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SUBCONTRACTING TRANSPARENCY AND RELIABILITY ACT OF 2012

DECEMBER 27, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 3893]

The Committee on Small Business, to whom was referred the bill (H.R. 3893) to amend the Small Business Act with respect to subcontracting and insourcing, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

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I. AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Subcontracting Transparency and Reliability Act of 2012".

(b) TABLE OF CONTENTS.—

Sec. 1. Short title; table of contents.

TITLE I—LIMITATIONS ON SUBCONTRACTING

Sec. 101. Limitations on subcontracting.
Sec. 102. Penalties.
Sec. 103. Conforming amendments.
Sec. 104. Guidance.

TITLE II—SUBCONTRACTING PLANS

Sec. 201. Subcontracting plans.
Sec. 202. Notices of subcontracting opportunities.

TITLE III—INSOURCING

Sec. 301. Definitions relating to procurement protest system.
Sec. 302. Insourcing.

TITLE I—LIMITATIONS ON SUBCONTRACTING

SEC. 101. LIMITATIONS ON SUBCONTRACTING.

The Small Business Act (15 U.S.C. 631 et seq.) is amended—

(1) by redesignating section 45 as section 47; and

(2) by inserting after section 44 the following:

"SEC. 45. LIMITATIONS ON SUBCONTRACTING.

"(a) IN GENERAL.—If awarded a contract under section 8(a), 8(m), 15(a), 31, or 36, a covered small business concern—

"(1) in the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract;

"(2) in the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, paid to the concern under the contract;

"(3) in the case of a contract described in more than 1 of paragraphs (1) through (4)—

"(A) shall determine for which category of services or supplies, described in 1 of paragraphs (1) through (4), the greatest percentage of the contract amount is awarded;

"(B) shall determine the amount awarded under the contract for that category of services or supplies; and

"(C) may not expend on subcontractors, with respect to the amount determined under subparagraph (B), more than—

"(i) 50 percent of that amount, if the category of services or supplies applicable under subparagraph (A) is described in paragraph (1); and

"(ii) 50 percent of that amount, if the category of services or supplies applicable under subparagraph (A) is described in paragraph (2); and

"(4) in the case of a contract for supplies from a regular dealer in such supplies, shall supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted—

"(A) by the Administrator, after reviewing a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required by the contract; or

"(B) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

"(b) SIMILARLY SITUATED ENTITIES.—Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted for purposes of determining whether the covered small business concern has violated a requirement established under subsection (a) or (d).

"(c) MODIFICATIONS OF PERCENTAGES.—

"(1) IN GENERAL.—The Administrator may change, by rule (after providing notice and an opportunity for public comment), a percentage specified in paragraphs (1) through (4) of subsection (a) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

"(2) UNIFORMITY.—A change to a percentage under paragraph (1) shall apply to all covered small business concerns.

"(d) OTHER CONTRACTS.—

"(1) IN GENERAL.—With respect to a category of contracts to which a requirement under subsection (a) does not apply, the Administrator is authorized to establish, by rule (after providing notice and an opportunity for public comment), a requirement that a covered small business concern may not expend on subcontractors more than a specified percentage of the amount paid to the concern under a contract in that category.

"(2) UNIFORMITY.—A requirement established under paragraph (1) shall apply to all covered small business concerns.

"(3) CONSTRUCTION PROJECTS.—The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).

"(e) DEFINITIONS.—In this section, the following definitions apply:

"(1) COVERED SMALL BUSINESS CONCERN.—The term 'covered small business concern' means a business concern that—

"(A) with respect to a contract awarded under section 8(a), is a small business concern eligible to receive contracts under that section;

"(B) with respect to a contract awarded under section 8(m)—

"(i) is a small business concern owned and controlled by women (as defined in that section); or

"(ii) is a small business concern owned and controlled by women (as defined in that section) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

"(C) with respect to a contract awarded under section 15(a), is a small business concern;

"(D) with respect to a contract awarded under section 31, is a qualified HUBZone small business concern; or

"(E) with respect to a contract awarded under section 36, is a small business concern owned and controlled by service-disabled veterans.

"(2) SIMILARLY SITUATED ENTITY.—The term 'similarly situated entity' means a subcontractor that—

"(A) if a subcontractor for a small business concern, is a small business concern;

"(B) if a subcontractor for a small business concern eligible to receive contracts under section 8(a), is such a concern;

"(C) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)), is such a concern;

"(D) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law), is such a concern;

"(E) if a subcontractor for a qualified HUBZone small business concern, is such a concern; or

"(F) if a subcontractor for a small business concern owned and controlled by service-disabled veterans, is such a concern.".

SEC. 102. PENALTIES.

Section 16 of the Small Business Act (15 U.S.C. 645) is amended by adding at the end the following:

"(g) SUBCONTRACTING LIMITATIONS.—

"(1) IN GENERAL.—Whoever violates a requirement established under section 45 shall be subject to the penalties prescribed in subsection (d), except that, for an entity that exceeded a limitation on subcontracting under such section, the fine described in subsection (d)(2)(A) shall be treated as the greater of—

"(A) $500,000; or

"(B) the dollar amount expended, in excess of permitted levels, by the entity on subcontractors.

"(2) MONITORING.—Not later than 1 year after the date of enactment of this subsection, the Administrator shall take such actions as are necessary to ensure that an existing Federal subcontracting reporting system is modified to notify the Administrator, the appropriate Director of the Office of Small and Dis-

advantaged Business Utilization, and the appropriate contracting officer if a requirement established under section 45 is violated.".

SEC. 103. CONFORMING AMENDMENTS.

(a) HUBZONES.—Section 3(p)(5) of the Small Business Act (15 U.S.C. 632(p)(5)) is amended—

(1) in subparagraph (A)(i) by striking subclause (III) and inserting the following:

"(III) with respect to any subcontract entered into by the small business concern pursuant to a contract awarded to the small business concern under section 31, the small business concern will ensure that the requirements of section 45 are satisfied; and";

(2) by striking subparagraphs (B) and (C); and

(3) by redesignating subparagraph (D) as subparagraph (B).

