹¹² 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. *See* 48 C.F.R. §15.304.

¹¹³ Funds generally are not appropriated specifically to pay such monetary incentives, unlike with "subcontracting bonuses" under the Indian Financing Act. *See, e.g.,* Consolidated and Further Continuing Appropriations Act, P.L. 113-235, §8020.—Stat.—(December 16, 2014) (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).

¹¹⁴ 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)(5); 48 C.F.R. §10.001(c)(2)(i).

¹¹⁵ P.L. 108-375, §807, 118 Stat. 2010-11 (October 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."

¹¹⁶ *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.

contracts.¹¹⁷ SBA, in contrast, is generally tasked with implementing those provisions of the Small Business Act governing firm size, and SBA size standards would prevail over the FAR to the degree that they were inconsistent.¹¹⁸

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.¹¹⁹ 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.¹²⁰ 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.”¹²¹ 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,¹²² and for mentors to have their participation counted towards their subcontracting plans or as evaluation factors in future procurements.¹²³ Such agencies have less flexibility in authorizing reimbursement of advance payments made by mentors to small business subcontractors, like DOD can, because advance payments are strongly disfavored under federal procurement law.¹²⁴

¹¹⁷ 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)-(c).

¹¹⁸ See, e.g., *Marvais 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).

¹¹⁹ See 38 C.F.R. §§ 74.1-74.29; 48 C.F.R. §§ 819.7001-819.7009.

¹²⁰ 48 C.F.R. Appendix I to Chapter 2, 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.

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

¹²² See, e.g., 48 C.F.R. § 3052.219-71(b)(1) (mentor-protégé program of the Department of Homeland Security).

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

¹²⁴ 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 (continued...)”

Such agencies also cannot provide that joint ventures between mentors and protégés may qualify as small for purposes of federal procurements, as SBA can.¹²⁵ SBA may authorize such treatment because the 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.¹²⁶

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 effect 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.¹²⁷ In *Rothe*, the court struck down a statute authorizing the Department of Defense (DOD) to apply a 10% “price evaluation adjustment”¹²⁸ 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 1998,¹²⁹ 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*.¹³⁰ Congress also re-enacted¹³¹ certain preferences for

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payments” and may be used only when authorized in “exceptional cases.” See 48 C.F.R. §§32.501-32.501-2.

¹²⁵ 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 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.” 13 C.F.R. §124.520(d)(1). 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.

¹²⁶ See, e.g., Small Bus. Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 *Federal Register* 55694, 55694 (October 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.”).

¹²⁷ 545 F.3d 1023 (Fed. Cir. 2008). For more on the *Rothe* decision and its potential implications for small business contracting programs, see generally archived 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.

¹²⁸ 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.

¹²⁹ See Strom Thurmond National Defense Authorization Act for FY1999, P.L. 105-261, §801, 112 Stat. 2080-81 (October 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).

¹³⁰ See Small Bus. Admin., The Women-Owned Small Business Federal Contract Assistance Procedures: Eligible Industries, 74 *Federal Register* 1153 (January 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. (continued...)

minority-serving institutions of higher education that the district court, to which the Federal Circuit remanded the case in *Rothe*, had struck down on the grounds that they were “contingent” upon the provision authorizing price evaluation adjustments.¹³² In addition, in October 2014, the Obama Administration amended the FAR to repeal the regulations governing the price evaluation adjustment authority struck down in *Rothe*.¹³³

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.¹³⁴

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.¹³⁵ This test is significant because, when firms are found to be affiliates, their annual receipts or number of employees are generally combined when determining whether each firm is small or other than small for purposes of the Small Business Act (e.g., if firms A and B are found to be affiliates, the number of firm A’s employees are added to the number of firm B’s employees when determining whether firm A is small).¹³⁶ OHA does not hear protests regarding the award, or proposed award, of federal contracts, as discussed below.¹³⁷ Conversely, the Government Accountability Office

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Admin., Women-Owned Small Business Federal Contract Program: Final Rule, *75 Federal Register* 62258 (October 7, 2010).

¹³¹ National Defense Authorization Act for FY2010, P.L. 111-84, §252, 123 Stat. 2242-43 (October 28, 2009).

¹³² *Rothe Dev. Corp. v. Dep’t of Defense*, 2009 U.S. Dist. LEXIS 22029, at *11-14 (W.D. Tex. 2009).

¹³³ 79 Fed. Reg. 61746.

