



Legislative Bulletin.....May 9, 2007

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H.R. 1873 — Small Business Fairness in Contracting Act

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: Creates two new federal databases

Total Cost of Discretionary Authorizations: unknown millions

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 1

H.R. 1873 — Small Business Fairness in Contracting Act (*Braley, D-IA*)

Order of Business: The bill is scheduled for consideration on Wednesday, May 9, 2007, under a structured rule ([H.Res. 383](#)).

Summary: H.R. 1873 would revise Small Business Administration (SBA) requirements regarding contracting bundling, increase the government-wide goal for participation by small businesses in federal procurement and services contracts, and make various other modifications to SBA programs and reporting requirements. The specific provisions of the bill are summarized below.

Title I – Contract Bundling

- Defines “contract bundling” to mean “an order that is entered into to meet procurement requirements that are consolidated in a bundling of contract requirements, without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made.”
- Defines “bundling of contract requirements” to mean “the use of any bundling methodology to satisfy two or more procurement requirements for new or existing goods

or services, including any construction services, that is likely to be unsuitable for award to a small business concern” due to various factors, such as the aggregate dollar value of the expected award or the specialized nature of the contract requirements. In other words, this provision allows an individual small business to be awarded a contract as part of a “contract bundle” (with other small businesses) that might otherwise not be able to perform the desired contract requirements on its own.

- Stipulates that contracts under \$1.5 million (or \$65 million for construction) are exempted under the above mentioned definitions.
- Requires the SBA to promulgate regulations within six months to implement the provisions of this Act.

Title II – “Increasing the Number of Small Business Contracts and Subcontracts”

- Increases the government-wide contract procurement goal from 23 percent to 25 percent of the total value of all prime contract awards for each fiscal year. ***Note: Since the total value of government procurement contracts is roughly \$300 billion annually, this two (2) percent change represents a \$6 billion increase in the goal for government-wide small business contracts.***
- Increases the government-wide contract procurement goal for small businesses owned and controlled by socially and economically disadvantaged individuals, and for small businesses owned by women, ***from 5 percent to 8 percent for each fiscal year.***
- Requires the President to establish annual government-wide goals for procurement contracts for the following fiscal year *prior* to the close of the current fiscal year. Currently, the President is required to establish annual goals, but the Committee contends that in practice the Administration engages in “biannual goal setting.”
- Allows a small business to be counted toward a maximum of one additional category (when agencies are attempting to reach contracting goals). Thus, even if a small business may otherwise qualify for several categories, this provision would restrict the agency to count that small business as meeting a maximum of two categories (i.e. – once as small, and one more for minority-owned).
- Requires that each federal agency (prior to each fiscal year) submit a report to the SBA and to Congress outlining how the agency intends to meet its small business contracting goals for the upcoming fiscal year.
- Requires that the small business set-aside requirement applies to orders as well (currently applies only to contracts); requires that the maximum dollar value for the small business threshold be raised from \$100,000 to that of the Simplified Acquisition Threshold. Currently, the SAT is currently at \$100,000 as well. The committee notes that by changing the \$100,000 threshold (defined in the U.S. Code) to that of the SAT, it allows “for greater flexibility than having one static number covering all acquisition types” and the two limits can more easily be adjusted for inflation simultaneously.
- Requires the SBA to require each prime contractor to report small business contract usage at all tiers based on the percentage of the total dollar amount of the contract award. Thus, requires contractor reporting to be uniform.
- Requires the SBA to develop and maintain a password-protected database that will enable the Administration “to assist small businesses in marketing to large corporations that have not achieved their small business goals.”

- Requires the SBA, whenever a small business enters information in the Central Contractor Registry, to contact that business within 30 days regarding the likelihood of federal contracting opportunities. Further requires the SBA to ensure that each small business that registers is provided with the total dollar value of government contract awards to small businesses for each specific industry code for which the business entered.
- Requires the SBA, within 120 days after enactment of this Act, to prescribe regulations to govern the SBA's review of subcontracting plans, including standards for determining good faith effort in compliance with the subcontracting plans.
- Requires each federal agency to submit a report to Congress specifying the percentage of contracts awarded by that agency for that fiscal year that were awarded to small businesses. If the percentage is less than 25 percent (the new government-wide goal), the agency must explain why the goal has not been met and what will be done to ensure that the 25 percent goal will be met for the following fiscal year.
- Requires the Federal Procurement Policy Administration in conjunction with the SBA Administrator, if a law is not enacted by December 31, 2007 revising the sole-source contract limits, to establish "appropriate limits on the value of contracts awarded without the use of competitive procedures to participants in the SBA 8(a) program that are not subject to the limits on the value of such contracts (as defined in U.S. Code).