(b) ENTITIES ELIGIBLE FOR CONTRACTS UNDER SECTION 8(a).—Section 8(a) of such Act (15 U.S.C. 637(a)) is amended by striking paragraph (14) and inserting the following:

"(14) LIMITATIONS ON SUBCONTRACTING.—A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees to satisfy the requirements of section 45.".

(c) SMALL BUSINESS CONCERNS.—Section 15 of such Act (15 U.S.C. 644) is amended by striking subsection (o) and inserting the following:

"(o) LIMITATIONS ON SUBCONTRACTING.—A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees to satisfy the requirements of section 45.".

SEC. 104. REGULATIONS.

Not later than 180 days after the date of enactment of this Act, the Administrator of the Small Business Administration shall issue guidance with respect to compliance with the changes made to the Small Business Act by the amendments in this Act, with opportunities for notice and comment.

TITLE II—SUBCONTRACTING PLANS

SEC. 201. SUBCONTRACTING PLANS.

(a) SUBCONTRACTING REPORTING REQUIREMENTS.—

(1) IN GENERAL.—Section 8(d)(6) of the Small Business Act (15 U.S.C. 637(d)(6)) is amended—

(A) by striking "(6) Each subcontracting plan" and inserting the following:

"(6) SUBCONTRACTING PLAN REQUIREMENTS.—Each subcontracting plan";

(B) by amending subparagraph (E) to read as follows:

"(E) assurances that the offeror or bidder will—

"(i) submit—

"(I) not later than 180 days after the date on which performance under the applicable contract begins, and every 180 days thereafter until contract performance ends, a report that describes all subcontracting activities under the contract during the preceding 180-day period;

"(II) not later than 1 year after the date on which performance under the applicable contract begins, and annually thereafter until contract performance ends, a report that describes all subcontracting activities under the contract that have occurred before the date on which the report is submitted (except that, with respect to the Department of Defense and the National Aeronautics and Space Administration, a report under this subclause shall be submitted not later than 180 days after the date on which contract performance begins and every 180 days thereafter until contract performance ends); and

"(III) not later than 30 days after the date on which performance under the applicable contract ends, a report that describes all subcontracting activities under the contract; and

"(ii) cooperate with any study or survey required by the applicable Federal agency or the Administration to determine the extent of compliance by the offeror or bidder with the subcontracting plan;"; and

(C) by moving the margins for subparagraphs (A), (B), (C), (D), and (F) 2 ems to the right (so that the align with subparagraph (E), as amended by subparagraph (B) of this paragraph).

(2) REPORTING SYSTEM MODIFICATION.—

(A) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator of the Small Business Administration shall take such actions as are necessary to ensure that the Federal subcontracting reporting system to which covered reports are submitted is modified to notify the Administrator, the appropriate contracting officer, and the appropriate Director of Small and Disadvantaged Business Utilization if an entity fails to submit a required covered report. If the Administrator does not modify the subcontracting reporting system on or before the date that is 1 year after the date of enactment of this Act, the Administrator may not carry out or establish any pilot program until the date the Administrator modifies the reporting system.

(B) COVERED REPORT DEFINED.—In this paragraph, the term "covered report" means a report submitted in accordance with assurances provided under section 8(d)(6)(E) of the Small Business Act (15 U.S.C. 637(d)(6)(E)).

(b) FAILURE TO SUBMIT SUBCONTRACTING REPORTS AS BREACH OF CONTRACT.—Section 8(d)(8) of such Act (15 U.S.C. 637(d)(8)) is amended—

(1) by striking "(8) The failure" and inserting the following:

"(8) MATERIAL BREACH.—The failure";

(2) in subparagraph (A) by striking "subsection, or" and inserting "subsection,";

(3) in subparagraph (B) by striking "subcontract," and inserting "subcontract, or";

(4) by inserting after subparagraph (B) the following:

"(C) assurances provided under paragraph (6)(E),"; and

(5) by moving the margins of subparagraphs (A), (B), and the matter following subparagraph (B) 2 ems to the right.

(c) AUTHORITY OF SMALL BUSINESS ADMINISTRATION.—Section 8(d)(10) of such Act (15 U.S.C. 637(d)(10)) is amended—

(1) by striking "(10) In the case of" and inserting the following:

"(10) AUTHORITY OF ADMINISTRATION.—In the case of";

(2) in subparagraph (B) by striking ", which shall be advisory in nature,";

(3) in subparagraph (C) by striking ", either on a contract-by-contract basis, or in the case contractors" and inserting "as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors"; and

(4) by moving the margins of subparagraphs (A) through (C) 2 ems to the right.

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

"(13) APPEALS.—

"(A) IN GENERAL.—If a procurement center representative or commercial market representative determines that a subcontracting plan required under paragraph (4) or (5) fails to provide the maximum practicable opportunity for covered small business concerns to participate in the performance of the contract to which the plan applies, such representative may delay acceptance of the plan in accordance with subparagraph (B).

"(B) PROCESS.—A procurement center representative or commercial market representative who makes the determination under subparagraph (A) with respect to a subcontracting plan may delay acceptance of the plan for a 30-day period by providing written notice of such determination to appropriate personnel of the contracting agency. Such notice shall include recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph.

"(C) DISAGREEMENTS.—If a procurement center representative or commercial market representative delays the acceptance of a subcontracting plan under subparagraph (B) for a 30-day period and, during such period, does not reach agreement with appropriate personnel of the contracting agency to alter the plan to provide the maximum practicable opportunity described in subparagraph (A), the disagreement shall be submitted to the head of the contracting agency by the Administrator for a final determination.

"(D) COVERED SMALL BUSINESS CONCERNS DEFINED.—In this paragraph, the term 'covered small business concerns' means small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.".