¹³⁴ See OHA Decisions, available at http://archive.sba.gov/aboutsba/sbaprograms/oha/OHADecisions/OHA_DECISIONS.html.

¹³⁵ *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.

¹³⁶ 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.”).

¹³⁷ See 31 U.S.C. §3556 (granting GAO, the procuring agencies, and the U.S. Court of Federal Claims each non-continued...)

(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.¹³⁸

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 other tribunals play a role. GAO and the U.S. Court of Federal Claims,¹³⁹ along with the procuring agencies, have jurisdiction to hear “bid protests,” or challenges to the award or proposed award of federal contracts.¹⁴⁰ 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.¹⁴¹ Subsequently, GAO construed the Veterans Benefits Act as removing VA’s discretion to procure supplies or services through the Federal Supply Schedules when a set-aside for veteran-owned small businesses could be used,¹⁴² an interpretation which, some suggested, could have resulted in veteran-owned small businesses receiving an additional \$3 billion in federal procurement dollars annually.¹⁴³ However, the Court of Appeals for the Federal Circuit recently reached a different conclusion, upholding a lower court decision which had found that the relevant statute was ambiguous and that VA’s interpretation was entitled to deference.¹⁴⁴ VA had provided, in the prologue to certain regulations implementing the Veterans Benefits Act, that supplies or services which could potentially be obtained from veteran-owned small businesses may be purchased through the Federal Supply Schedules.¹⁴⁵

Such differences of opinion between GAO and the Court of Federal Claims are relatively unusual. These tribunals generally agree in their interpretations of various procurement laws and regulations.¹⁴⁶ However, the court’s decisions are legally binding upon executive branch agencies,

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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 (October 19, 1996).

¹³⁸ 4 C.F.R. §21.5(b).

¹³⁹ Appeals from the Court of Federal Claims are heard by the U.S. Court of Appeals for the Federal Circuit.

¹⁴⁰ 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.

¹⁴¹ *See supra* note 8 for a discussion of these decisions and subsequent amendments to the Small Business Act.

¹⁴² Aldevra, B-405271; B-405524 (October 11, 2011).

¹⁴³ *See, e.g.*, Kathleen Miller, Veteran-Owned Suppliers May Gain \$3 Billion from Griddle Fight, *Bloomberg Gov’t*, November 14, 2011.

¹⁴⁴ *See* Kingdomware Techs., Inc. v. United States, 754 F.3d 923 (Fed. Cir. 2014), *aff’g* 107 Fed. Cl. 226 (November 27, 2012). A petition for Supreme Court review of this decision is pending. *See supra* note 79.

¹⁴⁵ Dep’t of Veterans Affairs, VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 *Federal Register* 64619 (December 28, 2009)..

¹⁴⁶ *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)).

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.¹⁴⁷ GAO can only make "recommendations" in its bid protest decisions, although these recommendations are highly influential and typically adopted by the procuring agencies.¹⁴⁸

Federal District Courts

The federal district courts currently do not have jurisdiction to hear bid protests.¹⁴⁹ 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;¹⁵⁰ (2) asserting that particular agency actions are contrary to federal law and, thus, violate the Administrative Procedure Act (APA);¹⁵¹ and (3) alleging liability under the False Claims Act for fraudulent subcontracting plans or reports.¹⁵² In addition, at least one federal district court has found that it has jurisdiction to hear challenges to agency insourcing determinations brought by small businesses.¹⁵³

¹⁴⁷ *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 809 F.2d 979, 986 (3d Cir. 1986).

¹⁴⁸ 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).

¹⁴⁹ See *supra* note 137.

¹⁵⁰ See, e.g., *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994) (finding that such forms were generally not confidential or exempt from disclosure).

¹⁵¹ See, e.g., *Am. Small Bus. League v. Johnson*, 2010 U.S. Dist. LEXIS 97846 (N.D. Cal., September 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).

¹⁵² See, e.g., *United States ex rel. King v. F.E. Moran, Inc.*, 2002 U.S. Dist. LEXIS 16277 (N.D. Ill., August 29, 2002).

¹⁵³ *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: 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>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>Federal Acquisition Regulatory Council (FAR Council)</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; make any requisite price evaluation adjustments for HUBZone small businesses in unrestricted competitions</p> <p>Exercise authority under Title 10 of the U.S. Code, Title 41 of the U.S. Code, 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 grouping requirements into “bundled” or “consolidated” contracts that are 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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