Title III – "Protection of Taxpayers From Fraud"

- Requires the SBA to work with federal agencies to ensure that whenever a business is awarded a contract on the basis that it qualifies as a "small business" and later is determined not to qualify as small, a notification of those facts must be entered in the Central Contractor Registry adjacent to that business' listing.
- Requires the Inspector General (IG) of each federal agency to submit an annual report to Congress listing the number and dollar value of contract awards that were coded as awards to small businesses but in fact were made to businesses that did not qualify as small businesses.
- Requires the SBA to ensure that an independent audit is performed on a biannual basis on the Central Contractor Registry, and the Registry is purged of any businesses that are not in fact small businesses. If a business that has been purged (which is not a small business) attempts to re-register, that business may be debarred and further penalized (subject to section 16 of the Small Business Act; 15 U.S.C. 645).
- For businesses that are awarded a contract (due to being qualified as a small business), and the business is close to exceeding the standard for small business at the time of the contract award, then the business must recertify annually to the agency awarding the contract (to determine/verify that the business still meets the standard). "Close to exceeding" is defined as 1) the business has 95% of the number-of-employees standard, and 2) the business has a dollar volume of 80 percent or more of the maximum dollar volume allowed under the standard.

Title IV – Authorizations of Appropriations

- Authorizes such sums as necessary to be appropriated to carry out this Act.

Additional Background: The SBA was originally established in 1953, and has been subsequently expanded and reauthorized numerous times in the last four decades, most recently

within the 2005 Consolidated Appropriations Act (H.R. 4818; P.L. 108-447) in the 108th Congress. Congress has also established and increased small business contract set-asides (goals) that federal agencies are expected to meet annually.

According to CRS, a “business” must meet the following SBA definition:

- it is organized for profit
- it makes a contribution to U.S. economy by paying taxes or using American labor, products, and materials, and
- it does not exceed the size standard for its industry.

However, the definition of “small” (called the size standard) business depends on what a business produces. Based on what is produced, the SBA determines the size standard in terms of dollars of revenue or number of employees at the business, but not both. For example, most manufacturers cannot have more than 500 employees to meet the size standard of a small business. Many construction firms cannot have more than an average annual revenue of \$28.5 million to qualify. The formal determination involves selecting the North American industrial classification system (NAICS) codes that represent the business. For additional information, please see this [CRS Report](#).

Possible Conservative Concerns: As described above, the bill increases the government-wide “goals” for all federal agencies regarding the minimum percentage of procurement contracts for small businesses. Some conservatives may be concerned by these increases, which further restrict the competitive, free market process in obtaining the most suitable contracts for the specific task at hand. Thus, rather than requiring federal agencies to seek the most cost-effective and best suited contractors for a government contract, Congress is increasing the percentage of federal contract set-asides for certain groups. This effectively diminishes or locks out the opportunity for larger businesses (which may be better equipped to perform the contract) to obtain federal contracts. While some may argue that the goals are not “requirements” and no punitive action is taken against an agency that fails to meet these goals, the very nature of these goals is to increase contract set-asides for certain groups (small businesses, minority and women-owned small businesses, veteran-owned small businesses, etc.). Further, the bill’s provisions specifically hold each federal agency head accountable for failure to meet the increased goals, and require each agency head to explain *why* the goal was not met and *how* the goals will be met in the forthcoming fiscal year.

In addition, some conservative may be concerned that this bill is being considered on the House Floor without the benefit of a CBO Cost Estimate, and the bill itself calls for “such sums as may be necessary.” Thus, Members are expected to vote on a bill when they are unaware of its costs or effect on the federal budget.

Rep. Chabot, the Ranking Member on the Small Business Committee and a member of the RSC, is opposed to the bill in its current form. According to the Small Business Minority Staff, H.R. 1873 “weakens protections against inappropriate contract bundling, reduces opportunities for small businesses to participate in the federal government marketplace, and undermines the exclusive jurisdiction on the Committee on Small Business” (since the Committee on Oversight

and Government Reform changed or modified many of the bill's provisions that were included by the Small Business Committee).

Amendments: Below are the summaries of the eight amendments made in order under the rule (all debatable for 10 minutes each). The rule provides for one hour of debate and waives all points of order against the bill (except for clauses 9 and 10 of Rule XXI: for PAYGO and earmarks/limited tax benefits), and allows for a motion to recommit with or without instructions. Note: Summaries are based on RSC staff's review of actual amendment text.