SEC. 202. NOTICES OF SUBCONTRACTING OPPORTUNITIES.

Section 8(k)(1) of the Small Business Act (15 U.S.C. 637(k)(1)) is amended by striking "in the Commerce Business Daily" and inserting "on the appropriate Federal Web site (as determined by the Administrator)".

SEC. 203. REGULATIONS.

Not later than 180 days after the date of enactment of this Act, the Administrator of the Small Business Administration shall issue guidance with respect to the changes made to the Small Business Act, with opportunity for notice and comment.

TITLE III—INSOURCING

SEC. 301. DEFINITIONS RELATING TO PROCUREMENT PROTEST SYSTEM.

(a) PROTEST.—Section 3551(1) of title 31, United States Code, is amended by adding at the end the following:

"(F) Conversion of a function that is being performed by a small business concern to performance by a Federal employee.".

(b) INTERESTED PARTY.—Section 3551(2) of such title is amended—

(1) in subparagraph (A) by striking "and" at the end;

(2) in subparagraph (B) by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(C) with respect to a conversion described in paragraph (1)(F), means a small business concern (as that term is defined in section 3(a) of the Small Business Act) whose economic interest would be affected by the conversion.".

SEC. 302. INSOURCING.

The Small Business Act (15 U.S.C. 631 et seq.), as amended by this Act, is further amended by inserting after section 45 the following:

"SEC. 46. INSOURCING.

"A Federal agency may only convert a function that is being performed by a small business concern to performance by a Federal employee if—

"(1) the agency has made publicly available, after providing notice and an opportunity for public comment, the procedures of the agency with respect to decisions to convert a function being performed by a small business concern to performance by a Federal employee; and

"(2) the procedures described in paragraph (1) include that all decisions described in such paragraph are reviewed by any appropriate—

"(A) Office of Small and Disadvantaged Business Utilization; and

"(B) procurement center representative.".

II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 3893, the "Subcontracting Transparency and Reliability Act of 2012," is to amend the Small Business Act (the Act)[1] to impose additional limitations on the ability of small businesses that obtain contracts through preferences established in the Act to subcontract the performance of that work to large businesses. By changing basis on which the limitations on subcontracting by small business concerns are calculated from cost to price, the bill will promote firms' ability to comply with subcontracting limitations. At the same time, this legislation also recognizes the need to penalize those who engage in improper subcontracting by imposing additional penalties on those who attempt to circumvent these limitations.

Further, to improve the subcontracting plans that large business prime contractors must submit with their bids, H.R. 3893 amends the reporting of subcontracting actions taken by the large prime

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

contractors by requiring more accurate information. Finally, the legislation imposes additional restraints on the ability of the federal government to transfer work performed under contract by private entities and transfer it to federal employees by a process known as "insourcing."

III. NEED FOR LEGISLATION

In FY 2010, approximately $536 billion were awarded as federal prime contracts, of which at least $210 billion ultimately went to subcontractors. The Act iterates Congress's belief in the importance of small business participation in federal prime contracts and the resultant subcontracts. Therefore, when a small business receives a set aside or sole source contract under the auspices of the Act contracting programs, the government has a vested interest in ensuring that the small business performs a significant portion of the work. Otherwise, the small business could pass through the work to a large contractor, thereby defeating the purpose of the Act. Consequently, Sections 3(p)(A)(i)(III), 8(a)(14) and 15(o) of the Act each impose restrictions on the amount of work a business may subcontract on a set aside contract.

Small businesses face two issues in making a good faith effort to comply with the restrictions on pass-through contracting, First, there problems with the cost-based accounting required by the Act, and second there are issues concerning classification of the contracts themselves.

First, there are the inherent challenges with cost-based accounting. Take for example, the case of a service contract. Pursuant to section 15(o)(1)(A) of the Act, at least 50 percent of the cost of contract performance incurred for personnel must be spent on employees of the prime contractor. However, that requires that the prime contractor have a cost-based accounting system, something that few small businesses and almost no commercial companies use. The Federal Acquisition Regulation (FAR) specifically exempts most small businesses from employing cost accounting systems, because they are considered a barrier to entry for small firms.[2] Even if a prime contractor has a cost accounting system, the firm must have access to each subcontractor's personnel costs if the firm is to correctly calculate 50 percent of the cost of contract performance incurred for personnel.

Unfortunately, even for cost accounting standards compliant contracts, the subcontractor is not required to give its cost information to the prime contractor, because the information is considered too sensitive. Instead, subcontractors are permitted to provide cost and pricing data in a sealed envelope that is transmitted to the contracting officer (CO). However, this data pass-through will not work when examining limitation on subcontracting, as the prime contractor needs access to the cost data to track its own compliance. The small firm that wants to comply is therefore left making guesses and estimates regarding its subcontractors costs.

The second challenge faced by small businesses is that the current statutory scheme assumes that contracts are either for goods or services. While this is sometimes the case, an increasing number of small businesses are receiving contracts as value added resellers,

[2] 48 C.F.R. § 30.000.

or for contracts that encompass the provision of goods and services. Neither the Act nor the implementing regulations give small firms guidance on how to comply in these scenarios.

H.R. 3893 clarifies the limitation on subcontracting and puts in place a usable standard to ease small businesses ability to comply with the law. Specifically, by changing the standard from cost to price and allowing the Small Business Administration (SBA) to promulgate rules which recognize the differences between certain industries, tools are being provided to ensure ease of compliance.

However, due to the challenges and complexities of complying with limitations on subcontracting, firms occasionally, rather than acting in good faith, utilized the complexity to their advantage while defrauding and harming legitimate small businesses. In this scenario, the issue is that tracking compliance with the limitation on subcontracting provisions is complicated, time consuming, and bears little advantage for the typical COs. Merely easing the ability to comply with the subcontracting limitations does not itself solve the problem. Therefore, this legislation provides penalties for those firms who violate these limitations.

Furthermore, the Executive branch has a nonstatutory goal of awarding 35.9 percent of all dollars subcontracted from federal prime contracts to small businesses.[3] It also has statutory goals of awarding 5 percent of subcontracted dollars to Women-Owned Small Businesses (WOSBs) and Small Disadvantaged Businesses (SDBs) firms, and 3 percent to Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Historically Underutilized Business Zone (HUBZone) small businesses. To achieve these goals, a contract awarded to an other-than-small business for more than $650,000 must include a subcontracting plan enumerating the opportunities for small businesses to participate as subcontractors and the plan must assign both percentage and dollar value goals to these opportunities.[4] The failure of an other-than-small business to make a good faith effort to comply with the subcontracting plan is supposed to result in the government collecting liquidated damages from the contractor.[5] The SBA Procurement Center Representative (PCR),[6] when available, provides an opinion to the CO on the appropriate subcontracting goals, and then the Commercial Market Representative (CMR)[7] and CO assume responsibility for post award compliance with the subcontracting plan.

Firms with subcontracting plans are required to submit semi-annual individual contract reports, a report within 30 days of contract

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[3] SBA, Governmentwide 2010 Small Business Procurement Scorecard (2011). Interestingly, in 2003, the goal was 40 percent, and in 1978, this Committee amended the Act, H. Rep. No. 95–949 at 5 (1978), to address the fact that small businesses were receiving only 37.5 percent of subcontract dollars—1.6 percent more than the current goal. SBA, Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals and Achievements 6 (2003).

[4] 15 U.S.C. § 637(d).

[5] *Id.* at § 637(d)(5). The damages are calculated as the actual dollar amount by which the contractor failed to achieve each subcontracting goal. 48 C.F.R. § 19.705–7.

[6] According to the SBA, PCRs "increase the small business share of Federal procurement awards by initiating small business set-asides, reserving procurements for competition among small business firms; providing small business sources to Federal buying activities; and counseling small firms. In addition, PCRs advocate for the breakout of items for full and open competition to affect savings to the Federal Government." SBA, Government Contracting Field Staff Directory (2011) (hereinafter Field Staff Directory) available at http://www.sba.gov/content/government-contracting-field-staff-directory.

[7] CMRs also assist small businesses seeking subcontracts through counseling and matchmaking. *Id.*

completion, and summary subcontracting reports annually, except that the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA) require summary reports semi-annually. These reports are submitted using the Electronic Subcontracting Reporting System (ESRS). Compliance with the subcontracting goal is reflected in past performance reports on prime contractors.[8] However, given the sheer number of other-than-small prime contractors and the fact that there are fewer than 35 full and part time CMRs,[9] it is unsurprising that in FY 2006, the SBA Office of the Inspector General (OIG) found that CMRs monitored less than half of the 2,200 largest prime contractors.[10]

In order to aid small businesses in receiving subcontracting opportunities and promote compliance with requirements to submit subcontracting plans, this legislation allows PCRs and CMRs ability to review subcontracting plans ensuring the maximum practicable opportunity for small business concerns to participate. The CMRs and PCRs are then permitted to protest those plans that do not represent the maximum practicable utilization of small businesses as subcontractors.

Additionally, the Act requires that prime contractors publish any subcontracting opportunities over $10,000 through a publication known as Commerce Business Daily (CBD).[11] At the time this provision was added, CBD also reported all prime contract opportunities. On January 1, 2002, CBD was replaced by Federal Business Opportunities (FBO)—a website that provides all prime contract opportunities over $25,000. SBA introduced Subcontracting Network (SUB-Net), which was intended to replace the subcontracting function of the CBD. Unfortunately, SUB-Net has never been fully adopted. Furthermore, the FAR does not even mention SUB-Net, so it remains unclear how prime contractors would be required to use the system. Due to this, H.R. 3893 requires that federal subcontracting opportunities are being posted on an appropriate federal website that widens the dissemination of prime contractor subcontracting opportunities.

Finally, this bill seeks to ensure transparency in the insourcing process. Insourcing is the process by which the federal government transfers work performed under contract by private entities to federal employees. Much of the debate regarding insourcing focuses on which work should be performed by government employees and which work may be performed by private entities. The Constitution of the United States vests the executive power in the President,[12] foresees certain duties that should be restricted to government.[13] However, it was understood that not all functions of government need be carried out by federal employees, but that contractors

[8] 48 C.F.R. § 19.704.
[9] The average CMR is responsible for 90 to 200 prime contractors. GAO, Improvements Needed to Help Ensure Reliability of SBA's Performance Data on Procurement Center Representatives 2 GAO–11–549 (2011).
[10] SBA OIG, Review of SBA's Subcontracting Assistance Program, 2007 (No. 7–33).
[11] 15 U.S.C. § 637(d)(8)(k).
[12] U.S. Const. art. II, § 1, cl. 1.
[13] *See, e.g.,* U.S. Const. art. II, § 2–3; U.S. Const. art. I, § 8.

could provide some goods and services.[14] Yet there has always remained a question as to when work should be performed by federal employees and when it should be performed by contractors. It is accepted that work which is inherently governmental should be performed by federal employees.[15] There remains a debate concerning what is inherently governmental and how work not inherently governmental should be performed.

The most recent attempt to address this issue was the Omnibus Appropriations Act (OAA) of 2009.[16] Pursuant to the 2009 OAA, each civilian agency was required to publish insourcing guidance by mid-July of 2009. However, three years later, that guidance has not been made publicly available. According to the GAO, agencies were waiting for final guidance from Office of Federal Procurement Policy (OFPP) before issuing their own guidelines, so that the insourcing documents are consistent.[17] However, the OFPP guidance was published on September 12, 2011[18] yet agency specific guidance has not yet been made public. This does not mean that agencies have not been insourcing, simply that there is no guidance publicly available to the small businesses whose work is being insourced.