1. Reyes (D-TX). Requires the General Services Administration (within 180 days of enactment) to make modifications to the Electronic Subcontracting Reporting System (ESRS) to track companies' compliance with small business plans included in successful contract bids. Requires ESRS to be further developed to allow agencies to track whether or not the prime contractor subcontracted work out to the subcontracting firms described in the Small Business Subcontracting Plan, and to facilitate review of a company's record of compliance with small business subcontracting plans. Requires prime contractors to submit small business subcontracting plans to ESRS describing the extent to which the prime contractor complied with the plans submitted as part of the company's successful contract proposal.

2. Shuler (D-NC) / Chabot (R-OH). Extends the contract procurement goals (increased in the underlying bill from 23 to 25 percent) to include overseas contracts. This provision was included in the version of the bill that was reported out of the Small Business Committee, but was stripped in the Oversight and Government Reform Committee reported version.

3. Bean (D-IL) / Chabot (R-OH). Increases the government-wide contract procurement goal from 25 percent (in the underlying bill) to 30 percent of the total value of all prime contract awards for each fiscal year. The goal in current law is 23 percent. This provision was included in the version of the bill that was reported out of the Small Business Committee, but was stripped in the Oversight and Government Reform Committee reported version. ***Note: Since the total value of government procurement contracts is roughly \$300 billion annually, this five (5) percent change represents an additional \$15 billion increase in the goal for government-wide small business contracts.***

4. Sestak (D-PA) / Chabot (R-OH). Modifies the definitions "bundled contract" and "bundling of contract requirements" and lowers the dollar threshold to \$1.5 million (\$65 million if solely for construction services – same as base bill). The net effect of these changes would be to decrease the number of small business impact studies agencies are required to complete, and increase the portion of contracts that are reviewed for their impact on small business.

5. Welch (D-VT) / Inslee (D-WA) / Blumenauer (D-OR). Adds a new provision to set the government-wide procurement goal for "green" businesses to 5 percent for each fiscal year. It defines a "green small business" to mean "a small business that carries out its activities in an environmentally sound manner." The amendment requires the Environmental Protection Agency, along with the GSA, to specify detailed definitions and standards by which a business may be determined to be "green."

6. Wynn (D-MD). Adds a new provision which would require the SBA to complete a study on the feasibility and desirability of providing financial incentives to federal prime contractors who achieve the goals set forth in their subcontracting plan of utilizing small business concerns owned by economically or socially disadvantaged individuals.

7. Jackson-Lee (D-TX). Requires the SBA to publish information on its website regarding any action taken and result achieved by the SBA in all instances where the SBA and the contracting procurement agency fail to agree and the SBA has decided to take action to further the interests of a small business.

8. Jackson-Lee (D-TX). Requires that, when the SBA and the contracting procurement agency fail to agree and the SBA submits the matter to the head of the agency for a determination, a copy of the written response to the SBA be sent to all House and Senate committees that have jurisdiction over the agency concerned, in addition to the Committees on Small Business and Oversight & Government Reform.

Committee Action: H.R. 1873 was introduced on April 17, 2007, and referred to the Committees on Small Business and Oversight and Government Reform (OGR). The bill was marked-up by Small Business on March 26, and marked up by OGR on May 3, and reported (amended) to the House by both the same day respectively (House Report [110-111 Part 1](#), [110-111 Part 2](#)).

Administration Policy: The Administration opposes passage of H.R. 1873 and released a Statement of Administration Policy (SAP) on May 8, 2007, which included the following statement:

The Administration supports efforts to increase opportunities for small businesses to compete for Federal government acquisitions. *The Administration, however, opposes H.R. 1873, because it would impose broad, burdensome statutory restrictions on Federal agencies' ability to conduct acquisitions and establish unrealistic small business procurement goals.* (emphasis added)

Cost to Taxpayers: A CBO score of H.R. 1873 is unavailable. *However, the bill authorizes "such sums as necessary" to be appropriated.*

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. As noted above, the bill creates two new federal databases and increases the small business contracting "goals" to which federal agencies must adhere.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Small Business Committee, in House Report [110-111](#), cites constitutional authority in Article I, Section 8, Clause 18 (the congressional power to make all laws necessary and proper for carrying into execution the foregoing powers listed in the Constitution), but fails to cite a foregoing power of authority.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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