To promote transparency and ensure that the unique nature of small business concerns are examined during an insourcing decision, H.R. 3893 allows small firms to protest the insourcing of their contract as well as requiring that an Agency must publish the procedures for converting the function previously contracted to a small business concern have a notice and comment period before insourcing that contract. Additionally, the decisions must be reviewed by a PCR or the agency's Office of Small and Disadvantaged Business Utilization to ensure small business concerns are being appropriately addressed.

IV. HEARINGS

In the 112th Congress, the Committee held three hearings to address subcontracting and insourcing. One was conducted by the Subcommittee on Contracting and Workforce at a hearing entitled "Insourcing Gone Awry: Outsourcing Small Business Jobs" on June 23, 2011. At this hearing, the Subcommittee examined the implementation of the Administration's insourcing policies and the effect of these policies on small businesses. Specifically, five issues were discussed: the lack of transparency in the insourcing process; inconsistencies in the cost studies used to justify insourcing; the prohibition on public-private competitions when insourcing; the lack of standing for small businesses that wish to challenge agency insourcing decision; and the role of the SBA in insourcing.

The second hearing, also conducted by the Subcommittee on Contracting and Workforce was entitled "Subpar Subcontracting: Challenges for Small Business Contractors" on October 6, 2011. At this

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[14] *See, e.g., R.R. Co. v. Peniston,* 85 U.S. 5 (1873) (Contractor provided services to government); *Reeside v. Walker,* 52 U.S. 272 (1851) (plaintiff was heir to contractor who delivered the mail for the Federal government); U.S. Const. art. I, § 8 (Congress has the power to spend).

[15] 31 U.S.C. § 501 (note).

[16] Omnibus Appropriations Act, 2009 [hereinafter 2009 OAA] Pub. L. No. 111–8, § 736, 126 Stat. 524 (2009).

[17] GAO, Insourcing Guidelines 2 (GAO–10–58R) (Oct. 6, 2009).

[18] Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Sept. 12, 2011).

hearing, the Subcommittee examined issues with the limitation on subcontracting requirements; noncompliance with subcontracting plans; and duplicative government contracting systems which fail to support enforcement or compliance.

The third hearing was held by the Subcommittee on Investigations, Oversight and Regulation on October 27, 2011 and entitled "Misrepresentation and Fraud: Bad Actors in the Small Business Procurement Programs." The Subcommittee examined whether there are sufficient monitoring mechanisms in place to detect fraud and misrepresentation related to limitations on subcontracting.

V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on March 7, 2012, and ordered H.R. 3893 reported, as amended, to the House by a roll call vote of 11 to 7 at 3:27 pm. During the markup, two amendments were offered, and one amendment was adopted while the other amendment was rejected. Disposition of the amendments is addressed below and is based on the order amendments were filed with the Clerk of the Committee and not necessarily in the order that they were considered at the markup.

Amendment Number One filed by Mr. Mulvaney (R–SC) allows the Administrator to set appropriate limitations on subcontracting for construction contracts, and clarifies that the insourcing provisions only apply to small businesses. Amendment Number One was adopted by a voice vote at 3:16 pm.

Amendment Number Two filed by Ms. Clarke (D–NY) strikes sections 301 and 302 related to insourcing. Amendment Number Two failed by a voice vote at 3:26 pm.

VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. No recorded votes were taken in consideration of H.R. 3893.

AMENDMENT TO H.R. 3893

OFFERED BY MR. MULVANEY OF SOUTH CAROLINA

Page 2, beginning on line 13, strike "(except construction)".

Strike page 2, line 17, and all that follows through page 3, line 7, and redesignate provisions accordingly.

Page 4, strike line 5 and all that follows through line 12, and redesignate provisions accordingly.

Page 6, insert after line 3 the following:

> (3) CONSTRUCTION PROJECTS.—The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).

Page 18, line 2, strike "private sector entity" and insert "small business concern".

Page 18, line 12, strike "includes any" and insert "means a".

AMENDMENT TO H.R. 3893

OFFERED BY MS. CLARKE OF NEW YORK

Beginning on page 17, line 18, strike all that follows through the end of the bill, and redesignate provisions accordingly.

VII. SECTION-BY-SECTION ANALYSIS OF H.R. 3893

SECTION-BY-SECTION ANALYSIS OF H.R. 3893 AS AMENDED

Section 1. Short Title; Table of Contents

This section provides that the bill may be cited as the "Subcontracting Transparency and Reliability Act of 2012."

TITLE I—LIMITATIONS ON SUBCONTRACTING

Section 101. Limitations on Subcontracting

This section amends the Small Business Act by changing the limitations on subcontracting by small business concerns from cost to price and by allowing, in case of a contract that combines services, construction or supplies, the limitation on subcontracting to be determined by the category that is the greatest percentage of the contract amount. Currently, these limitations are addressed in sections 8(a), 8(m), 15(a), 31, or 36 of the Act. H.R. 3893 instead consolidates these into a new section 45. This addresses confusion by slight inconsistencies in the language of each individual section.

Section 45 then limits subcontracting based on the price of the contract rather than the costs incurred by the contractor. Specifically, for service contracts, prime contractors are limited to expending 50 percent of the amount paid under the contract.

This section also would require that amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be used in the determination of the subcontracting limitations. This will allow small businesses to pursue larger contracts, and encourage the formation of small business teams.

Additionally this section allows the Administrator to modify the subcontracting limitation percentage by rule with public notice and comment period is needed to reflect industry changes. The Administrator has previously done so for construction and specialty construction firms, where standard industry practice is to subcontract a much higher percentage of work. The Administrator is directed to continue these variances for general and specialty construction, and to adopt similar practices for industries where additional subcontracting is required.

Section 102. Penalties

This section amends section 16 of the Act by establishing penalties for anyone who violates the subcontracting limitations established in section 45 as added by this bill. An entity that exceeds the limitation on subcontracting will be fined either $500,000 or

the dollar amount expended to the subcontractor in excess of permitted levels, whichever is greater.

Section 103. Conforming Amendments

This section makes conforming amendments to the Act in order to incorporate the changes made by section 101. Specifically, the limitation in subcontracting provisions in sections 8, 15, 31 and 36 are replaced with references to section 45.

Section 104. Regulations

This section requires the Administrator to issue implementing regulations no later than 180 days after the date of passage of H.R. 3893. The regulations must be promulgated pursuant to notice and comment rulemaking.

TITLE II—SUBCONTRACTING PLANS

Section 201. Subcontracting Plans

Subsection (a)—Subcontracting Reporting Requirements

This subsection amends section 8(d) of the Act to require an offeror or bidder responding to a federal solicitation to submit a subcontracting report every 6 months during contract performance, an annual subcontracting report during performance, and a summary report within 30 days of the end of the contract. This is a codification of the reporting requirements currently in use. As DoD and NASA currently require an additional semiannual report, this requirement was also retained for contractors at those agencies.

This subsection also requires the offeror or bidder to cooperate with any federal survey or study to determine the extent of compliance with the subcontracting plan. Additionally, it provides for modification of the federal subcontracting reporting system by the Administrator, so that the system will notify appropriate the appropriate federal employees if a contractor fails to submit a required report. If the modification to the reporting system is not completed within the first year after passage of H.R. 3893, this subsection prohibits the Administrator from establishing or carrying out any pilot program.

Subsection (b)—Failure to Submit Subcontracting Reports as a Breach of Contract

This subsection provides authority for a PCR or CMR to assess whether a proposed subcontracting plan provides the maximum practicable opportunity for small business concerns to participate. If the PCR or CMR believes that the plan does not provide sufficient opportunities for small business participation, the PCR or CMR is permitted to delay acceptance of the subcontracting plan for up to 30 days. However, if the PCR or CMR fails to reach an agreement with the contracting agency's personnel on a plan to provide the maximum practicable opportunity; this subsection provides that the disagreement shall be decided by the head of the contracting agency.

Section 202. Notices of Subcontracting Opportunities

This section amends section 8(k) of the Act to require that notices of small business contracting opportunities to be posted on an

appropriate federal website. This is necessary as the Act currently requires publication in the CBD, which has been defunct for a decade. The Administrator is given discretion to determine the appropriate replacement website, but the website should be one that provides for maximal dissemination of opportunities available to small businesses seeking subcontracts.

Section 203. Regulations

This section requires the Administrator promulgate regulations implementing H.R. 3893 within 180 days of passage.

TITLE III—INSOURCING

Section 301. Definitions Relating to Procurement Protest System

This section amends section 3551(1) of title 31 to allow include any small business concern whose contract is being insourced or whose economic interests will be affected to protest the agency's decision at GAO. This is comparable to the protection already provided under section 3557 of title 31 to federal employees whose functions are being converted to performance by a private company.

Section 302. Insourcing

This section would amend the Act by adding a new section 46. The new section requires that, prior to insourcing work currently performed by a small business, the agency insourcing the work must publish by notice and comment rulemaking its procedures for determining which functions to convert. Further, the procedures must provide for the review of any insourcing decisions involving a small business by the appropriate Office of Small and Disadvantaged Business Utilization and PCR.

VIII. Unfunded Mandates

H.R. 3893 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104–4, and would impose no costs on state, local or tribal governments.

IX. New Budget Authority, Entitlement Authority and Tax Expenditures

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures. The Committee has not received an estimate of new budget authority contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974. However, the Committee believes that the cost of implementing H.R. 3893 should be less than $1 million. This amount should allow for SBA to modify its subcontracting reporting systems to allow for improved reporting and notification. All other costs contained herein would be handled under existing levels of appropriations for agency salary and expenses.

X. Oversight Findings

In accordance with clause 2(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 3893 are incorporated into the descriptive portions of this report.

XI. Statement of Constitutional Authority

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18 and Art. IV, § 3, cl. 2 of the Constitution of the United States.

XII. Congressional Accountability Act

H.R. 3893 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104–1.

XIII. Federal Advisory Committee Act Statement

H.R. 3893 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

XIV. Statement of No Earmarks

Pursuant to clause 9 of rule XXI, H.R. 3893 does not contain any congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of rule XXI of the Rules of the House.

XV. Performance Goals and Objectives

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

H.R. 3893 includes a number of provisions designed to improve compliance with limitations on subcontracting found in the Small Business Act, ensure compliance with reporting subcontracting plans, and promote transparency for insourcing the work of small business concerns.

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

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

SMALL BUSINESS ACT

* * * * * * *

Sec. 3. (a) * * *

* * * * * * *

(p) DEFINITIONS RELATING TO HUBZONES.—In this Act:

(1) * * *

* * * * * * *

(5) QUALIFIED HUBZONE SMALL BUSINESS CONCERN.—

(A) IN GENERAL.—A HUBZone small business concern is "qualified", if—

(i) the small business concern has certified in writing to the Administrator (or the Administrator otherwise determines, based on information submitted to the Administrator by the small business concern, or based on certification procedures, which shall be established by the Administration by regulation) that—

(I) * * *

* * * * * * *

[(III) with respect to any subcontract entered into by the small business concern pursuant to a contract awarded to the small business concern under section 31, the small business concern will ensure that—

[(aa) in the case of a contract for services (except construction), not less than 50 percent of the cost of contract performance incurred for personnel will be expended for its employees or for employees of other HUBZone small business concerns;

[(bb) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), not less than 50 percent of the cost of manufacturing the supplies (not including the cost of materials) will be incurred in connection with the performance of the contract in a HUBZone by 1 or more HUBZone small business concerns; and

[(cc) in the case of a contract for the procurement by the Secretary of Agriculture of agricultural commodities, none of the commodity being procured will be obtained by the prime contractor through a subcontract for the purchase of the commodity in substantially the final form in which it is to be supplied to the Government; and]

(III) with respect to any subcontract entered into by the small business concern pursuant to a contract awarded to the small business concern under section 31, the small business concern will ensure that the requirements of section 45 are satisfied; and

* * * * * * *

[(B) CHANGE IN PERCENTAGES.—The Administrator may utilize a percentage other than the percentage specified in item (aa) or (bb) of subparagraph (A)(i)(III), if the Administrator determines that such action is necessary to reflect

conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry category.

[(C) CONSTRUCTION AND OTHER CONTRACTS.—The Administrator shall promulgate final regulations imposing requirements that are similar to those specified in items (aa) and (bb) of subparagraph (A)(i)(III) on contracts for general and specialty construction, and on contracts for any other industry category that would not otherwise be subject to those requirements. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B).]

[(D)] *(B)* LIST OF QUALIFIED SMALL BUSINESS CONCERNS.—The Administrator shall establish and maintain a list of qualified HUBZone small business concerns, which list shall, to the extent practicable—

(i) * * *

* * * * * * *

SEC. 8. (a)(1) * * *

* * * * * * *

[(14)(A) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—

[(i) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

[(ii) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

[(B) The Administrator may change the percentage under clause (i) or (ii) of subparagraph (A) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category. A percentage established under the preceding sentence may not differ from a percentage established under section 15(o).

[(C) The Administration shall establish, through public rulemaking, requirements similar to those specified in subparagraph (A) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to such requirement shall be determined in accordance with subparagraph (B), except that such a percentage may not differ from a percentage established under section 15(o) for the same industry category.]

(14) LIMITATIONS ON SUBCONTRACTING.—A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees to satisfy the requirements of section 45.

* * * * * * *

(d)(1) * * *

* * * * * * *

[(6) Each subcontracting plan]

(6) SUBCONTRACTING PLAN REQUIRLEMENTS.—Each subcontracting plan required under paragraph (4) or (5) shall include—

(A) percentage goals for the utilization as subcontractors of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

[(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan;]

(E) assurances that the offeror or bidder will—

(i) submit—

(I) not later than 180 days after the date on which performance under the applicable contract begins, and every 180 days thereafter until contract performance ends, a report that describes all subcontracting activities under the contract during the preceding 180-day period;

(II) not later than 1 year after the date on which performance under the applicable contract begins, and annually thereafter until contract performance ends, a report that describes all subcontracting activities under the contract that have occurred before the date on which the report is submitted (except that, with respect to the Department of Defense and the National Aeronautics and Space Administration, a report under this

subclause shall be submitted not later than 180 days after the date on which contract performance begins and every 180 days thereafter until contract performance ends); and

(III) not later than 30 days after the date on which performance under the applicable contract ends, a report that describes all subcontracting activities under the contract; and

(ii) cooperate with any study or survey required by the applicable Federal agency or the Administration to determine the extent of compliance by the offeror or bidder with the subcontracting plan;

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; and efforts to identify and award subcontracts to such small business concerns; and

* * * * * * *

[(8) The failure]

(8) MATERIAL BREACH.—The failure of any contractor or subcontractor to comply in good faith with—

(A) the clause contained in paragraph (3) of this [subsection, or] *subsection,*

(B) any plan required of such contractor pursuant to the authority of this subsection to be included in its contract or [subcontract,] *subcontract, or*

(C) assurances provided under paragraph (6)(E),

shall be a material breach of such contract or subcontract.

* * * * * * *

[(10) In the case of]

(10) AUTHORITY OF ADMINISTRATION.—In the case of contracts within the provisions of paragraphs (4), (5), and (6), the Administration is authorized to—

(A) assist Federal agencies and businesses in complying with their responsibilities under the provisions of this subsection, including the formulation of subcontracting plans pursuant to paragraph (4);

(B) review any solicitation for any contract to be let pursuant to paragraphs (4) and (5) to determine the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate as subcontractors in the performance of any contract resulting from any solicitation,

and to submit its findings[, which shall be advisory in nature,] to the appropriate Federal agency; and

(C) evaluate compliance with subcontracting plans[, either on a contract-by-contract basis, or in the case contractors] *as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors* having multiple contracts, on an aggregate basis.

* * * * * * *

(13) APPEALS.—

(A) IN GENERAL.—If a procurement center representative or commercial market representative determines that a subcontracting plan required under paragraph (4) or (5) fails to provide the maximum practicable opportunity for covered small business concerns to participate in the performance of the contract to which the plan applies, such representative may delay acceptance of the plan in accordance with subparagraph (B).

(B) PROCESS.—A procurement center representative or commercial market representative who makes the determination under subparagraph (A) with respect to a subcontracting plan may delay acceptance of the plan for a 30-day period by providing written notice of such determination to appropriate personnel of the contracting agency. Such notice shall include recommendations for altering the plan to provide the maximum practicable opportunity described in that subparagraph.

(C) DISAGREEMENTS.—If a procurement center representative or commercial market representative delays the acceptance of a subcontracting plan under subparagraph (B) for a 30-day period and, during such period, does not reach agreement with appropriate personnel of the contracting agency to alter the plan to provide the maximum practicable opportunity described in subparagraph (A), the disagreement shall be submitted to the head of the contracting agency by the Administrator for a final determination.

(D) COVERED SMALL BUSINESS CONCERNS DEFINED.—In this paragraph, the term "covered small business concerns" means small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

* * * * * * *

(k) NOTICES OF SUBCONTRACTING OPPORTUNITIES.—

(1) IN GENERAL.—Notices of subcontracting opportunities may be submitted for publication [in the Commerce Business Daily] *on the appropriate Federal Web site (as determined by the Administrator)* by—

(A) * * *

* * * * * * *

SEC. 15. (a) * * *

* * * * * * *

[(o)(1) A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that—

[(A) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

[(B) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

[(2) The Administrator may change the percentage under subparagraph (A) or (B) of paragraph (1) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

[(3) The Administration shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).]

(o) LIMITATIONS ON SUBCONTRACTING.—A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees to satisfy the requirements of section 45.

* * * * * * *

SEC. 16. (a) * * *

* * * * * * *

(g) SUBCONTRACTING LIMITATIONS.—

(1) IN GENERAL.—Whoever violates a requirement established under section 45 shall be subject to the penalties prescribed in subsection (d), except that, for an entity that exceeded a limitation on subcontracting under such section, the fine described in subsection (d)(2)(A) shall be treated as the greater of—

(A) $500,000; or

(B) the dollar amount expended, in excess of permitted levels, by the entity on subcontractors.

(2) MONITORING.—Not later than 1 year after the date of enactment of this subsection, the Administrator shall take such actions as are necessary to ensure that an existing Federal subcontracting reporting system is modified to notify the Administrator, the appropriate Director of the Office of Small and Disadvantaged Business Utilization, and the appropriate contracting officer if a requirement established under section 45 is violated.

* * * * * * *

SEC. 45. LIMITATIONS ON SUBCONTRACTING.

(a) IN GENERAL.—If awarded a contract under section 8(a), 8(m), 15(a), 31, or 36, a covered small business concern—

(1) in the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract;

(2) in the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, paid to the concern under the contract;

(3) in the case of a contract described in more than 1 of paragraphs (1) through (4)—

(A) shall determine for which category of services or supplies, described in 1 of paragraphs (1) through (4), the greatest percentage of the contract amount is awarded;

(B) shall determine the amount awarded under the contract for that category of services or supplies; and

(C) may not expend on subcontractors, with respect to the amount determined under subparagraph (B), more than—

(i) 50 percent of that amount, if the category of services or supplies applicable under subparagraph (A) is described in paragraph (1); and

(ii) 50 percent of that amount, if the category of services or supplies applicable under subparagraph (A) is described in paragraph (2); and

(4) in the case of a contract for supplies from a regular dealer in such supplies, shall supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted—

(A) by the Administrator, after reviewing a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required by the contract; or

(B) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

(b) SIMILARLY SITUATED ENTITIES.—Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted for purposes of determining whether the covered small business concern has violated a requirement established under subsection (a) or (d).

(c) MODIFICATIONS OF PERCENTAGES.—

(1) IN GENERAL.—The Administrator may change, by rule (after providing notice and an opportunity for public comment), a percentage specified in paragraphs (1) through (4) of subsection (a) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

(2) UNIFORMITY.—A change to a percentage under paragraph (1) shall apply to all covered small business concerns.

(d) OTHER CONTRACTS.—

(1) IN GENERAL.—With respect to a category of contracts to which a requirement under subsection (a) does not apply, the Administrator is authorized to establish, by rule (after providing notice and an opportunity for public comment), a re-

quirement that a covered small business concern may not expend on subcontractors more than a specified percentage of the amount paid to the concern under a contract in that category.

(2) UNIFORMITY.—A requirement established under paragraph (1) shall apply to all covered small business concerns.

(3) CONSTRUCTION PROJECTS.—The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).

(e) DEFINITIONS.—In this section, the following definitions apply:

(1) COVERED SMALL BUSINESS CONCERN.—The term "covered small business concern" means a business concern that—

(A) with respect to a contract awarded under section 8(a), is a small business concern eligible to receive contracts under that section;

(B) with respect to a contract awarded under section 8(m)—

(i) is a small business concern owned and controlled by women (as defined in that section); or

(ii) is a small business concern owned and controlled by women (as defined in that section) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(C) with respect to a contract awarded under section 15(a), is a small business concern;

(D) with respect to a contract awarded under section 31, is a qualified HUBZone small business concern; or

(E) with respect to a contract awarded under section 36, is a small business concern owned and controlled by service-disabled veterans.

(2) SIMILARLY SITUATED ENTITY.—The term "similarly situated entity" means a subcontractor that—

(A) if a subcontractor for a small business concern, is a small business concern;

(B) if a subcontractor for a small business concern eligible to receive contracts under section 8(a), is such a concern;

(C) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)), is such a concern;

(D) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law), is such a concern;

(E) if a subcontractor for a qualified HUBZone small business concern, is such a concern; or

(F) if a subcontractor for a small business concern owned and controlled by service-disabled veterans, is such a concern.

SEC. 46. INSOURCING.

A Federal agency may only convert a function that is being performed by a small business concern to performance by a Federal employee if—

(1) the agency has made publicly available, after providing notice and an opportunity for public comment, the procedures of the agency with respect to decisions to convert a function being performed by a small business concern to performance by a Federal employee; and

(2) the procedures described in paragraph (1) include that all decisions described in such paragraph are reviewed by any appropriate—

(A) Office of Small and Disadvantaged Business Utilization; and

(B) procurement center representative.

SEC. **[**45.**]** *47.* All laws and parts of laws inconsistent with this Act are hereby repealed to the extent of such inconsistency.

TITLE 31, UNITED STATES CODE

* * * * * * *

SUBTITLE III—FINANCIAL MANAGEMENT

* * * * * * *

CHAPTER 35—ACCOUNTING AND COLLECTION

* * * * * * *

SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

§ 3551. Definitions

In this subchapter:

(1) The term "protest" means a written objection by an interested party to any of the following:

(A) * * *

* * * * * * *

(F) Conversion of a function that is being performed by a small business concern to performance by a Federal employee.

(2) The term "interested party"—

(A) with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an 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; **[**and**]**

(B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 with respect to the performance of an activity or function of a Federal agency, or a decision to convert a

function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, includes—

(i) * * *

(ii) any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest under this subchapter that relates to such public-private competition, has been designated as the agent of the Federal employees by a majority of such employees**[**.**]***; and*

(C) with respect to a conversion described in paragraph (1)(F), means a small business concern (as that term is defined in section 3(a) of the Small Business Act) whose economic interest would be affected by the conversion.

* * * * * * *

○